



Code of Conduct Investigations: How to draft effective allegations Tip sheet

This advice is for HR practitioners and managers who are considering allegations or undertaking a misconduct investigation, and aims to assist in framing allegations more effectively.



Why is the proper drafting of allegations critical?

The purpose of drafting allegations is to firstly allow the employee to understand what it is they are alleged to have done, and to enable them to fairly respond, and secondly to enable a fair and impartial decision maker to determine, on the balance of probabilities, whether or not the employee has engaged in the behaviour of concern.

Allegations provide the framework for your investigation. They help clarify what matters are in or outside the scope of the investigation. They should focus on the most serious of the alleged behaviours.

Allegations are also an important part of the process of providing the employee under investigation with procedural fairness. They inform the employee of the case they have to answer. Poorly expressed allegations can lead to an unfair outcome by denying the employee a fair hearing. This can result in a decision vulnerable to challenge on review, or in the courts. Allegations also assist the employee to understand why the alleged behaviours are viewed to be of sufficient seriousness to be treated as alleged misconduct.

What are common traps?

On review, we have seen allegations expressed in the following way:

It is alleged you spoke in an offensive and derogatory way to team members.

It is alleged that you communicated with your team members in a passive-aggressive manner which made them uncomfortable.

Expressing allegations in this way is problematic because:

1. they are expressed as assertions with an absence of supporting detail, in particular specific incidents of behaviour
2. they use imprecise and subjective descriptors such as 'offensive' 'derogatory' and 'passive aggressive'.

Why is this a problem?

It is difficult for an employee to respond to allegations communicated this way, other than to ask ‘what did I do or say that was offensive?’, ‘in what way was I passive-aggressive?’ and ‘what do you mean by passive-aggressive?’.

Allegations framed in this way do not allow an employee to understand why their behaviour is of concern, and they do not allow the employee to fairly respond.

How can this be overcome?

It is helpful to frame your allegations using ‘who, what, when, where, how’ style language. For example:

On 25 August of this year, you said to your colleague Mr Smith words to the effect of ‘you are corrupt and unethical and a terrible manager’ in a team meeting in the level 4 meeting room, in the presence of Ms Jones.

Attaching complaints and witness statements to an allegation that is expressed as a general assertion does not address the problem of a lack of supporting detail. Witness statements and complaints may include assertions and subjective opinion about a range of matters that an employee cannot respond to, for example ‘I find the person to have a controlling, unprofessional and demeaning manner’. This may lead the employee to focus their response on matters that digress from the key issue. In addition, an employee should not have to piece together and/or guess from witness statements which incidents and behaviours are the ones of concern.

An additional concern is allegations expressed in subjective and inflammatory terms, for example ‘it is alleged that behaving in this way, you were in breach of the agency’s x policy and that you either knew or ought to have known that your behaviour was totally unacceptable’. Language of this sort can lead the employee to feel they are being subjected to a process that is punitive by an investigator who is not a detached and fair judge of the employee’s behaviour.

It is important to remember that the role of an investigator and/or conduct decision maker is quite separate to the role of any later sanction delegate. It is important not to conflate the two processes.

Good practice tips for drafting allegations

The Code of Conduct investigatory process is a fact finding exercise.

The basic procedural requirements for a Code of Conduct process in Part 5 of the Australian Public Service Commissioner’s Directions include that an employee under investigation be informed of ‘the details of the suspected breach’.¹ The details of the suspected breach consist of the following:

- the alleged behaviours which are the factual basis of the allegations of misconduct (i.e. what the employee is alleged to have done or not done)
- the evidence about whether those behaviours in fact occurred as alleged
- the elements of the Code of Conduct the employee may have breached should those behaviours be proven.²

¹ Clause 43 of the Australian Public Service Commissioners Directions

² See pages 59 to 60 of Handling Misconduct: A Human Resource Managers Guide, Australian Public Service Commission, 2015.

If, during the course of your investigation, you need to vary the details of the alleged misconduct in any way, you will need to provide the employee with this new information, and with an opportunity to respond to any new considerations.

Allegations should:

- Focus on the specific things the employee may have or have not done linked to specific incidents of behaviour.
- Be precise, not vague. Include the following:
 - state how the allegation arose
 - describe the behaviour
 - indicate when and where it happened
 - indicate how often it happened
 - indicated who witnessed it
- Focus on the most serious behaviour/s.
- Use objective and non-inflammatory language.
- Reference the policy and/or legal or professional obligations the behaviour may be inconsistent with.
- Refer to the elements of the Code of Conduct that may be breached if the allegation is proven on the facts.

Example allegation

The following example demonstrates an allegation with a factual basis that explains clearly to the employee what they need to respond to. This is an example of a well drafted allegation.

The allegations arise from discussions with your manager about your performance. It is alleged that in the period from March to April 2021, you responded inappropriately to performance feedback from your supervisor, Ms Patel. In particular, it is alleged that you:

- Reacted in an aggressive manner.
- Made allegations that Ms Patel bullied you and acted in a discriminatory manner without providing any information to support your allegations.

It is also alleged that your behaviour, as described by Ms Patel, could reasonably be expected to upset and offend her and cause her to be concerned about her reputation.

The incidents on which this allegation is based are detailed below. The documentary evidence with respect to these incidents is in Attachments A to D.

Meeting on 9 March 2021

Ms Patel met with you at 2:00pm in a meeting room on Level 6 of the XYZ building to discuss feedback about your work and her decision to put you on a performance improvement plan. Ms Patel states that you refused to accept her feedback. Ms Patel states that you reacted in an angry and aggressive manner, in particular that you shouted at her, were 'red in the face' and pointed your finger in her face. Ms Patel states that you made statements that she interpreted as threats, in particular that you had made complaints about her management style to the Agency Head. Ms Patel states that you told her you had sought advice about her behaviour from a Facebook bullying support group and had been advised by experts in the group that Ms Patel had acted in an unlawful and discriminatory way. Ms Patel's statement about this incident is documented in Attachments A (her complaint) and B (her contemporary notes of the meeting).

Your email of 7 April 2020

It is alleged that on 7 April 2020, you sent an email to Ms Patel, which you copied to your Branch Head and a number of colleagues, in which you made an allegation that she was untruthful and had engaged in discrimination and workplace bullying. A copy of the email is in Attachment C.

Your email exchange with Mr Rogers, Human Resources, of 9 April 2020

On 9 April 2020, Mr Rogers emailed you in response to your email of 7 April asking you to provide details supporting your allegation that you had been bullied and discriminated against by Ms Patel. You responded on the same day advising that 'Ms Patel knows very well what she has done'. You did not provide any further information. A copy of these emails are in Attachment D.

If you behaved in the way alleged in these incidents, your behaviour may amount to a breach of:

- Section 13(1) of the Code of Conduct which requires that an APS employee must act with honesty and integrity in connection with APS employment.

Generally making serious allegations about a manager's integrity without providing supporting information, could be viewed as behaviour that does not have regard to the consequences of this behaviour or to assist the agency to respond to the allegations. It would be considered behaviour that would be seen as a failure to demonstrate the right standards of conduct and to be lacking in integrity.

- Section 13(2) of the Code of Conduct which requires that an APS employee must act with care and diligence in connection with APS employment.

The agency's performance management policy requires employees to engage constructively with the performance management process, including reflecting courteously on feedback provided by their managers. The agency's Workplace Behaviour policy requires employees to provide supporting information when making allegations of bullying or inappropriate behaviour. Reacting to performance feedback in an angry and aggressive way and making allegations about the manager's integrity without having regard to the consequences and without providing supporting information, would be considered inconsistent with your obligations under the performance management policy and the Workplace Behaviour policy. It may be regarded as behaviour inconsistent with a requirement to act with care and diligence.

- Section 13(3) of the Code of Conduct which requires an APS employee, when acting in connection with APS employment, to treat everyone with respect and courtesy and without harassment.

Behaving aggressively and making allegations about a manager's integrity that appear to be unfounded, and making statements that could be considered threats, may be considered behaviour that lacks respect and courtesy and that would constitute harassment.