

GUIDE TO MANAGING POOR BEHAVIOUR IN THE WORKPLACE

VPSC

Victorian Public Sector Commission



The Victorian Government has vested the Victorian Public Sector Commission with functions designed to enhance the performance of the public sector – fostering the development of an efficient, integrated and responsive public sector which is highly ethical, accountable and professional in the ways it delivers services to the Victorian community.

The key functions of the Commission are to:

- strengthen the efficiency, effectiveness and capability of the public sector in order to meet existing and emerging needs and deliver high quality services; and
- maintain and advocate for public sector professionalism and integrity.

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Currency

This is *Managing poor behaviour in the workplace* version 2.0 published in December 2016

Subsequent versions may be published from time to time. Always check for updates at:

www.vpsc.vic.gov.au/resources/managing-poor-behaviour-in-the-workplace/

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1. FOREWORD

As public officials, we all have a duty to uphold high standards of integrity. This includes maintaining high standards of behaviour in the workplace. Positive work behaviours contribute to higher organisational performance, productivity and safety. In contrast, poor behaviour in the workplace can diminish public confidence in government administration and undermine the legitimacy we need to implement policy and deliver services on behalf of government.

Raising and responding to concerns about behaviour in the workplace can be challenging for managers and colleagues. However, dealing with poor behaviour is critical for strong organisations and cultures. It is important that poor behaviours are dealt with effectively, and that the responses reflect the desired behaviours in the workplace.

Each year, a significant proportion of the concerns lodged by public sector employees with the Victorian Public Sector Commission relate to how organisations have handled unsatisfactory performance or misconduct. This suggests that there are opportunities to improve our processes and practices in this area.

By improving our practice in this area, we can work towards building more positive and stronger organisations.

Belinda Clark QSO

Victorian Public Sector Commissioner

2. ABOUT THIS GUIDE

The Victorian Public Sector Commission (VPSC) has prepared this guide to assist human resource practitioners and managers to develop relevant policies and procedures for addressing behavioural issues with their employees in the workplace. The guide also aims to:

- encourage organisations to achieve the best levels of people management practice by addressing behavioural concerns effectively and constructively;
- provide practical assistance as to how disciplinary procedures, if required, should be handled; and
- help reduce the incidence of employee grievances relating to behavioural matters.

This guide is non-binding. It is not designed to impose mandatory procedures that an organisation must follow when an employee's behaviour is called into question. The VPSC recommends that readers also refer to the Employment Standards and the separate guidelines in relation to the 'fair and reasonable treatment' employment principle issued by the Victorian Public Sector Commissioner.¹ When managing both unsatisfactory performance and misconduct, the reader should also refer to relevant industrial instruments.

It is also important to refer to:

- managing performance resources – the VPSC has developed a range of resources to help manage performance;
- protected disclosure legislation, policies and procedures – where complaints are protected disclosures, HR practitioners and managers will need to adhere to particular processes; and
- mandatory notifications requirements – from 1 December 2016, heads of departments and council CEOs (and other relevant 'principal officers') will be required to notify the Independent Broad-based Anti-corruption Commission (IBAC) if they suspect corruption is occurring.² Directions to the type of matters to be reported, how to report and what to include are available at www.ibac.vic.gov.au/notifications.

Note: The word 'behaviour' is used in this guide to refer to both unsatisfactory performance and misconduct.

¹ These can be accessed via www.vpsc.vic.gov.au.

² Under the *Independent Broad-based Anti-corruption Act 2011*. For more information, see www.ibac.vic.gov.au.

3. STANDARDS OF BEHAVIOUR

Employees are required to conduct themselves in a manner that is consistent with the public sector values and employment principles set out in the *Public Administration Act 2004* (PAA). These values and principles are further defined through the Codes of Conduct and Standards issued by the Victorian Public Sector Commissioner. Local policies and procedures issued by public sector organisations may include specific expectations for staff in particular roles.

Employees have a responsibility to ensure they are aware of, and comply with, the standards of behaviour expected of them. Organisations, through their managers, have a responsibility to support employees in meeting their obligations.

Organisations also have a responsibility to address behaviour that falls short of the expected standards. This is necessary to protect the integrity of the organisation, the wellbeing of colleagues, and maintain public confidence in public administration.

Whether the behaviour may be classified as unsatisfactory performance or misconduct, any action taken should focus on the employee's behaviour. The desired outcome is for the relevant behaviour to cease or improve and not to re-occur. It is important to start with this objective in mind.

In some circumstances, the seriousness of the behaviour may warrant termination of the employment relationship. However, these cases tend to be the exception rather than the rule. In all other cases, the employment relationship is expected to continue. The objective in these cases should be aimed at positively influencing the employee's future behaviour to ensure proper standards of behaviour are maintained in the future.

3.1 What does the term 'behaviour' cover?

In this guide, 'behaviour' is used as a general term in relation to both the performance and conduct of employees.

When employees do not comply with the standard of behaviour expected of them, whether it is behaviour set out in the employment principles, values, Standards, Codes of Conduct, a contract of employment or in local policies and procedures, their behaviour may constitute unsatisfactory performance or misconduct.

3.2 How is unsatisfactory performance defined?

Unsatisfactory performance means either:

- a failure to perform to the required standards or expectations of the role
- minor behavioural issues.

Often there is an overlap between performance and minor behavioural issues, and it is difficult to distinguish between the two because some minor behavioural issues can affect an employee's performance. For example, lateness to work is essentially a behavioural issue, but it may affect an employee's ability to perform the requirements of the position. Similarly, while some personal use of internet, email or phone is reasonable, it should not interfere with the performance of duties.

Some examples of unsatisfactory performance include:

- failure to meet key performance indicators
- failure to meet agreed standards
- an unauthorised absence from work
- lateness to work

- failing to share information
- making excessive personal phone calls or emails whilst at work.

3.3 How are the terms misconduct and serious misconduct defined?

In this guide, 'misconduct' is defined as conduct that may justify the imposition of a sanction, such as a warning or termination (with notice). Under the PAA, misconduct can include:

- a contravention of the PAA, the regulations or a binding code of conduct
- improper conduct in an official capacity
- a contravention, without reasonable excuse, of a lawful direction given to the employee by a person authorised to give the direction
- employees making improper use of their position for personal gain
- employees making improper use of information, acquired by virtue of his or her position, to gain personally or for anyone else, financial or other benefits or to cause detriment to the public service or the public sector.

'Serious misconduct' is used in this guide to describe misconduct of such a nature that it would be unreasonable to require the employer to continue his or her employment during the required period of notice.

Some examples of serious misconduct include:

- employees, in the course of their employment, engaging in theft, fraud or assault, or being intoxicated at work
- employees refusing to carry out a lawful and reasonable instruction that is consistent with their contract of employment³
- conduct that causes serious and imminent risk to:
 - the health or safety of a person; or
 - the reputation, viability or profitability of the employer's business.⁴

It is not possible to provide an exhaustive list of the behaviours that may constitute unsatisfactory performance, misconduct or serious misconduct. Each case needs to be looked at individually, bearing in mind the particular work environment and context in which it occurs (see section 4.1.5).

³ The seriousness of the consequences of refusing to carry out a lawful instructions or direction will determine whether the employee's behaviour amounts to misconduct or serious misconduct.

⁴ This is consistent with the Fair Work Regulations 2009.

4. DISCIPLINARY AND NON-DISCIPLINARY APPROACHES

4.1 Introduction

4.1.1 How do non-disciplinary and disciplinary approaches differ?

The aim of non-disciplinary action should be focused on remedying the behaviour, enabling employees to learn from their mistakes, as well as avoiding or resolving tensions in the workplace.

A non-disciplinary approach uses various techniques to shape future good behaviour, whereas a disciplinary approach imposes sanctions, such as a warning, to discourage future poor behaviour.

Some examples of non-disciplinary options include:

- development options – e.g. coaching or mentoring, re-training and development, increased supervision
- behavioural options – e.g. counselling, mediation, performance improvement plans and strategies
- employment options – e.g. changes in shift or duties, or a transfer.⁵

4.1.2 Which approach is best for unsatisfactory performance?

Whenever possible, it is preferable to take a non-disciplinary approach. People are generally more responsive to a non-disciplinary, non-adversarial approach that helps them reach the required standards of behaviour. This helps to achieve the objective of changing behaviour and maintaining standards of conduct.

Both performance and minor behavioural issues can usually be dealt with by using non-disciplinary actions such as counselling, coaching, training and professional development and where interpersonal conflict is involved (voluntary) mediation.⁶

Repeated acts of unsatisfactory performance, however, may require disciplinary action.

4.1.3 When may a disciplinary approach be appropriate?

Not all behavioural issues can be dealt with by adopting a non-disciplinary approach. In particular, it may be more appropriate to deal with the following cases with a more traditional disciplinary approach:

- misconduct or serious misconduct
- repeated acts of unsatisfactory performance
- where non-disciplinary action has been tried in the past but failed.

4.1.4 Are the two approaches mutually exclusive?

In cases where disciplinary action (other than termination) is necessary, some non-disciplinary options could also be provided. Disciplinary action taken in isolation may not assist an employee in knowing the standards of behaviour expected of them, or what they must do to reach and maintain that standard.

⁵ Office of Police Integrity Victoria, *A fair and effective Victoria Police discipline system*, Victorian Government, October 2007, p.55.

⁶ More guidance on performance management can be found at the VPSC website (www.vpsc.vic.gov.au).

4.1.5 How do I decide which approach to take?

When a behavioural issue arises, the manager needs to make an initial assessment about taking a non-disciplinary or disciplinary approach. In addition to the information above, it may be helpful to consider:

- How serious is the suspected behaviour? If it was proven, would it justify a formal warning or dismissal of the employee? As a general rule, the more serious the alleged behaviour, the more appropriate it is to use disciplinary approaches.

If a preliminary assessment finds there are no grounds for formal investigation, the matter may be appropriate to conclude at that stage. However, in some cases, the preliminary assessment may still highlight a weakness or limitation that requires a non-disciplinary response such as training or professional development.

- How likely is it that the employee would respond constructively to a non-disciplinary approach? Has non-disciplinary action been taken in the past but failed? Where an employee has shown, through their behaviour, that they are unlikely to respond constructively to action under the performance management framework, a disciplinary approach may be the most effective way of dealing with the matter.
- To what extent is the alleged behaviour within the control of the employee? Non-disciplinary approaches may be most appropriate for behaviour that is either accidental or the result of a lack of capability on the employee's part. In contrast, unacceptable behaviour that is within an employee's control, such as blatant disregard for expected behavioural standards, may require a disciplinary approach.⁷

It is also important to consider the workplace environment. For example, a person who works in an office and falls asleep at their desk may be considered to have a minor behavioural issue. However, a security officer who falls asleep at their post, may have committed a serious act of misconduct. This is because each employee's action is likely to have different consequences in their workplace.

In borderline situations, a preliminary assessment may be required to gather some more information to determine the appropriate course of action (see section 4.3).

Whatever approach is taken, good records should be kept. If there is insufficient evidence to warrant a formal investigation, or if the allegations are not proven, this should be documented with the reasons (see section 6).

4.1.6 What else may be relevant?

Talking to an employee about why they behaved in a certain manner, or why they may be having difficulties meeting the expectations of their role, may also help determine how a behavioural issue should be handled. For example, a manager may discover that an employee is having personal or health problems, and may decide that disciplinary action is not the most appropriate way of helping the person improve their behaviour. Similarly, a manager may discover that the employee's inability to perform is due to the poor communication skills of their supervisor. Sometimes, the required course of action will emerge through discussion with employees.

Whichever approach a manager takes when dealing with a behavioural issue, it should be broadly consistent across the organisation, so that employees receive a consistent message as to how various types of behaviour are handled.

⁷ Australian Public Sector Commission, Handling misconduct: A human resource manager's guide, <http://www.apsc.gov.au/publications-and-media/current-publications/handling-misconduct-a-human-resource-managers-guide-2015>, viewed 19 October 2016.

4.1.7 How is the relevant employee informed?

If a manager decides that non-disciplinary action is the most appropriate option, this should ideally occur with the agreement of the employee. For example, the employee may agree to attend training or participate in mediation. This way, the employee is part of the decision. However, if agreement is not reached, management can impose non-disciplinary action.

If a manager decides that disciplinary action is the most appropriate option (without first engaging in non-disciplinary processes), the manager should explain the reasons for this to the employee.

4.2 Preliminary assessment

4.2.1 What is a preliminary assessment?

A preliminary assessment is a process for determining whether or not there is sufficient evidence to proceed to formal disciplinary processes (see section 5).

In cases relating to persistent unsatisfactory performance, a preliminary assessment should focus on ensuring there is sufficient evidence of repeated failure to perform to the required standards, or that there have been repeated minor behavioural issues. This should be in the form of documented attempts to improve performance through non-disciplinary approaches.

4.2.2 Should the relevant employee be informed about a preliminary investigation?

It can help to advise employees of the complaint of poor behaviour or misconduct promptly, to avoid the employee finding out through other means that a preliminary assessment is underway.

On the other hand, if there is a prospect that an employee may destroy or remove evidence, an organisation may decide that information gathering should be completed, as far as is reasonably practicable, before the employee is advised. Similarly, if a person makes an allegation against one of their colleagues, which a manager believes is vexatious but nevertheless requires some preliminary assessment, a manager may decide not to tell that employee unless or until some substance to the allegation is established.

4.2.3 What else should be considered?

It is important that a preliminary assessment does not turn into, or duplicate, a formal investigation. In some circumstances it may be necessary to take a more formal approach at the preliminary stage, in order to determine whether there is a case to be answered or to establish the facts surrounding an allegation.

Preliminary assessments should be conducted as soon as is reasonably practicable. It is important to recognise, however, that some flexibility may be required to deal with unplanned circumstances.

4.3 Moving from non-disciplinary to disciplinary action

Deciding whether to move from non-disciplinary to disciplinary action requires careful consideration. For example, managers may need to determine whether disciplinary action should be taken on the basis of repeated behavioural issues, despite the initial incident not immediately justifying disciplinary action. In some cases, this will depend on the seriousness of the behaviour.

In situations where one type of non-disciplinary action has not achieved its objectives, managers may wish to consider trying another type of non-disciplinary action, before heading down the disciplinary path.

5. RELEVANT PRINCIPLES

When dealing with poor behaviour in the workplace, there are a number of principles that should be applied. This is particularly relevant when taking a disciplinary approach and conducting formal investigations.

5.1 Natural justice

5.1.1 Why is natural justice important?

When conducting an investigation, one of the primary aims is to ensure that all procedures are followed correctly. This prevents, as far as practicable, the possibility of an employee being treated unfairly or unreasonably, and having to seek an avenue of redress, such as an internal review or an unfair dismissal claim.

5.1.2 What are the rules of natural justice?

The rules of natural justice ensure that investigations, and any related decisions, are fair and reasonable. In the context of suspected misconduct, and action taken in relation to cases of repeated unsatisfactory performance, natural justice generally requires that:

- **the employee is informed that a complaint or situation is being investigated** and under which relevant provisions (usually contained in an industrial instrument).
- **the employee is informed of the specific allegations made against them.** It is a fundamental element of natural justice that a person knows the allegations that have been made against them, so they have a fair opportunity to respond. It is important the employee is provided with as much information as possible in writing – i.e. dates, names and details of the alleged conduct. Providing the employee with generalised allegations of behaviour is likely to be in breach of the principles of natural justice, and will not give the employee the best opportunity to respond.

Example

It would not be acceptable to merely state the allegations as being: “It has been alleged that you have used the corporate credit card for personal use.”

A more acceptable way of making the allegation would be to state: “It has been alleged that on 16, 20 and 25 April 2015, you used your corporate credit card for unauthorised personal use. This is in contravention of section 3.2 of the Code of Conduct. The attached bank statement shows the alleged unauthorised purchases, which are highlighted in yellow.”

- **the process to be followed is explained to the employee** e.g. that the allegations will be put to them and they will be given X number of days to respond; that any relevant witnesses will be interviewed within X number of days; and that the investigator will then make a finding based on the evidence.
- **the employee is informed that they may be represented** by their union representative, or other advocate, at each stage of the process.
- **the employee is informed of the purpose of any meetings that may be held.**
- **the employee is provided with an opportunity to respond** via documentation, an interview or a combination of both. Whichever method is adopted, each party is to be made aware of the arguments of each other party, and be given an opportunity to respond to these.
- **the investigator and then in turn, the decision-maker, must act in good faith and without bias.** To act without bias means the person conducting the investigation has no preconceived

opinions, vested interests or prior personal involvement in the matter. This does not necessarily exclude a person from the same organisation as the employee, from conducting an investigation or making a decision. However, there must not be any actual or perceived bias (see sections 5.3.2).

In the case of addressing issues of repeated unsatisfactory performance, unless there are exceptional circumstances, the employee's manager will have been handling the non-disciplinary process. The manager will, therefore, have a preconceived view about the employee and a prior personal involvement. Nevertheless, the manager must act in good faith.

- **a decision is based on the facts presented by the parties.** To base a decision on the facts requires the decision-maker to consider only the information that is relevant to the matter, as presented by the parties. The onus of proof will generally lie with the party asserting a fact and the investigator must reach a conclusion on the balance of probabilities (see section 5.5.1).
- **the employee is given a reasonable opportunity to present all relevant evidence** including details of any mitigating circumstances.

5.1.3 What if the rules of natural justice are breached?

It is important to remember that a finding that an employee has engaged in misconduct or unsatisfactory performance may be set aside or overturned on review if there are flaws in the investigation or decision-making process. This may be because the investigator fails to comply with proper procedures, acts for the wrong purpose, exercises power in bad faith, fails to take into account relevant information, or takes into account irrelevant information or acts unreasonably.

Having to conduct another investigation because the first investigation was flawed is not only traumatic and stressful for the parties involved, but also costly in terms of time and resources.

If breaches of the natural justice rules are identified before the investigation is completed and the outcome is decided, it may be possible to remedy the situation. For example, if new information emerges, this can be provided to the respondent for an opportunity to respond.

5.2 Confidentiality

5.2.1 Why is confidentiality important?

It is essential to keep confidential all information about an alleged act of misconduct or unsatisfactory performance before, during and after the investigation process. This is to ensure fair treatment and fair process, to minimise the risk of victimisation, to avoid defamation proceedings and to respect people's privacy. It will also help develop and maintain employee confidence in the process. When non-disciplinary techniques are applied, the confidentiality principles of the organisation's performance management policy will also apply.

5.2.2 Can complainants or witnesses remain anonymous?

In some situations, a complainant or witness may wish to remain anonymous. However, it may not be possible to keep the identity of a person or people providing information completely secret for two reasons:

- under the principles of natural justice, the respondent has a right to know the full allegations
- the employer may need to provide information to another body, such as the Independent Broad-based Anti-corruption Commission (IBAC), under the legislative obligation for relevant principal officers to notify IBAC if they suspect corrupt conduct, or under protected disclosure legislation, policies and procedures.

The complainant and any witnesses should be informed about this.

5.2.3 What information can the complainant receive?

In most cases, the complainant will want to know the outcome at the end of an investigation. In such cases, the interests and rights of the complainant to know that their complaint has been dealt with appropriately, should be balanced with the interests and rights of the respondent (to have the outcome of the investigation kept confidential). To provide the complainant with details of the exact sanction imposed may be a breach of privacy.

To balance these interests, the organisation should inform the complainant that an investigation was conducted and that it resulted in an appropriate outcome (without details of the nature of any sanction).

Providing some comment about the outcome of an investigation is also important in order to avoid a potential complaint that nothing has been done about an allegation.

5.2.4 What information should the respondent receive?

In some cases, a respondent may request a copy of the investigation report. A manager should provide information about the investigation and their conclusions when the manager is communicating their decision. The default should be the provision of the report unless there are compelling confidentiality reasons not to do so.

In some circumstances, it may be appropriate to maintain the confidentiality of the complainant and any witnesses. This may be achieved by providing a summary of the investigation. However, the written summary should provide sufficient detail so that the employee is left in no doubt why a decision was made and on what criteria it was based.

5.3 Conflict of interest

5.3.1 Why is avoiding a conflict of interest important?

The principles of natural justice require that an investigator handling a unsatisfactory performance or misconduct complaint must act in good faith and without bias. It is important to ensure there is no perception of bias or conflict of interest that could be interpreted as prejudicing an investigation.

If an investigator has a vested interest or a prior involvement in a matter, or a personal relationship with either the complainant or respondent, there may be a conflict of interest. This needs to be managed.

It is also important that the person who decides that an investigation should take place should not conduct the investigation. In addition, the investigator and the person deciding on any sanction must be different people. This is essential to avoid perceptions of bias or conflict of interest.

5.3.2 What forms can a conflict of interest take?

Conflicts of interest can be actual or perceived. The effect of these, however, is the same.

Example: Actual conflict

John makes a complaint to his manager, Diego, that one of his colleagues is making threatening comments to him. Diego asks Sarah, who is part of the HR team, to conduct a preliminary assessment regarding John's allegations. Unbeknown to most people, Sarah and John are in a relationship. Sarah has a conflict of interest in that she has a personal relationship with John, who is the complainant. As such, Sarah should not conduct the preliminary assessment as there is an actual conflict of interest.

Example: Perceived conflict

Sarah declares her conflict of interest and withdraws from conducting the preliminary assessment. Diego then asks Sue to carry out the preliminary assessment. However, Sue and John are members of the same tennis club. Although they do not know each other well, the connection outside of the workplace creates the perception of a pre-existing friendship. As such, Sue should not conduct the preliminary assessment as there could be a perceived conflict of interest.

5.3.3 What if a conflict of interest arises?

It is very important that the investigator and decision-maker identify and appropriately manage any actual or perceived conflict of interest at an early stage.

Depending on the particular situation, it may be appropriate to appoint a different investigator.

5.4 Victimisation

Employers have a responsibility to ensure that employees are not victimised or treated unfairly because they have made a complaint.

Victimisation means punishing or threatening to punish someone. It can include:

- bullying or intimidation by co-workers
- being denied a promotion or being moved to a position with lower responsibility
- dismissal from employment
- being refused further contract work.

Victimisation is prohibited under the *Equal Opportunity Act 2010* and federal anti-discrimination laws.

5.5 Standard of proof

5.5.1 What is the standard of proof?

When deciding whether allegations against an employee have been proved in a misconduct or unsatisfactory performance investigation, a finding must be based on the conclusion that it is more probable than not that the matter, which is alleged to have occurred, did in fact occur. This is known as 'on the balance of probabilities' and is the standard of proof required in civil cases. It is a lesser standard than the criminal test of 'beyond reasonable doubt'.

This standard of proof derives from *Briginshaw vs Briginshaw*.⁸ The standard of evidence required to meet the 'balance of probabilities test' will increase in accordance with the seriousness and consequences of the allegations.

5.5.2 How should an investigator proceed?

An investigator should always ensure that there is sufficient supporting evidence before being satisfied that alleged misconduct or unsatisfactory performance did occur, on the balance of probabilities. Where a serious allegation is made, reasonable satisfaction should not be made on the basis of "unsupported evidence, indefinite witness statements or indirect inferences".⁹ That is, an investigator should always proceed cautiously before making a finding against an employee, especially in cases where the allegations are of a serious nature.

It is also important for the investigator to separate the process of finding of facts from the determination of the outcome of the investigation.

⁸ *Briginshaw v. Briginshaw* [1938] 60 CLR 336.

⁹ *Apelo v. Calvary Health Care Adelaide Ltd* [2008] AIRC 448.

5.6 Record keeping

5.6.1 Why is record keeping important?

All correspondence with an employee, who is the subject of a misconduct allegation or unsatisfactory performance issue in the workplace, should be recorded. It is extremely important to keep all correspondence, and document all conversations and action taken to avoid any dispute between the parties, if a disagreement between versions of events arises.

5.6.2 What records should be kept?

Records should include:

- letters and emails (including any attachments)
- notes of telephone calls and conversations
- the investigation report with all relevant evidence
- any draft material provided to the employee for comment
- the employee's response to correspondence
- file notes of action taken in the process.

5.6.3 Where should records be kept?

At the conclusion of an investigation, materials and records in relation to the investigation should not be placed on an employee's personnel file. Instead, they should be placed in a separate misconduct file or investigation file. This is because the investigation report and investigation material may contain sensitive information about the employee and other persons involved in the investigation. The personnel file and investigation file, however, should be linked for reference purposes and restricted to only those who need access for a proper reason.

However, if a sanction is imposed on an employee as a result of an investigation, details of this should be placed on an employee's personnel file as it forms part of their employment history.

5.7 Suspension from duties

5.7.1 What should be considered when determining whether to suspend an employee?

There must be a very good reason to suspend an employee. Suspension should only be considered if re-assigning an employee to alternative duties is not an option (see section 5.7.6).

In some situations, however, suspending an employee is an appropriate risk management strategy. When determining whether to suspend an employee, relevant considerations include:

- potential risk to the health and safety of other employees and/or clients
- potential for the employee to interfere with the investigation
- risk that the misconduct may be continued or repeated
- the severity of the alleged act of misconduct.

5.7.2 When can suspension happen?

Managers should refer to the applicable industrial instruments and legislation in relation to the steps they are able to take during the investigation process.

Generally, the decision to suspend an employee will be made at the same time as the decision to commence disciplinary proceedings. If the decision is made to suspend an employee later in the investigation process, it will normally be linked to some further development in the case (e.g. a further act of misconduct), or if substantial new evidence comes to light during the investigation. The person suspending the employee must have the delegated authority to do so.

5.7.3 What are the risks?

It is important for a manager not to prejudge, or be seen to prejudge, the finding as to whether misconduct or unsatisfactory performance has occurred. It is also important for managers to remember that suspension is not a sanction and should not be used as one.

In addition, the employee's welfare and reputation must be considered before a decision to suspend is made, especially during the investigation stage where no findings of wrong-doing have been made. To this end, investigations should be completed as soon as reasonably practicable. In addition, the manager should maintain contact with the employee.

Employees should not be suspended without pay. Although some industrial instruments may still provide for suspension without pay, it is in fact unlawful to do this. Under ordinary employment law principles a failure to pay an employee is a fundamental breach of contract.

5.7.4 What rights does the employee have?

Generally, an employee should be given the opportunity to respond before a decision to suspend is made. However, in circumstances where the allegations of misconduct are extremely serious, it may be appropriate to suspend the employee immediately, without firstly obtaining the employee's response. This may be in situations where there is the risk of an imminent serious threat to the safety of others if suspension is delayed, or of the employee destroying or tampering with evidence.

5.7.5 How long should suspension last?

The continuation of an employee's suspension should be reviewed at reasonable intervals (such as every four weeks), by an appropriate person in the organisation. Suspension must end immediately when the organisation no longer believes the employee has committed an act of misconduct. Similarly, the suspension must end when a sanction is imposed on the employee or some other action is taken.

If it becomes apparent that an investigation into an alleged act of misconduct is going to take longer than first anticipated, the decision to suspend an employee should be reviewed in light of this information. Again, it is important to consider the welfare of the suspended employee, together with the welfare of their colleagues.

A decision to suspend an employee on full pay raises significant governance and probity issues. It is important to remember that public money is being expended on wages without any work being provided in return. Therefore investigations into allegations of misconduct should be completed as soon as reasonably practicable. Of course, in some cases an investigation may take longer than first anticipated, particularly if an employee is sick during the investigation or if a case is particularly complex.

5.7.6 Is there an alternative?

As an alternative to suspension, managers may decide that it is more appropriate to temporarily re-assign the employee's duties (if it is possible to do so). A re-assignment of duties may remove the employee from working with a complainant or being in a position to tamper with evidence, but still enables the employee to work. It can also help maintain a cohesive and efficient workplace. Re-assignment of duties should be contemplated before making any decision to suspend an employee; suspension should be the last resort. The factors to take into account are similar to the factors relating to whether or not to suspend an employee (see section 5.7.1).

If an employee is assigned alternative duties during an investigation, the employee should not suffer any loss of income during this period. Any reduction in salary may result in a breach of contract.

Depending on any relevant policy or industrial instrument it may, however, be appropriate to withhold any performance pay that is due and owing to an employee, whilst they are on suspension or alternative duties, pending an investigation.

5.8 Behaviour outside the workplace

5.8.1 When is this relevant?

Under the Code of Conduct, public sector employees must avoid conduct in their private life that may adversely affect their standing as a public official or which may bring their public sector employer into disrepute.

As such, conduct that is apparently unrelated to the performance of duties may be a breach of the Code, if there is a clear and relevant connection between the employee's out-of-hours conduct and its effect on the workplace. Of course, this must be balanced against the principle that a public sector employee has an entitlement to a private life outside of work.

Example 1

Sofia receives a criminal conviction for drink driving, outside of the workplace. Sofia is not required to drive a car as part of her duties and her drink driving conviction is unlikely to be considered a breach of the Code of Conduct or a trigger for misconduct proceedings.

Example 2

Tendai works for a government department, which has had a major news story hit the headlines. At a party outside work, Tendai gets 'grilled' by friends about what he knows and, in response, reveals confidential information about the issue.

Tendai's manager finds out that he revealed confidential information at the party. His behaviour appears contrary to the public sector value relating to integrity and to the Code of Conduct in relation to public comment and official information.

Although Tendai's comments were made outside of the workplace, there would be a sufficient connection between his out-of-work conduct and his employment to justify his manager speaking with him about the incident and, if necessary, taking non-disciplinary or disciplinary action.

Example 3

Sam, who worked for a public body, was found to have accessed pornography outside work hours using a tablet provided by work. Sam argued that because it was outside work hours in private, this was lawful and not grounds for disciplinary action.

However, the public body's policy prohibited the use of work computers to view pornography, including in private outside work hours. In **Griffiths v Rose**, the court held that such a direction was lawful and reasonable and was not contrary to privacy concerns under general or international law.¹⁰

Courts and tribunals have provided guidance as to what conduct is of legitimate concern of the employer. In the most serious cases of misconduct, termination of employment has been upheld when there is sufficient connection between the alleged misconduct and the employment. This can involve

¹⁰ *Griffiths v Rose* (2011) 192 FCR 130.

consideration of whether the conduct is 'contrary to the employee's duty of good faith and fidelity or is repugnant to the employment relationship'¹¹.

5.8.2 How can employers be pro-active?

As part of normal training, organisations could provide employees with training on how to conduct themselves appropriately outside of the workplace. It needs to be made clear that inappropriate conduct may result in a breach of the Code of Conduct. Expected standards of behaviour should also be reinforced before a work-related social function, such as an office Christmas party.

¹¹ Australian Government Solicitor, *Legal briefing: Misconduct in the Australian Public Service*, 15 October 2014.

6. PROCEDURAL ISSUES FOR MISCONDUCT INVESTIGATIONS

This section sets out a number of procedures for conducting formal investigations. A manager may decide that a formal disciplinary investigation is required. This may follow a preliminary assessment and will usually be relevant in cases of alleged misconduct or serious misconduct.¹²

Investigation and post-investigation procedures also need to be consistent with:

- the principles of natural justice (discussed in section 5)
- relevant industrial instruments, such as enterprise agreements
- IBAC's Directions for making mandatory notifications of suspected corruption.

If at any time an investigation ceases for lack of evidence, the reasons should be documented and the decision communicated confidentially to the employee concerned. If other parties need to be advised, confidential information should not be disclosed.

6.1 Disciplinary investigations

6.1.1 What is the purpose of an investigation?

The purpose of a formal disciplinary investigation is to examine and evaluate all relevant facts, and to determine whether the alleged behaviour took place. It also assists the decision-maker in determining the appropriate sanction, if applicable, to apply at the conclusion of the investigation.

6.1.2 How should the relevant employee be informed?

As soon as a decision is made that a disciplinary investigation into allegations of misconduct or unsatisfactory performance will be conducted, an employee should be notified in writing.

Written communication should contain the following details:

- the details of the act(s) of misconduct or unsatisfactory performance that the employee is alleged to have committed, with as complete and specific information as is available (see section 5.1.2)
- the possible sanctions that may apply, including an indication that an employee's employment may be at risk if the act of misconduct is sufficiently serious
- who will be conducting the investigation
- how the disciplinary investigation will proceed, which should include a copy of the organisation's misconduct procedures and any relevant industrial instrument, and affirm the employee's right to representation.

6.1.3 Who should investigate?

The person who has made the decision that a disciplinary investigation should take place should not conduct the investigation. In order to avoid a conflict of interest situation, whether actual or perceived, an organisation will also need to consider whether the investigation should be conducted by an internal or external investigator.¹³

¹² For more discussion and resources on dealing with unsatisfactory performance, refer to Section 4.

¹³ The VPSC has established a non-mandatory panel of review officers to enable public sector organisations to select independent review officers to conduct workplace grievance reviews and misconduct investigations on their behalf.

When determining who should conduct an investigation, an organisation should keep in mind the likelihood of any future challenges to the integrity of the investigation or its findings, remembering that a decision may be set aside if the principles of natural justice are not followed.

It should also be noted that the investigator and the person deciding the sanction must be different people. This means that in a small organisation, for example, if the CEO conducts the investigation, then the CEO cannot be the person to impose a sanction if it is required.

When deciding whether to appoint an external investigator, the following should also be considered:

- **the size of an organisation** – i.e. the smaller the organisation the more difficult it will be to appoint an independent internal investigator because the investigator and employee are likely to have a professional or personal relationship.
- **the seriousness of the allegations** – the more serious the allegations, the more appropriate it may be to appoint an external investigator.
- **whether anyone in the organisation has the appropriate training** to conduct an investigation.
- **the time and resources** that will be expended in conducting an internal investigation.

If there are any residual concerns about the appropriateness of an investigator, it is best to make another choice.

It is also important that the investigator not be told of any prior acts of misconduct on the part of the employee who is under investigation, as it may prejudice the investigator's view of the employee. Prior acts of misconduct will only be relevant if there is a decision to impose a sanction.

6.1.4 How much time should an investigation require?

A disciplinary investigation must be conducted in a timely and expeditious manner. A precise length of time is hard to define, as it will depend on the nature and seriousness of the alleged misconduct. Such matters as the complexity of the issues, the need to seek an external investigator or expert, the availability of representation and the availability of witnesses, may affect the timeliness of an investigation. Managers should, however, refer to relevant industrial instruments as they may set out timelines in relation to conducting an investigation.

When conducting an investigation, managers should always consider the impact of any delay on the:

- fairness of the process
- welfare of the employee who is the subject of the allegation, especially if the employee has been suspended.

The requirements of natural justice can add to the time required for an investigation. In particular, employees need to be provided with the opportunity to put their case and to obtain representation.

In addition, the rules of natural justice require that the employee be given a 'reasonable opportunity' to respond. The circumstances of each case will, in most situations, determine what is reasonable (that is, the more serious the allegations, the more reasonable it would be to allow more time to respond and to gain representation). However, it is not what the employee under investigation believes is a reasonable opportunity. Rather, it is determined by an objective standard of what a reasonable person would believe is a reasonable opportunity, given the circumstances.

Another time constraint may be caused by an employee taking sick leave. Managers may be able to request medical evidence from the employee's medical practitioner depending on the terms of any industrial instrument. This may be required to establish whether it is reasonable to postpone an investigation in these circumstances.

Some flexibility, however, must be allowed for unexpected situations that may delay proceedings. Managers should also be alert to any foreseeable delays that may occur, such as holiday breaks.

Appropriate interim action should be considered if it is likely there will be delays in an investigation being concluded, or a decision being made. Appropriate interim action may include:

- written notification to the parties concerned about the delay, and the proposed or revised timing for dealing with the matter
- provision for interim support and contact for the parties
- offering alternative duties to one of the parties, pending the outcome of the investigation.

6.1.5 What process should the investigator adopt?

A disciplinary investigation into alleged misconduct may include:

- a review of documentary material
- conducting interviews with the complainant and key witnesses
- conducting an interview with the employee who has engaged in the alleged act of misconduct.

The decision as to the scope and approach of the investigation may vary on a case by case basis. Factors such as the nature of the conduct being investigated, whether it has occurred in the past or is still occurring, whether there are any witnesses and/or documents to support the allegations, and the seriousness of the conduct, should all be taken into account.

The location of an interview should also be considered, depending on the nature of the behaviour in question (e.g. a witness may not wish to be seen speaking with an investigator in the office). The circumstances of each individual case may require an adaptation of the process.

Whichever way an investigator decides to conduct a disciplinary investigation, it is important that the investigator obtains sufficient evidence and facts in order to make a finding on the balance of probabilities. Investigators should only take into account relevant information, and any conclusions reached should be logically formulated. To this end, investigators will need to ensure that the employee and all key witnesses provide all relevant information. The investigator can decide whether or not to follow up witnesses or to consider additional material put forward by an employee, keeping in mind the requirement to ascertain as far as possible the truth of the allegations.

Further guidance on conducting investigations can be found in the joint IBAC and Victorian Ombudsman publication, *Investigations guide: conducting internal investigations into misconduct*, available on the IBAC website.

6.1.6 What if the misconduct might be a criminal act?

Criminal proceedings may result from a person's behaviour in the workplace, as well as through the employee's private actions outside of the workplace. If credible allegations are made against an employee and these involve an allegation of criminal conduct, managers should seek advice from senior management and consult any relevant policies and procedures. Organisations should promptly seek advice from the police or other external investigating bodies.

Organisations can face difficult judgements when misconduct proceedings interact with criminal proceedings, including whether or not to commence an internal investigation at the same time as the criminal process. The organisation should seek advice from police, other external investigating bodies and the prosecuting body to ensure any investigation would not jeopardise or prejudice any criminal proceedings.

When an employee's behaviour may constitute both misconduct in the workplace and a criminal offence, an internal investigation need not necessarily be delayed until criminal processes have been completed (subject to seeking the appropriate advice and consulting the relevant policies, as outlined above). Under general employment law principles, if an organisation possesses sufficient evidence upon which to base a decision that an employee has engaged in an act of serious misconduct, the

organisation may dismiss that employee. This is regardless of whether there may be criminal charges pending in relation to the conduct and regardless of whether the employee is ultimately convicted of those charges. This is because criminal proceedings require a higher standard of proof (i.e. beyond reasonable doubt) than the standard of proof test in disciplinary proceedings (i.e. on the balance of probabilities; see section 5.5).

Example

Unauthorised use of a petrol card by a public sector employee is effectively theft as it involves a misappropriation of government resources. Although it may not be serious enough for the police to lay criminal charges, it is a breach the Code.

6.2 Post investigation

6.2.1 What needs to happen after the completion of an investigation?

If a disciplinary investigation concludes that an employee has engaged in an act of misconduct, the organisation will need to decide on the most appropriate course of action, and then inform the employee. The person making the decision about the course of action must hold the delegated authority to do so.

6.2.2 Should a sanction be imposed?

A sanction can only be imposed on an employee after it has been established that misconduct has occurred. It does not necessarily follow, however, that a sanction must be imposed. If the employee's response to the misconduct action satisfies the decision-maker that a repetition of the behaviour is unlikely, a decision may be taken that some of the non-disciplinary options are more appropriate (such as mediation, counselling or re-training).

Organisations have a general duty of care to ensure the health, safety and welfare at work of all employees. It is an organisation's responsibility to ensure that all reasonably practicable measures have been taken to control risks against all possible injuries (this includes instances of bullying and harassment) arising from the workplace. This is also an important consideration when determining the appropriate sanction.

When deciding if a sanction is appropriate, and if so, the type of sanction, it is also important to have regard to the principles or objectives underlying the management of employee misconduct. These include:

- correcting an employee's behaviour, rather than punishing an employee
- encouraging employees to achieve, and maintain, standards of conduct consistent with the values and employment principles
- protecting the integrity of the public sector, and thereby maintaining public confidence in government administration
- striking an appropriate priority and balance between the individual, organisational and public interest.

6.2.3 What types of sanctions may be appropriate?

There are essentially three types of sanctions that may normally be imposed on an employee following a finding of misconduct. These are formal counselling, a formal warning (which may be a final

warning) or termination of employment. Decision-makers should refer to any relevant industrial instruments to confirm which types of sanctions are included.

A reduction in grade or transfer to a different position may be appropriate in certain circumstances, if it will assist an employee improve their performance. In some circumstances it may be a better option for an employee rather than termination. This is especially the case for an employee who, despite genuine efforts, cannot fulfil the requirements of a role in a certain position. The employee may still be able to be retained by the organisation in a different position. Transfers may also be an appropriate risk management strategy or a requirement for occupational health and safety.

A manager, however, should not transfer an employee to another section within an organisation, simply to 'punish' the employee. This has no value in terms of managing the employee's behaviour, and may simply pass the problem onto someone else, thus perpetuating the problem of the employee's unsatisfactory behaviour.

6.2.4 What should be considered when determining the appropriate sanction?

Aside from taking into account the principles outlined in section 6.2.2, the following should be considered when determining the appropriate sanction:

- whether the incident is an isolated one or whether the conduct has occurred previously (see section 6.2.5)
- the nature and seriousness of the incident, including the effect and circumstances
- whether the employee is aware of the required standard of behaviour that has been breached, and the consequences of breaching it
- any mitigating or extenuating circumstances
- the employment history and general behaviour of the employee
- the reputation of the organisation
- previous advice/counselling in relation to the same or other behaviour
- how other employees have been treated in similar circumstances (see section 6.2.6)
- whether there is an ongoing risk to the public, clients or work colleagues
- whether the employee has admitted to the inappropriate behaviour.

6.2.5 Should the employee's past conduct be considered?

The employee's past conduct may be a relevant consideration when deciding the most appropriate sanction to impose. Although an organisation should ordinarily only consider the incident in question, in some cases evidence of prior similar facts, or evidence that shows a particular pattern of behaviour, may be relevant in determining the appropriate sanction. Whether the employee's behaviour, or substantially similar behaviour, has previously been the subject of counselling or disciplinary action may be a consideration. The decision-maker may also consider whether any previous warnings, counselling or sanctions are relevant.

6.2.6 What about other similar cases?

Although individual cases are likely to vary, organisations should consider whether there have been any similar behavioural issues in the past, and the sanctions or courses of action that have been imposed.

A failure to act in accordance with similar cases, where decisions were made on similar facts, may be unfair and unreasonable. If an organisation deviates from a precedent, the test is normally whether

there are any material differences in the facts or circumstances. It is important to remember that a manager's decision may set a precedent for future cases of a similar nature.

6.2.7 What needs to happen before a sanction is imposed?

The principles of natural justice require that an employee be advised of the proposed sanction, and the reasons for it, before the decision is actually taken. This includes advising of any mitigating circumstances that are proposed to be taken into account (if known). This is to ensure the employee is given the opportunity to respond to the proposed sanction and to provide information on any mitigating circumstances.

Once the employee's response is received, the manager needs to decide if the information provided by the employee would lead to a reconsideration of the proposed sanction.

6.3 Reasons for the decision

Giving reasons for a decision is one of the basic principles of natural justice. It is therefore important that a decision-maker gives reasons for their decision and, if a sanction is applied, the reasons for the sanction. The reasons given should be clear and help the employee understand why that particular decision was made.

6.3.1 What should the reasons for a decision include?

Depending on the circumstances, the decision-maker should include the following when communicating his or her decision:

- the decision made (i.e. a finding of misconduct or no misconduct)
- the sources of all information relevant to the decision
- a statement of the evidence relied on showing breaches of the Code of Conduct or relevant policy (e.g. any witness statements)
- findings on the facts that arose, including inferences drawn from those facts
- whether, in relation to the facts, the evidence was accepted or rejected – where the evidence is conflicting, reference should be made to the available evidence and why certain evidence is preferred
- any rights of the person affected, including any rights of objection, review or appeal (e.g. a section 64 review under the PAA or an unfair dismissal application).

The reasons for a decision should be in writing.

A1 WHERE TO FIND FURTHER INFORMATION

- For further information regarding privacy, refer to the Commissioner for Privacy and Data Protection (www.privacy.vic.gov.au).
- For further information about how to conduct investigations, mandatory notifications about suspected corruption or protected disclosures, refer to IBAC's *Investigations guide: conducting internal investigations into misconduct*, *Directions for making mandatory notifications of suspected corruption* and Protected Disclosure guidelines, available at www.ibac.vic.gov.au.