



Reviewing the merits of a case Tip sheet

This information is for HR practitioners and managers who conduct reviews of workplace decisions under the Review of Actions scheme.

Examples of the types of decisions that you may be called upon to review include:

- a performance management assessment and end-cycle rating
- a decision about the type of leave an employee may take
- a decision about flexible working arrangements
- the appropriate handling of bullying and harassment complaints.

Our Employment Principles provide that the APS and the Parliamentary Service constitute a career based public service that makes fair employment decisions with a fair system of review .

Your role in applying this aspect of the Employment Principles is to conduct a fair review of a workplace decision or action of concern to an employee, if it is eligible for review. You can find out more information to assist you to make an eligibility decision on our website.

In conducting a review, you are not merely checking to make sure the decision complied with the relevant policy; your role is to conduct a merits review of the decision or action. But what do we mean when we talk about a merits review?



What is a merits review?

A merits review involves an independent person ‘standing in the shoes’ of the original decision maker and freshly considering all of the relevant facts, law and policy aspects of the original decision. The reviewer is not confined only to consider the information which was before the original decision maker; the reviewer can have regard to all relevant information, including fresh evidence or fresh considerations which arose after the original decision was made . Sometimes this means that a reviewer will make a different decision to the original one, even if they consider the original decision was correct at the time. The role of the reviewer is to consider all of this information and then to decide what the correct or preferable decision is.

Tip: If you are relying on new information that is adverse to the review applicant, a copy of that information, or a summary of the relevant material, should be given to them to comment on before taking that information into account. This will ensure your review decision is robust and procedurally fair.

Review outcome

If there is a clear outcome, then your role is to choose the correct one. Where there may be a range of decisions that may be correct, your role is to choose the preferable one, that is, the decision that best suits the particulars of the situation at hand. Deciding what a 'correct' or 'preferable' decision may be can be tricky, particularly if there are a range of competing interests, or where you have to carefully balance conflicting evidence.

In reaching your outcome, you will need to consider all of the facts that are relevant to the decision as well as all of the policies that apply, whether those policies apply to the public service generally or are particular to your agency. An example of a public service policy that may be relevant to a review in your agency may be the APS Commissioner's Circulars related to COVID-19.

More information about merits review

Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of agency and departmental decision makers, as well as contributing to the openness and accountability of decisions made by managers.

Some decisions are more difficult than others to review on their merits. For example, it may be difficult for reviewers to stand in the shoes of a manager making a decision about an employee's performance, unless the reviewer has a sufficient level of professional expertise in the work area.

In such cases, the reviewer may wish to consider the following:

- What level of inquiry is appropriate having regard to the seriousness of the decision under review, (noting that a process-only review is not sufficient)?
- Could the gaps in knowledge be filled by reading business plans; organisation charts, procedural manuals and other guidance material about the work area?
- Is there technical advice available that could reasonably be seen to be independent?
- Are the manager's concerns about an employee's performance supported by evidence?
- How credibly have the manager and the employee presented their respective cases?

For further information about merits review you can find best practice advice and guidance on the Administrative Review Council's website.

The Merit Protection Commissioner's website has tips and traps for reviewers and decision makers, and plenty of helpful advice. You can also contact us for more assistance on 02 8239 5330 (option 2) or send us an email to review@mpc.gov.au