

MAKING MISCONDUCT FINDINGS

It is usually the role of the decision maker to make misconduct findings. This is to be done after they have received the investigation report from the investigator.

The process involves:

- independently examining the findings of fact and endorsing or disagreeing with each, and
- deciding whether each substantiated factual allegation amounts to misconduct.

The decision maker may also require further investigations to be undertaken.

Assessing the investigator's factual findings

The decision maker needs to consider each finding of fact made by the investigator and endorse or disagree with each one. This should be done on the balance of probabilities standard of proof. [FS20]

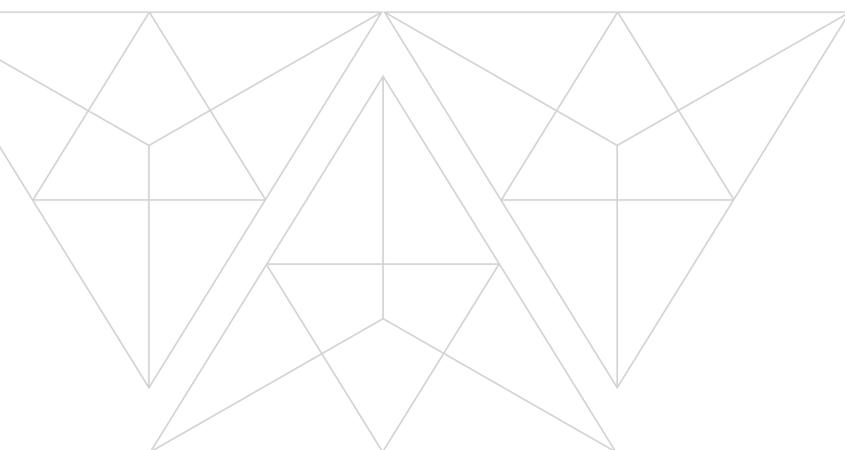
It is open for the decision maker to disagree with the investigator's findings. In this case, the decision maker may make alternative findings, request further investigation, or seek independent advice from a third party (such as a lawyer).

Keep in mind that as long as the correct processes have been followed, the investigation report does not need to be perfect for you to make misconduct findings.

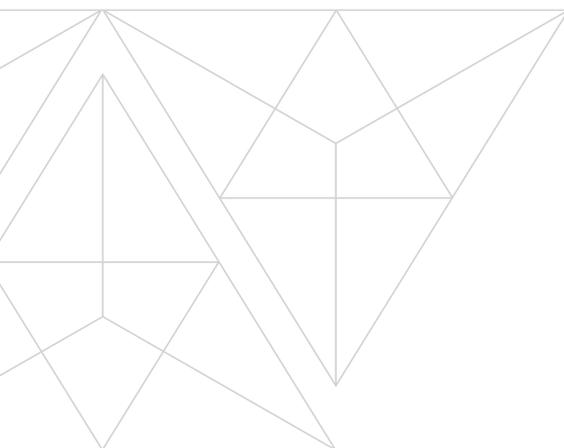
What to take into account

After deciding on the findings of fact, the decision maker then needs to determine whether – on the facts as established – the respondent has committed misconduct.

The following table sets out some of the things you should and should not take into account in making this decision.



Past behaviour:	If there have been several allegations of a similar nature against the respondent it may tend to support the allegation, but do not rely on this alone to make a finding. Usually past misconduct is an aggravating factor that should be taken into account in terms of outcomes, not in terms of whether misconduct has occurred.
Medical and health issues:	If there is a medical reason for the conduct, this should not be taken into account at this stage. It is a mitigating factor. Aggravating and mitigating factors should be taken into account in determining outcomes for the respondent.
Extenuating circumstances:	Extenuating circumstances can be taken into account. Extenuating circumstances may lead to a finding that misconduct has not occurred. The most common extenuating circumstances are honest mistakes and ignorance. This may be because, for example, your organisation has failed to give the respondent adequate training. Keep in mind that the more senior a person is, the less room there is for honest mistakes and ignorance. Consider whether the respondent had a duty to inform themselves.
Intent:	Intent is not taken into account in making misconduct findings. That is, do not take into account whether the respondent intended to commit misconduct.
Culture:	The culture of an organisation may be an extenuating circumstance. Similarly, if management has condoned or ignored the conduct it may amount to an extenuating circumstance. However, if the conduct was blatant and clearly gratuitous, these circumstances are unlikely to change the finding. For an example of this, see the case of <i>Torres v Commissioner of Police</i> [2017] NSWIRComm 1001.
Common sense:	The decision maker may draw on their common sense and general life experience. They do not need to disclose any particular specialist training or knowledge that they have, unless they attach particular weight to it.



Example

An example of what the decision maker's findings might look like is:

- Breach of Government Department Gifts and Benefits Policy clause 9 (Mr Smith accepted a gift from Company A) – substantiated.
 - › The factual allegation in this case was substantiated, so the decision maker found that Mr Smith committed misconduct.
 - › The decision maker may have considered whether there were extenuating circumstances – for example, culture or ignorance. In this case, they have decided that there were no extenuating circumstances to negate the misconduct finding.
- Breach of Government Department Code of Conduct section 5 (Mr Smith did not declare a gift from Company A) – not substantiated.
 - › The factual allegation in this case was not substantiated, so the decision maker did not find that Mr Smith committed misconduct.
- Breach of Government Department Code of Conduct section 7 (Mr Smith used his position as a regulator to gain a gift) – not substantiated.
 - › The factual allegation in this case was inconclusive, so the decision maker did not find that Mr Smith committed misconduct.

Procedural fairness, the hearing rule and the respondent's final submission

As covered in more detail in [\[FS16\]](#), you may ask the respondent to make a submission on the investigation report before you make misconduct findings. You may also ask the respondent to make a submission on proposed adverse misconduct findings.

If the respondent has refused to respond to the allegations during the investigation, you should at least ask them to respond to the investigation report. [\[FS16\]](#) [\[FS18\]](#)

When you ask for a response, give the respondent a specific date by which they need to respond. Make sure you give them sufficient time to respond. Generally seven days should be enough, but be open to extending the timeframe if requested.

If you have not received a response by the deadline, you should contact them and make sure they do not intend to respond. Get this in writing if you can.

If they make a submission, you should objectively and carefully consider the submission. When you notify them of your final decision, you should set out why you did or did not take each aspect of their submission into account. [\[FS24\]](#)