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| Notable Case |  |

## Discipline decisions can be made on the balance of probabilities without corroborating evidence

Date of decision: 18 January 2017

## **Overview**

An employee was disciplined for a second time for using inappropriate language in the workplace during a conversation with another employee. The previous incident had occurred five months prior. The employee acknowledged the conversation but denied using the words alleged, and made the following arguments:

* the agency had relied on the statement of the complainant, which could not be corroborated;
* the complaint had been fabricated because the employee had been complaining about someone the complainant had a relationship with; and
* the agency had not given any weight to the employee’s efforts to improve their standard of conduct since the previous discipline process.

The agency believed that, on the balance of probabilities, the offence had occurred. There was no evidence or valid reasons provided to support the argument that the other employee had fabricated the allegation. The agency also stated that they had reduced the proposed penalty in response to the employee’s submission that they had made efforts to improve their conduct.

## **Decision**

The Appeals Officer dismissed the appeal.

In circumstances where there is no corroborating evidence, an agency must carefully consider all the facts and evidence to determine, on the balance of probabilities, whether the incident is more likely to have occurred in the manner alleged.

Given the employee had recently been reprimanded for similar behaviour, it was fair and reasonable that the agency would impose a higher penalty for the second incident.

## **Implications for agencies**

Where there is no corroborating evidence, decision-makers can still make decisions on the balance of probabilities based on the information available.

The Briginshaw vs Briginshaw principle requires that the more serious the proposed discipline is, the more satisfied the decision-maker must be that the event occurred.

It is open for agencies to consider additional penalties when an employee is disciplined for the same behaviour on subsequent occasions.