
WITHOUT PREJUDICE – THIS CLAUSE IS NOT FINAL & MAY BE SUBJECT TO CHANGE

PLEASE NOTE: THIS CLAUSE OR SUBCLAUSE SHOULD NOT BE READ IN ISOLATION, & MUST BE READ IN CONJUNCTION WITH THE ENTIRE CLAUSE AND/OR AGREEMENT

Tabled 26/6/2012

66. Misconduct or Serious Misconduct

66.1. This Clause 66 will apply in conjunction with Schedule 7(2), Transitional Arrangements.

66.2. Definitions

Disciplinary Process means the process prescribed in this Clause 66, Misconduct or Serious Misconduct.

Misconduct means a breach of appropriate standards of conduct expected of staff at the University.

Serious misconduct means any or all of the following:

a) serious misbehaviour of a kind that constitutes a serious impediment to the carrying out of a staff member’s duties or to a staff member’s colleague(s) carrying out their duties;

b) serious dereliction of the duties required of a general staff member’s office;

c) conviction by a Court of an offence that constitutes a serious impediment to the carrying out of a staff member's duties or to a staff member’s colleague(s) carrying out their duties.

66.3. Application

66.3.1. For the purposes of this Clause 66, all references to misconduct are taken to include serious misconduct.

66.3.2. This Clause 66 does not apply to casual or probationary staff members.

66.3.3. Before the Vice-Chancellor takes disciplinary action against a staff member for misconduct or serious misconduct, the Vice-Chancellor must comply with this Clause 66.

66.3.4 In calculating the periods of time referred to in subclauses 66.5.3, 66.6(c), 66.9.8 and 66.10.1, where a staff member is on leave or away from their normal place of work for work purposes, these days will not constitute working days.

66.4. Principles

66.4.1. The University’s Code of Conduct and Guiding Ethical Principles may be referred to for guidance on appropriate standards of conduct expected of all staff at the University. A copy of the University’s Code of Conduct and Guiding Ethical Principles may be referred to for guidance on appropriate standards of conduct expected of all staff at the University.

Code of Conduct and Guiding Ethical Principles will be made available to staff members on the University’s website.

66.4.2 Within 3 months of the commencement of this agreement, a committee will be established to determine under what circumstances a breach of the University’s Code of Conduct and Guiding Ethical Principles constitutes misconduct and/or serious misconduct, and when this is of a serious nature. The findings of this committee will deliver its findings within 6 months of its establishment. The committee will comprise of:

a) 3 management representatives nominated by the Vice-Chancellor; and
b) 3 union representatives nominated by the Union(s)

The findings of the Committee will be used as the framework in determining whether a staff member’s actions constitute misconduct.

66.4.3 A staff member may be represented by their Union or other nominated representative throughout the conduct of the disciplinary process.

66.4.4 A record of all meetings with the staff member will be kept by the University and a copy of these meeting records will be provided to the staff member.

66.5 Step 1 - Enquiry into Complaint Concerning Staff Conduct

66.5.1 A complaint concerning a staff member’s conduct must be dealt with when it first arises, and prior complaints about a staff member’s conduct will not be incorporated into any complaint, and will not be taken into account in determining how a complaint is to be dealt with.

66.5.2 A line manager will deal with a complaint concerning a staff member’s conduct through initial enquiry into the matter and resolution at the local level using appropriate interventions, including counselling, mediation, and staff training, except where subclause 66.5.3 applies.

66.5.3 Where:

a) The line manager is unable to resolve the complaint(s) at the local level; or
b) The line manager is of the view that it is not appropriate to deal with the complaint(s) at the local level as the complaint, if substantiated, is of such a serious nature that it is not appropriate to deal with it at the local level; or
c) The line manager or the staff member perceives a conflict of interest on the line manager’s part in dealing with the complaint(s);

the line manager will refer the complaint to the relevant Executive Manager for further consideration. Where subclause 66.5.3 applies, the line manager will notify the staff member in writing within 1 working day of their referral of the complaint to the relevant Executive Manager. Where the line manager is dealing with the complaint and the staff member perceives a conflict of interest on the line manager’s part in dealing with the complaint, the staff member will notify the line manager and Executive Manager of this within 5 working days of their receiving the written advice that the line manager is dealing with a complaint concerning their conduct.
66.5.4. The Executive Manager will deal with a complaint referred to them by a line manager or the staff member concerning a staff member’s conduct through initial enquiry into the matter and resolution at the local level using appropriate interventions, including counselling, mediation, and staff training, except where the complaint, if substantiated, is of a serious nature that it is not appropriate to deal with it at the local level, and may warrant formal investigation. In this circumstance the Executive Manager will identify from the complaint the precise nature of the allegation to be investigated by the University, and may undertake preliminary enquiries for that purpose. The staff member may also choose to have the complaint investigated by the University.

66.6. Step 2 - Notification of Allegation(s)

The Executive Manager will write to the staff member to:

a) notify the staff member of the allegation(s) being investigated by the University in sufficient detail to enable the staff member to understand and to properly consider and respond to the allegation(s). This includes notifying the staff member of:
   i) How the alleged misconduct arises. For example if it is alleged that a staff member’s actions are contrary to the University’s Code of Conduct and Guiding Ethical Principles, this must be indicated as well as what specific part of the University’s Code of Conduct and Guiding Ethical Principles their alleged action is contrary to, and why their alleged actions are contrary to the University’s Code of Conduct and Guiding Ethical Principles.
   ii) how their alleged behaviour constitutes misconduct. This must include a detailed explanation of how the staff member’s alleged actions, omissions or behaviour constitutes misconduct.

; and

b) inform the staff member of their right to be represented by their Union or other nominated representative throughout the conduct of the disciplinary process; and
c) require the staff member to submit a written response to the allegation(s) within 15 working days or other period as agreed between the Executive Manager and the staff member; and
d) inform the staff member of the disciplinary action that may be taken in accordance with this Clause 64 should the allegation(s) be substantiated; and
e) provide the staff member with a copy of Clause 66, Misconduct or Serious Misconduct.

66.7. Step 3 - Suspension with Pay Pending Investigation

66.7.1. Where the Executive Manager:

a) has identified an allegation(s) of misconduct by a staff member for formal investigation by the University; and
b) is of the view that the allegation(s) is of a sufficiently serious nature that it would, if substantiated, constitute serious misconduct; the Executive Manager may, following consultation with the Director, Human Resources or Associate Director(s) (Human Resources), recommend to the Vice-Chancellor that the staff member be suspended with pay pending investigation.
66.7.2. The Vice-Chancellor or nominee may, on receipt of such a recommendation, suspend the staff member with pay pending investigation, if the Vice-Chancellor is of the view that the allegation(s) would, if substantiated, justify the dismissal of the staff member with notice.

66.7.3. Any decision by the Vice-Chancellor to suspend the staff member pending investigation will be advised to the staff member as soon as practicable after the decision is made.

66.7.4. The staff member may be excluded from the University and its facilities during any period of suspension.

66.7.5. Notwithstanding subclause 66.7.4, the staff member will be permitted reasonable access to the University for the preparation of their case and to collect personal property.

66.7.6. Except as provided for in this Clause 66, the Vice-Chancellor may not impose any disciplinary sanctions against a staff member prior to the steps in clause 66 being completed.

66.8. Step 4 - Response by Staff Member to Allegations

66.8.1. Where the staff member, in their response to the allegation(s), admits the allegation(s) in full, the Executive Manager may:

   a) take no further action; or
   b) recommend to the Vice-Chancellor that appropriate disciplinary action be taken for those allegation(s).

66.8.2. A staff member who admits the allegation(s) in full is not entitled to seek a review of the misconduct process.

66.8.3. Where a staff member provides a response to the allegation(s), the Executive Manager will give due and proper consideration to this response. Where a staff member denies an allegation(s) of misconduct in part or in full and provides a reasonable explanation of why their behaviour or actions do not constitute misconduct, the Executive Manager will not refer the allegation(s) for investigation and report in accordance with the terms of this Clause 66, Misconduct or Serious Misconduct.

66.8.4. Only where the staff member fails to respond to the allegation(s) within the required timeframe or denies the allegation(s) in part or in full and does not provide a reasonable explanation of why their behaviour or actions do not constitute misconduct, may the Executive Manager refer those denied allegation(s) for investigation and report in accordance with the terms of this Clause 66, Misconduct or Serious Misconduct. Alternatively the Executive Manager may:

   a) deal with it at the local level using appropriate interventions, including counselling, mediation, and staff training and after having considered the response to the allegation(s) of the staff member.
   b) inform the staff member in writing that no further action will be taken, having considered the staff member’s response.
66.9. Step 5 – Investigation

66.9.1. The Executive Manager and the staff member will agree upon a suitably qualified and experienced investigator to undertake the investigation of allegation(s) required to be investigated by the University. This investigator may be from within the University or may be an independent external investigator. Alternatively the staff member may choose to matter to refer the matter to Fair Work Australia under Clause 62, Dispute Resolution Procedure. In any arbitration the burden of proof rests on the University to prove the staff member committed misconduct, beyond reasonable doubt.

66.9.2. The Executive Manager will inform the staff member whose conduct is being investigated of any intention to investigate an allegation(s) in accordance with this Clause 66, Misconduct or Serious Misconduct.

66.9.3. The investigation will be undertaken in such a way as to ensure that the requirements of procedural fairness and natural justice are met, including providing an adequate opportunity for the staff member for the following:

a) to be heard;
   b) to be represented by their Union or other nominated representative in their dealings with the investigator;
   c) to respond to the allegation(s) arising in the course of the investigation which may be the subject of findings by the investigator;
   d) to present and challenge evidence;
   e) make submissions; and
   f) to access all relevant documentation in their original form (including witness statements and transcripts or recordings of any interviews with people related to the allegations) except that which is legally privileged or commercial-in-confidence.

The University will not record any interviews or conversations with the staff member without their express written consent.

66.9.4. Where an allegation of research misconduct involves action by staff members across more than one institution, the Union and the Vice-Chancellor or suitable nominee can agree on an appropriate multi-university investigation or review, or both, rather than having separate investigations or reviews at each university.

66.9.5. The investigator will provide the Executive Manager with the final report which will:

a) state the investigator’s findings of fact concerning the allegation(s) referred for investigation; and
   b) state the basis for those findings of fact; and
   c) identify any relevant mitigating circumstances arising from the investigation.

66.9.6. In making their findings of fact concerning the allegation(s) referred for investigation, the standard of proof to be used by the investigator in determining whether the allegation(s) are substantiated is beyond reasonable doubt.
66.9.7 The Executive Manager will provide a copy of the report to the staff member.

66.9.8 The staff member must provide their response to the report, if any, to the Executive Manager within 15 working days.

66.9.9. The Executive Manager will consider the staff member’s response, if any, and make his or her recommendation to the Vice-Chancellor within 10 working days where any disciplinary action is to be taken. Where the investigator’s findings of fact concerning the allegations referred for investigation is that misconduct did not occur, the Executive Manager must accept this finding as correct, except where he or she has reasonable grounds for believing their recommendations to be incorrect or inappropriate. The recommendation must provide the reasons for the Executive Manager’s decision, including why they have not accepted the investigator’s findings where appropriate, and any recommendations, and address the issues raised in the staff member’s response.

66.9.10 Where the Executive Manager’s recommendation is termination of the staff member, the recommendation must provide reasons for this.

66.9.11. The Executive Manager will provide the staff member with a copy of his or her recommendation at the same time as it is provided to the Vice-Chancellor.

66.10. Step 6 - Misconduct Process Review Committee

66.10.1. Following the investigation, where the Executive Manager recommends to the Vice-Chancellor that disciplinary action, including termination without notice, be taken in accordance with Clause 66.11.3, the staff member may, within 15 working days of the date of the advice of the Executive Manager’s recommendation, request the convening of a Review Committee to:

   a) review the evidence, the findings of the Investigation, the misconduct process and the Executive Manager’s recommendations arising from that process; and
   b) report to the Vice-Chancellor on the following:
      i) the findings of its review;
      ii) whether or not these findings support the findings of the Investigation and the Executive Manager’s recommendation;
      iii) whether there are any mitigating circumstances;
      iv) the recommendations of the Review Committee.

66.10.2. The Review Committee will comprise:

   a) 1 management representative nominated by the Vice-Chancellor; and
   b) 1 union representative nominated by the Union; and
   c) an independent Chair, external to the University, as agreed between the University and the Union.

66.10.3. Where allegations of research misconduct are involved, the Vice-Chancellor or suitable nominee and the Union will confer to ensure that the Review Committee includes a person with direct or cognate discipline knowledge to give the Review Committee relevant expertise in technical or scientific questions,
or a person with knowledge or experience in dealing with research conduct issues, or both. This may involve selecting an appropriate mix of people when appointing the Union or management nominees, or may involve, by agreement, the appointment of additional members of the Review Committee, including persons other than employees of the University.

66.10.4. The Review Committee will take into account the needs of the staff member and the University and will:

   a) ensure natural justice and procedural fairness are observed and practiced; and
   b) enable the interviewing of any person the Review Committee thinks fit, in the presence of the staff member and their Union or other nominated representative.

66.10.5. The Review Committee will have access to relevant documentation in order to establish the facts.

66.10.6. The staff member and their Union or other nominated representative and the Executive Manager will be given an opportunity for the following:

   a) to be heard;
   b) to answer findings or allegations;
   c) to be represented in proceedings of the committee;
   d) to present and challenge evidence. Where a witness statement is submitted as evidence, the party submitting the witness statement must make the witness available to be questioned in the proceedings, unless the other party and the Review Committee agree to waive this requirement in writing;
   e) to make submissions; and
   f) to access all relevant documentation except that which is legally privileged or commercial-in-confidence.

provided that the Review Committee may place reasonable limits on the opportunity to make and respond to submissions to ensure that the duration of the proceedings is not unduly prolonged.

66.10.7. Proceedings will be conducted in camera unless otherwise agreed between the staff member and the University.

66.10.8. The Review Committee will provide a copy of the report to the staff member.

66.10.9. The staff member must provide their response to the report, if any, to the Vice-Chancellor within 15 working days, or other period as agreed between the Vice-Chancellor or nominee and the staff member.

66.11. Step 7 - Decision in Relation to Allegations of Misconduct or Serious Misconduct

66.11.1. The Vice-Chancellor may make a decision after the application of Step 4 where the staff member admits the allegations in full, or following Step 6 of this Clause 66.
66.11.2. The Vice-Chancellor may, taking into account the report of the investigator, recommendation(s) of the Executive Manager, the report of the Review Committee, the staff member’s response(s) and any part admissions to the allegation(s), and any other matter the Vice-Chancellor considers appropriate:

   a) take no further action; or
   b) require further investigation; or
   c) impose disciplinary sanction.

66.11.3. Where the Review Committee makes a recommendation, the Vice Chancellor must follow this recommendation, except where he or she has reasonable grounds for believing their recommendations to be incorrect or inappropriate.

66.11.4. The Vice-Chancellor will advise the staff member and the line manager of his or her decision within 10 days of receiving a recommendation or report. Where the Vice-Chancellor does not follow the recommendations of the Review Committee under subclause 66.11.3, the Vice-Chancellor will outline in writing what he or she believes are the reasonable grounds for believing the Review Committee’s recommendations to be incorrect or inappropriate when notifying the staff member and the line manager of his or her decision.

66.12. Step 8 - Disciplinary sanction

66.12.1. Where the Vice-Chancellor decides to impose disciplinary sanction on a staff member for misconduct or serious misconduct in accordance with the provisions of Clause 66.12, the disciplinary sanction may include formal censure or reprimand and no more than one of the following:

   a) directive from line management to undertake relevant training and education;
   b) withholding an increment;
   c) withdrawal of other benefits (eg. conference leave, academic study leave);
   d) demotion by one or more classification levels or increments;
   e) reversion to substantive appointment where a variation to employment contract exists;
   f) transfer to another suitable position in the University;
   g) removal from any appointment or Office to which the staff member is assigned by the University, while remaining in the employ of the University;
   h) suspension with pay;
   i) termination of employment with notice;
   j) termination of employment without notice.

66.12.2. The Vice-Chancellor will only impose the sanction at subclause 66.12.1(i) or (j) in the case of findings of serious misconduct that involve a staff member engaging in activity of a serious criminal nature. Where the Vice-Chancellor imposes a disciplinary sanction of termination of employment with notice under subclause 66.12.1(i) and termination of employment without notice 66.12.1(j), the Vice-Chancellor must provide to the staff member in writing at the time of their decision, the rationale for why the disciplinary sanction was justified in the circumstances.

66.12.3. Nothing in this Clause 66 prevents the utilisation of Clause 62, Dispute Resolution Procedure. Where a matter is referred to Fair Work Australia as part of the Dispute Resolution Procedure, in any
arbitration the burden of proof rests on the University to prove the staff member committed misconduct, beyond reasonable doubt.