



Drafting clear employee directions Tip sheet

This guidance is for HR practitioners and managers who are considering issuing a formal direction to an employee. It aims to assist with framing clear and effective directions.

Section 13(5) of the Code of Conduct provides:

- An APS or Parliamentary Service employee must comply with any lawful and reasonable direction given by someone in the employee's Agency/Department who has authority to give the direction.



"The right of an employer to direct their employee is implied at common law, stemming from the ability of an employer to exert control over their employees. Employees have a duty of obedience which requires an employee to comply with any lawful and reasonable direction given by a superior, or otherwise contained in an employer's policies and procedures. A breach of this implied duty constitutes a breach of contract; this misconduct can provide the basis of a valid reason for dismissal."

Ms Bou-Jamie Barber v Goodstart Early Learning
[2021] FWC 2156 (20 April 2021) at [303]

The objective of a direction is to make clear to an employee what is expected of them within the scope of their employment. While an employee must comply with a direction that is lawful and reasonable, this is a complex and evolving area of law. The lawfulness of a direction is determined, among other things, by whether it falls within the scope of the employee's employment contract and is consistent with any applicable workplace instruments.

An employee's refusal to comply with a direction that is unlawful or unreasonable is not a breach of the Code of Conduct and provides no valid ground for dismissal or other sanctions. The MPC recommends that managers obtain legal advice or legal assistance in cases where the lawfulness or reasonableness of a proposed direction could be problematic or contentious. This tip sheet is not intended as legal advice in this regard.

The MPC has recommended Code findings be set aside because the direction was not clearly articulated or ambiguous. An employee cannot be reasonably expected to comply with an unclear or vague direction.

Why is a clear direction important?

Directions are a tool used by managers to convey important information to employees about acceptable behaviour or procedures to be followed in the workplace. Employees are required to follow directions that are both lawful and reasonable, and

given by a person with authority to do so. This obligation applies under common law as well as the Code of Conduct. In this context, it is crucial that an employer makes a direction to an employee that is clear and is capable of being understood and complied with by the employee, and are given only in appropriate circumstances.

Warnings vs Directions

Directions are useful when there is something specific that the employer requires the employee to do in the future. For example, to refrain from working more than 7.5 hours in a day without permission from their supervisor, or not to speak over their colleagues in meetings. It is not necessary to direct an employee to comply with the Code of Conduct because that is already a requirement under the *Public Service Act 1999*.

A warning might be useful when an employee has behaved in a way that is inappropriate but is not serious enough to be dealt with through a Code of Conduct or underperformance process. If there is nothing specific to direct the employee about, they might be warned that their previous behaviour was unacceptable and reminded about their behavioural expectations, both in terms of specific behaviours and more generally under the Code of Conduct.

When to use a formal direction

Directions help the employee to understand their behaviour is not acceptable, and provide guidance about future behaviour. Directions are effective where employees did not initially comprehend their behaviour was unacceptable or where there are mitigating circumstances, such as the behaviour being a one-off event. Reformed behaviour and improved future conduct is usually the desired outcome. A direction may be a suitable management approach where the employee's behaviour is less serious than other types of behaviour for which a Code of Conduct investigation is more appropriate. Individual

circumstances vary and management's approach should also vary according to the circumstances.

Directions should be given as soon as possible after the event causing concern. This ensures the event is fresh in the mind of the recipient and can avoid entrenching unacceptable behaviour.

What are the elements and requirements of a clear direction?

Formal directions may be about:

- an employee's behaviour
- performance of work
- administrative matters.

A direction should not be confused with an instruction from management to employees, which concerns routine tasks or less important aspects of work tasks or work behaviour.

Authority

A direction needs to be given by a person with appropriate authority to do so,¹ generally a person in the employee's line of management.

Clear and specific

To be effective, a direction must be clear, capable of being complied with, internally consistent, "tightly drafted, using the language of command throughout, and specify exactly what actions should and should not be taken".²

Not providing enough specificity is a common mistake; a general direction to "behave appropriately", even if particular past situations are described may not contain the required level of detail. If a manager is concerned about an employee's behaviour being inappropriate, it is possible that the employee does not have a strong understanding of what behaviour is acceptable.

¹ The Australian Government Solicitor's Legal briefing Number 118 *Misconduct in the Australian Public Service* provides further information on the scope of a direction and who can give a direction [Legal briefing No. 118 | AGS](#) (see section titled "Section 13(5) – compliance with directions").

² *Phillips v DAC* (1994) 48 FCR 57.

The direction should focus on the specific actions which have caused concern and be explicit about what the employee should and should not do. For example:

- *You are directed not to hang up the telephone when you are speaking with your manager or colleagues, before the telephone call has reached its conclusion.*
- *You are directed to confine your conversations with Mr X to work-related matters during 9am and 5pm.*
- *You are directed to refrain from using social media and personal messaging to speak in derogatory terms about your agency colleagues.*

A direction should be also practicable and appropriate to the circumstances.

In a review matter, the Merit Protection Commissioner recommended a direction to “refrain from continuing to make these allegations in the future” be set aside. The employee had made several allegations of bullying which were not substantiated in the subsequent investigations. We noted that a general direction to refrain from making allegations of victimisation and bullying in unspecified future circumstances would be neither practical nor appropriate, and could seek to stifle the legitimate right of an APS employee to seek investigation or review of new matters affecting his or her employment.

Proportionate and reasonable

The manager should consider what they are hoping to achieve by issuing the direction. A reasonable direction needs to be proportionate to the behaviour that is the subject of the direction. A direction more generally must be reasonable in all the circumstances applicable to the individual matter or issue.

Lawful

A direction must be lawful. The general advice of the Australian General Solicitor is that “a direction to an

APS employee can be lawful if it involves no illegality and if it is reasonably adapted to protect the legitimate interests of the Commonwealth as employer or to discharge the obligations of the Commonwealth as an employer”³. A manager should seek legal advice if they are unsure or unclear on the lawfulness of the direction they are considering.

Directions about confidentiality

Employers often give employees directions about maintaining confidentiality as part of a process such as a Code of Conduct investigation or an inquiry into a complaint. The purpose of a direction to maintain confidentiality is usually legitimately aimed at:

- ensuring respondents do not attempt to influence or intimidate witnesses
- protecting the privacy of parties to the process and minimising the impact on the workplace (e.g. office gossip)
- preventing inappropriate disclosure of official information (e.g. posting on social media).

While it may not be intentional, overly restrictive confidentiality directions prevent the respondent from (for example):

- discussing the matter with a partner or close friend
- seeking advice or representation from a union or lawyer
- making an application to an external review body such as the MPC or the Fair Work Commission
- talking to the Employee Assistance Program or another treating practitioner
- honestly answering questions when applying for jobs about previous warnings, underperformance or behavioural concerns.

Employers should carefully consider the purpose and breadth of such directions and be clear with the employee about what is included and excluded. Look for a fair balance between the legitimate concerns of

³ The Australian Government Solicitor's Legal briefing Number 118 *Misconduct in the Australian Public Service* [Legal briefing No. 118 | AGS](#) (see section titled “Section 13(5) – compliance with directions”).

the employer with ensuring the employee has access to reasonable support, and that their legal rights are not restricted.

In [Ariana Goss v Health Generation \[2021\] FWC 1751](#), the Fair Work Commission provided useful guidance on when a confidentiality direction may be lawful but unreasonable in the circumstances.

Good practice tips for drafting directions to employees

Procedural fairness

Issuing a direction is a serious management step which can have significant adverse consequences for the employee. It is important to keep an open mind, taking into account that people may have different perceptions of the same events. Where practicable, an employee should be given a reasonable opportunity to explain their version of events before the decision to issue a direction is made.

In a review matter, the Merit Protection Commissioner recommended a formal warning letter could not stand in the form it was issued in, as it had been issued concerning a workplace incident without seeking the employee's version of the events. We obtained the employee's version of events and considered, on the balance of probabilities, that the alleged concerning conduct took place. However, we considered other conduct was described in imprecise terms to which the applicant could not be expected to respond. Therefore, we recommended the formal warning letter be reissued in modified form.

The direction should be in writing

As a matter of good administrative practice, a direction should be expressed in writing. A direction can be given verbally in the first instance, for example, the manager wishes to immediately stop ongoing conduct, such as swearing. It is better practice to follow-up a verbal direction with a written direction.

A written direction should specify any past conduct that has led to the direction being given.

Providing a detailed description of any past behaviour

or events that led to the direction ensures the employee is clear about the conduct that concerns the manager. The reasoning is an important part of the direction because it provides procedural fairness to the employee as it allows them to understand why the direction has been issued.

The written direction can specify future conduct expectations in general terms before giving the specific direction. In this section, the direction might remind an employee of their obligations under the APS Values or Code of Conduct. This part of the direction gives the employee a source for the manager's concern and allows them to do their own research to better understand their obligations.

The written direction should be clear about the expected future conduct. This section should begin with words to the effect of, "I direct you to ...". The words used should make it clear to the employee what they are required to do to comply with the direction.

The direction should contain information about review rights and other administrative issues.

This section can include information about privacy, if the direction will be on the employee's personnel file and for how long, whether there will be monitoring of compliance with the direction, and their review rights.

Have a conversation with the employee when delivering the written direction.

Managers are encouraged to meet privately and confidentially with the employee to convey the direction in person, even if the written direction itself is delivered electronically. Unless the matter is urgent, it is good practice to advise the employee in advance why the meeting is occurring and give them the opportunity to bring a support person. Relevant enterprise agreements or policies may provide guidance around such conversations and when support persons can be present. Contact details of relevant employee assistance programs (EAP) or services should be made available to the employee.

During the meeting the manager should explain the conduct that is of concern with as much detail as possible. Consideration should be given about how to convey information without violating any applicable

privacy guidelines, while at the same time providing enough information to provide the employee with procedural fairness. The manager should articulate future conduct expectations, as set out in the written direction.

The manager should also articulate the consequences of not following the direction, and should inform the employee of their review rights under section 33 of the Public Service Act or the Parliamentary Service Act. The employee should be informed of any relevant Agency/Department policies and procedures.

Further information

- The Australian Public Service Commission's guidance [Handling Misconduct](#) provides advice on how a lawful and reasonable direction may be expressed (see paragraphs 5.26 to 5.37 and in Appendix 2, paragraphs 2.31 to 2.35).
- The Australian Government Solicitor's [Legal briefing No. 118 | AGS Misconduct in the Australian Public Service](#) provides further information on the scope of a direction and who can give a direction (see section titled "Section 13(5) – compliance with directions").
- Merit Protection Commissioner [case studies](#).