



Small Business Assistance & Advisory Service

Performance Management Guidelines

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When Should Performance be Managed?

Performance management is a process, not an event. With this consideration in mind, performance management should ideally occur daily and not only when an employee has underperformed or as a part of the formal appraisal process.

Whilst many managers shy away from 'performance management' processes and associate them with negative experiences when handled correctly, performance management can be a positive experience that benefits managers and employees alike.

The take-home message of establishing a culture of continuous feedback and opening lines of communication is essential for performance to be monitored, feedback to be given and ultimately, performance to be improved.

A manager must manage this process and foster an environment where feedback is encouraged and valued. Doing so will reduce resistance to performance appraisal processes and help avoid situations where employees feel aggrieved or surprised by their performance review.

Day-to-Day

Quite often, the most straightforward process of providing feedback when it is due will avoid future underperformance and hopefully reduce the likelihood of having to conduct formal performance management procedures.

Whilst commonly overlooked and underestimated, communicating day-to-day expectations and following up with feedback on how well those expectations have been met is enough to keep employees motivated and on track and creates a sense of manager approachability and willingness to speak openly about performance matters.

This is not to say that employees need to be micromanaged to the point where they lack trust in their supervisor. Still, it may be as simple as saying, "Alice, good job on that report today. I particularly liked when you spoke about brand awareness; very insightful. Well done!" or "Brett, that draft letter you sent through today was good, do you have a minute to discuss a few ways to build and improve upon what you already have?"

Managers also need to remember that performance management not only involves improving performance and managing misconduct but also **coaching high-performing employees and rewarding good performance**. This can be an uplifting experience and provide job satisfaction to both parties.

The fact of the matter is this regardless of where an employee's performance falls; you need to manage it. Underperformers need coaching to build, and overperformers need guidance to grow. Your organisation's success relies on clear communication of its values and direction in its marketing to gain customer loyalty; this is no different from creating loyal, effective and efficient staff!

Instances of Underperformance and/or Employee Misconduct

Underperformance and misconduct need to be dealt with quickly and effectively. Ideally, a discussion about underperformance should be held as soon as the negative behaviour is noticed or complained about and will depend upon the severity of the behaviour as to how this is best addressed by management (be this formal meeting, informal conversations or through an investigation process).

If not dealt with promptly, the following adverse effects may ensue:

- Underperforming employees mistakenly believing their performance is satisfactory without feedback to the contrary
- Underperformance may continue to decline, which can infect the behaviour of others in the workplace
- Employees who are performing comparatively well find the lack of management action as de-motivating; leading to a lack of morals, respect for their manager and disengagement

Formal Performance Appraisal

The frequency of a performance appraisal process will be a decision for each organisation to make by its organisational, functional, unit and individual objectives and available resources. This will also depend on whether you take a formal or an informal approach to the performance appraisal process.

At a minimum, an appraisal process should be carried out at least once a year; however, ideally, this should happen more regularly.

In choosing an appropriate timeframe for your organisation, it is essential to remember that performance goals must be kept fresh and relevant to ensure continued motivation and incentive to meet performance standards at all levels.

With less structured or informal processes, ensuring employees have adequate notice of a performance appraisal discussion crucial. At a minimum, employees should be notified at least 48 hours before the scheduled performance appraisal meeting.

Formal and Informal Appraisals

The appraisal method can vary from very informal to highly formal and structured. The type of appraisal system that best suits your organisation will depend on:

- the size and type of organisation;
- which employees and job types are being appraised;
- training and development policies, procedures and resources;
- the access and availability of appraisal expertise to provide input into the desired system;
- the management capability and time available to make a formal system work; and
- whether existing informal systems work adequately.

Formal

A formal appraisal system involves setting guidelines, meetings and interviews, forms, times for review, assessment systems and reporting.

Informal

An informal appraisal approach relies on impromptu meetings, discussions, consultation, coaching, discipline, and feedback. These all occur in a formal system and should be encouraged to create a healthy culture of open communication. An excellent example of a time when an informal approach is needed is when a supervisor has identified minor performance gaps and wishes to address the issue promptly without going through formal channels (i.e. the underperformance does not warrant a formal disciplinary procedure). This can also be helpful if a performance gap has been identified. Waiting to discuss the issue until a formal process is undertaken could be detrimental to the individual and their team.

Which Approach?

The approach taken will depend on the organisation's circumstances. For example, a formal system may be unnecessary if there are few opportunities for promotion or career development within the organisation. On the other hand, a large organisation with several branches and people making management decisions will need a formal system to help with planning, consistency and employee development. Individual performance needs to be appraised regardless of whether a formal or informal appraisal process is used (or both).

Performance / Coaching Meeting Preparation

Prepare before each informal performance/coaching meeting by checking that you have the following information listed below.

Focus upon facts, be specific and provide detailed examples.

Step 1: Assess the Level of Performance

- What is the performance expectation?
- Is there an up-to-date position description?
- Have you clearly articulated the performance standard?
- What is the gap between actual and desired performance?
- Can you describe the performance shortfall in behavioural terms?
- How can the gap be defined in observable terms?
 - E.g. what should the employee stop doing?
 - What should the employee start doing?
 - What is the employee doing that is off target?

Step 2: Determine the Importance of the Performance Gap

- Would it matter if there were no changes? Is the gap worth fixing?
- Would the employees' performance and business results be significantly better if the problem/s were fixed?

Step 3: Consider if There are Impediments to Performance Outside the Control of the Employee

- Are there obstacles in the way of a successful performance?

Step 4: Consider Impediments to Performance Derived from the Person

- Does the employee have the mental and physical energy/capacity required?
- Does the employee know there is a performance gap / know how the job should be done?
- Is there an attitudinal or behavioural issue interfering with performance?

360 Degree Feedback

Some organisations prefer to use 360-degree feedback as a form of performance appraisal. This process provides information on an employee's performance from peers, subordinates and managers. Such an appraisal should provide a wide range of information about skills, performance and working relationships.

In 360-degree feedback, the peers, subordinates and managers fill in a questionnaire describing the employee's performance. The questionnaire usually consists of many statements rated on a scale (e.g. from 1 to 5) and includes the opportunity to provide additional comments. The employee in question also completes the questionnaire to assess their performance.

The process should be anonymous, and the feedback should be presented to the employee in aggregate or summary terms (i.e. as a feedback report).

To ensure the best possible results from the 360-degree feedback process, it's vital to ensure that:

- the questions are short, clear and relevant to the person's job
- the respondents are credible to the person being appraised (i.e. they are deemed as being in a position where they can credibly provide input)
- both the employee and those who will complete the questionnaires are adequately briefed on the process
- feedback is never attributed to an individual respondent
- it is clearly stated how feedback will be given and by whom
- training is provided to those individuals who will provide the feedback and results
- issues of confidentiality are communicated detailing who has access to the data and for what purpose
- the feedback report is concise, simple to understand and guides how the information can be used
- the process is constantly monitored and evaluated.

For more information about 360-degree performance appraisals or to obtain a quote, [contact us](#).

Giving Feedback in Difficult Circumstances

Discussing poor performance is difficult for both parties, and it is not unusual for employees to react to being told their performance is unsatisfactory. We will cover some common reactions and tips for maintaining control of the situation.

When the Employee Rejects the Feedback Given

- Ensure the feedback is timely, specific and directed at actual examples;
- Make it about the choices made and give options of what would have achieved better outcomes; that is, don't make it personal;
- Allow the employee time to digest the information, especially if the feedback was unexpected.

If the Employee Becomes Aggressive

- Maintain a calm and rational approach, **DO NOT** react;
- Take a short break to allow the employee to calm down;
- Reiterate your concerns and why they need to be addressed;
- Allow the employee to explain why they are angry and ask questions to clarify;
- Terminate the discussion if you have any health and safety concerns and reschedule for another time.

If the Employee Becomes Emotional

- Allow them time to collect themselves;
- Wait until they are ready before continuing;
- Avoid ending the meeting;
- Don't become angry or defensive.

If a Support Person Takes Over the Conversation

- Reclarify the role each person has to play in the discussion;
- Remind the support person they are there to support the employee and not to act or speak on their behalf (if necessary);

If the Employee or Support Person Makes a Threat

- Confirm employee rights in the performance management process;
- Reaffirm the reason for the discussion and the importance of talking about the relevant, specific issues;
- Encourage the employees to raise their concerns during the meeting.

If the Employee Refuses to Continue the Discussion or Walks Out

- Request a meeting in writing and the importance of addressing your concerns;
- Continued avoidance of meetings can be grounds for a formal written warning.

Make sure you are prepared with specific examples and plan your discussion agenda. You are confident that the key messages you wish to get across will help you remain calm during difficult performance management discussions.

It is important to remember that where an employee's performance is unsatisfactory, it is best to act swiftly to address these performance issues as they arise; leaving them until the next scheduled performance appraisal will both increase the difficulty of that conversation and give the impression that their performance is satisfactory in the meantime.

The thing about acceptable behaviour and performance is that they are just the behaviours and performance that have been accepted at their core!



Formal Performance Management or Disciplinary Meeting Process

<https://www.fairwork.gov.au/employee-entitlements/managing-performance-and-warnings>

Step 1 – Prepare for the Formal Performance Improvement Meeting

Step 2 – Conduct Formal Performance Improvement Meeting / Coaching Session

- Follow the guide to Performance Management Meeting Structure and Record-Keeping
- Clearly explain the employee's underperformance / poor behaviour
 - **Best Practice Tip:** where the employee has not met their work expectations refer to the job description to highlight deficiencies. Where conduct is lacking, refer to company policies to highlight potential breaches.
- Explain that further disciplinary action will be taken if performance does not improve, resulting in termination.

Step 3 – Issue Written Warning

- Provide written warning; please see the Warnings Fact Sheet and FWO's Warning Template
- Provide a Performance Improvement Plan document outlining action items and timeframes for improvement. Please see the Performance Improvement Program (PIP)

Step 4 – Follow up After Meeting

- Monitor progress to see if underperformance / poor behaviour continues. If performance continues, assess the level of underperformance and if termination is necessary, refer to step 5.

Step 5 – termination Meeting (If Required)

- Terminate employees based on failure to improve performance following a thorough and documented performance management process.

For generic templates, visit <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/templates>.

Performance Improvement Program (PIP)

Performance Improvement Plans (PIPs) are a management tool used to assist performance improvement of underperforming employees or those employees who have demonstrated unsatisfactory behaviour and conduct in the workplace.

PIPs should be implemented due to performance management/disciplinary counselling meetings or informal employee discussions regarding performance/conduct deficiencies. A PIP should not be issued to an employee without prior consultation of the worker and an opportunity for both parties to discuss and agree upon performance goals.

Essential features include:

- PIPs should have a definite timeframe in which the employee's progress/performance will be re-assessed to determine improvement or underperformance;
- Clear, specific and realistically attainable goals should be emphasised, e.g. employees sign up ten (10) new customers per month;
- Training of employees may be necessary to achieve performance improvement and should be included as a part of the PIP;
- Regular meetings with supervisor to monitor progress towards goal achievement, provide support and ability to modify objectives where appropriate;
- Re-assessment of performance after PIP timeframe and management action accordingly.
- PIPs should always be documented, including any progress meetings and the issues discussed therein and kept by the employer; copies should also be made available to employees for their records.

Benefits

PIPs are a valuable tool for ensuring procedural fairness when managing worker performance and providing benefits for employees and their superiors. Used as a remedial tool when performance is deemed capable of improvement, PIPs offer employees an opportunity to consciously work on their performance, learn new skills and prove their commitment to their role and the organisation.

A PIP combined with a formal disciplinary / performance management process is also used to put an employee on notice that if their performance does not improve in the designated timeframe in a specified way, their employment could be at risk. For Managers, PIPs allow close monitoring of employee progress against specific standards within a set timeframe.

This allows for easier decision-making in the future and will assist in proving that employees have been afforded procedural fairness if further disciplinary action or termination occurs due to a lack of improvement.

Importance of Environment

When setting PIPs, it is essential to keep environmental factors in mind as they will likely impact the employee's performance, albeit in a minor way.

External

Employers need to be realistic and consider external forces' impacts when assessing employee contribution to organisational performance.

Some examples may include:

- The impact of the exchange rate on organisational performance;
- The state of the national economy;
- The state of the global economy;
- Changes to government policy and funding/subsidies;
- Increased competition;
- Changing customer tastes and preferences;
- Natural disasters and changes in the level of supply of inputs; and
- Changes to the laws regulating the industry etc.

Accordingly, employers must fairly assess the likely cause for the underperformance/behaviour and refrain from taking rash action against employees for factors beyond their control.

Internal

Internal environmental factors at an organisational level may also affect how employees perform and their behaviour.

Some examples may include;

- New technology;
- Department or organisation re-structure;
- Job re-design;
- Redundancies and survivor syndrome;
- Organisational culture;
- Conflict with other staff; and
- Lack of clear goals set or misunderstanding of performance expectations.

Personal Factors

It is also vital to accurately assess the personal circumstances impacting an employee's performance and behaviour in the workplace. These factors should all be evaluated in the performance management / disciplinary meeting and discussed with the employee. For more information, please see the Template – Performance management meeting record.

Warnings

<https://www.fairwork.gov.au/employee-entitlements/managing-performance-and-warnings>

There is no magic number of how many warnings employees must receive before their employment can be terminated. A common misconception is that three warnings are the upper limit before termination procedures can be followed. However, **there is no legislative requirement that reflects this.**

Employers need to be mindful of the risk of unfair dismissal claims being made by employees who feel that they were not sufficiently warned about their underperformance and received no opportunity to improve or respond before being terminated.

Some key points to note:

- Warnings will not remain “alive” forever; depending on the severity of conduct that triggered the warning, they will typically lose relevance once an employee has demonstrated improvement for a consistent amount of time. A good guide is six months before expiration. This will, of course, depend on the severity of the triggering conduct and may be more or less time accordingly.
- Warnings should **always** be documented. Even where a verbal warning is verbal, it is best to make a note of this having taken place. This will help **prove reasonableness** if a subsequent termination decision is challenged and relates to an employee being afforded procedural fairness.
- For more information on documentation, please see Legal Aspects of Managing Underperformance and Discipline in this section.
- Warning’s needs to detail the type of underperformance with specificity and identify a timeframe for expected improvement. At the expiration of this period, the employee’s performance should be reviewed, and further discipline should be considered where appropriate. In addition, employees should also be advised of possible outcomes if their performance does not improve, e.g. further disciplinary action or potential termination.
- Employees should sign a receipt or acknowledgment of receiving a warning; however, it is generally inconsequential if an employee refuses to do so. Where an employee does refuse, they should still be issued with a copy, and a record is kept on their HR file/personnel file.
- The process for issuing warnings **should be detailed in a company’s policy and procedure documents** and an employee’s contract of employment or another industrial instrument.

Contact us to arrange or download our template here if you do not have appropriate policies and procedures.

Verbal Warning

Verbal warnings are appropriate when an employee starts showing signs of underperformance or where the conduct is such that it does not warrant a formal performance management process but still requires addressing.

The employee’s direct supervisor should issue a verbal warning which is best accompanied by an informal performance management process. The aim is for performance improvement, so an

informal performance management process allows a supervisor to inform their subordinate of the performance gap and how to correct it.

Further counselling, training or (where applicable) access to the employer's Employee Assistance Program (EAP) may also be necessary depending on the nature of the underperformance and the cause.

Although oral, verbal warnings should still be documented as being issued. This will assist employers if an employee makes any claims for unfair treatment in the future.

First Written Warnings

A first written warning is appropriate in several instances. These include; where a previous verbal warning has been issued for a minor problem, and the employee has not improved their performance, or where an employee has not previously been warned. Still, their behaviour/underperformance is such that a written warning is deemed necessary.

Ideally, a written warning will be issued in conjunction with a formal performance management process being followed. This will allow the employee to respond to the underperformance issues and work with their manager to seek a solution to the problem jointly.

The written warning should contain the following details:

- What the underperformance/misconduct issue is and the corrective action required;
- What action will be taken if the employee does not improve their behaviour;
- Detail previous warning and date of issue;
- Details and signatures of those present at the formal performance management meeting; and
- Dates for performance to be re-evaluated.

A Performance Improvement Plan (PIP) may also be issued with the first written warning.

Final Written Warnings

The number of warnings issued before an employee can be dismissed will depend on the severity of the underperformance, behaviour, or misconduct and whether any improvement has been noticed.

In some circumstances, an employee's final written warning may be the first warning if the events are severe enough. Conversely, employers may issue a final written notice to employees instead of dismissing them where they have shown considerable improvement but still fall short of the desired performance standard.

It is **inadvisable** to issue repeated final warnings. However, the situation needs to be assessed based on the facts.

Investigating and Managing Misconduct

Please Note: If you do not feel that your organisation has staff with the appropriate skills and abilities to investigate claims of misconduct adequately, then SBAAS advises that you don't take any risks of the process being misconstrued as any form of harassment or where claims of bias may be detrimental to bringing about appropriate outcomes. Contact us for more information on our Workplace Investigations.

Acting quickly to investigate allegations of misconduct or severe underperformance is essential. Below is a step-by-step guideline for analysing and managing misconduct.

Step 1: Investigation into Alleged Misconduct

Acting quickly to investigate allegations of misconduct or severe underperformance is essential. If misconduct/underperformance is not addressed promptly, an employee may take this as a sign of acceptance of their behaviour and continue to act accordingly.

Prepare for the Investigation Interview

The following are best practice tips to assist in preparation for an investigation interview:

- Gather all available evidence of misconduct or severe underperformance;
- Arrange interview time and place, taking care to ensure the location provides privacy and is free from interruptions;
- Decide who will be conducting the investigation interview: Ensure the interviewer is suitably experienced and is in no way associated or involved in the alleged misconduct or severe underperformance;
- Send a request for attending an investigation interview to an employee with a minimum of 24 hours notice. The request should outline the nature of the investigation, the investigation time and location and notify of the entitlement to invite a support person to the interview;

Note: *The amount of notice given to employees to prepare for the interview will depend on the severity of the alleged misconduct / serious underperformance and may vary from case to case, e.g. allegations of severe misconduct which pose threats to the company's viability will need to be dealt with very quickly to stop the conduct continuing. Good examples include employee fraud, theft, embezzlement or suspected stealing of trade secrets.*

- Prepare all records/documentation before the interview:
 - Ensure copies of relevant documents such as; company policies and procedures, job description, contract of employment, supporting evidence for misconduct etc.
 - Make sure the employee's HR file/record is also available for the meeting if previous conduct, disciplinary action, training or other events are referred to in the interview and need to be verified;
- Arrange someone to be present at the interview to take investigation notes;
- Fill out an Investigating misconduct interview record before the meeting.

Best Practice Tip: A glass of water is an excellent idea to provide for employees and their support person in the room. A tissue box is always good to have in case employees get emotional.

Conduct the Investigation Interview

Some preliminary points to note about conducting an investigation interview include:

- The investigation interview should be carried out by someone uninvolved with the situation, e.g. HR manager or a manager from a different department.
- It is not ideal for an employee to be outnumbered in an investigation interview. Ideally, the numbers of employee and their representative and those representing the organisation should be equal where possible. This is to affect the notion of procedural fairness and remaining objectively fair. An employer should not coerce an employee to confess to misconduct and intimidate them, which may be the implication if there is an imbalance of employee vs employer representatives.

Best Practice Tip: if the employee becomes emotional during the interview and uncooperative, adjourn the meeting and re-convene in approximately 20 minutes. Please refer to Giving Feedback in Difficult Circumstances before entering the discussion and keep it on hand if this happens.

In the meeting:

- After hearing the employee's response to the allegations, adjourn the meeting and consider whether it is more probable than not that the employee engaged in the misconduct. This is known as the balance of probabilities standard of proof. There are three possible outcomes of this inquiry (as noted above):
 - a. The misconduct/underperformance did occur. If so, consider disciplinary action options by the severity of the misconduct. Refer to the list of corrective actions below in step 2.
 - b. The misconduct/underperformance did not occur. If so, no disciplinary action is to be taken.
 - c. A conclusion cannot be drawn at this stage. If so, further investigation may be required. Refer to factors to consider for further investigations in step 2 below.
- Reconvene the meeting and advise the employee and their representative of the outcome at that stage (i.e. outcomes (a), (b), or (c) above).
- If the employee refuses to sign the investigation interview record, take note of this on the record form and retain a copy on the employee file.
- Write an investigation report into misconduct, noting the outcomes at this stage.

Step 2: consider Outcomes of Investigation.

It is crucial to refer to written organisational policies and procedures on conduct and discipline at this stage to see if there are examples of specific courses of action for different types of misconduct (if indeed it is determined that misconduct did occur).

Further investigation

Further investigation into the alleged misconduct is often necessary to determine whether disciplinary action is warranted or not.

This is most common when the employee raises issues that cannot be substantiated during the investigation interview or the employer needs to investigate further before forming an opinion.

The following questions will be helpful to ask:

- What other information may be relevant to the investigation process?
- Do other persons need to be interviewed? Did the employee mention other parties involved or witnesses to the alleged misconduct?
- Does video footage need to be reviewed? Is footage available?
- Do further documents need to be located?
- Is an inspection of the company-owned property in the employee's possession (i.e. company laptops, computers, cars, credit cards etc.) necessary to determine if the misconduct occurred?

Note: Suspension

Suspension of the employee should be considered if the employee needs to be absent from the workplace to complete further investigations effectively. E.g. where an employer needs to check an employee's computer and email account, an employee's presence at work may hinder the integrity of the investigation procedure.

Once further investigations have concluded, the employer will again need to revisit the question: "is it more probable than not that the employee engaged in the misconduct?" The investigation process may also reveal further issues in the workplace and require other actions to be taken by the employer, depending on what is uncovered.

Counselling for Misconduct and Performance Improvement Plans

Consider misconduct counselling where you believe the misconduct is not severe enough for dismissal on its own, or previous counselling for misconduct has not been provided.

Steps to follow:

- Request the employee attend a misconduct counselling meeting and advise of the right to bring a support person/representative with them.
- Hold a counselling meeting with the employee
- Devise a Performance Improvement Plan (PIP) with the employee and set time frames to improve their behaviour.
- Place the completed misconduct counselling record (including employee signature) on the employee's personnel / HR file.
- Set reminders for behaviour to be reviewed in the future.

Warnings

Warnings for misconduct should be issued in conjunction with counselling for misconduct unless the employee has been counselled in the past for similar behaviour, and final written notice is deemed necessary. The type of warning will depend on the severity of the misconduct and should refer to breaches of specific company policies where appropriate.

Steps to follow:

- Decide whether the misconduct requires a verbal, written or final written warning
- Issue warning to employee
- Request employee sign an acknowledgement of receiving the warning
- Set reminders for behaviour to be reviewed in the future.

Termination

Consider this option where the misconduct is severe enough to justify instant dismissal (theft, fraud, assault, a serious breach of company policy, etc.) Please seek advice from your human resources department before taking this course. Where an employee has engaged in criminal activity, the matter should be reported to the police.

Other

In some circumstances, counselling for misconduct, warnings or termination procedures may not be appropriate to manage an employee's behaviour or a problematic situation at the workplace. Below is a short list of alternative courses of action that can be taken in varying circumstances.

This is not definitive, and it is best to seek advice from your human resources department (or advisor) to devise a plan to best manage the process for the specific fact scenario.

- Conflict resolution or mediation

Consider this where there appears to be an issue between members of staff which has caused the underperformance/misconduct and needs resolving.

- Employee Assistance Program (EAP) or other counselling

Consider this if an employee's circumstances have contributed to the problem, and they may need professional help.

- Transfer of employment to a different location

Transfer of employment to an alternative location can be problematic in several ways, however, if the employee is consulted about this, is willing to make a move, and all other legal requirements have been met, this can provide a good change for the employee and may be a solution to the problem at hand.

- Changes to company policies and practices

This is likely due to the investigation report for misconduct where company factors have contributed to the employee's behaviour. This may be due to a lack of training, poor communication of behaviour standards and poor selection processes.

Guide to Conducting Counselling for Misconduct meeting:

- Ask the employee what they intend to do to remedy the situation;
- Search jointly for a solution that will address the problem and allow the employee to make the necessary improvements;
- Summarise the interview and make sure the employee is told that the interview must be treated as an informal warning and what steps will be taken next if improvements in performance or conduct are not forthcoming;
- Specify any time limits agreed for the employee's performance or conduct to be reviewed; and
- Make a note of the proceedings in a diary or on a file.

Step 3 – Write an Investigation into Misconduct Report

Recommendations may include:

- All employees to take a refresher course in bullying and harassment;
- Changes to training provided to employees; or
- Changes to policies and procedures to improve organisational systems to avoid future misconduct/underperformance;
- Counselling for misconduct etc.

Note: This may need to be completed after further investigations, and a final decision has been made.



Legal Aspects of Managing Underperformance and Discipline

Whilst there is no law governing how a performance management process should be conducted at a workplace, there are considerable legal risks to employers due to poorly handled performance management, disciplinary and termination procedures.

Aside from the obvious risks of **unfair dismissal and general protection claims** being lodged against an employer, employees may also be able to argue a breach of the implied duty of trust and confidence as contained in the employment contract. For this reason, employers must ensure that their internal policies and procedures reflect a fair approach to managing underperformance and misconduct and are applied equally to all employees without prejudice.

The Importance and Meaning of Procedural Fairness

Procedural fairness is a derivative of the legal concept of “natural justice”. It essentially translates to an employee being allowed to express their point of view before decisions affecting their employment are made and to have such choices unburdened by bias. As stated above, the processes to manage underperformance and misconduct need to be inherently fair and must also be exercised consistently and reasonably.

The issue of procedural fairness most commonly arises when the Fair Work Commission assesses the validity of a claim for unfair dismissal. In making this assessment, the Fair Work Commission will turn its mind to the following procedural fairness matters:

- Whether the worker was notified of the reason for the dismissal;
- Whether the worker was allowed to respond to any reason related to the capacity or conduct of the person;
- Any unreasonable refusal by the employer to allow the worker to have a support person present to assist at any discussions relating to dismissal;
- If the dismissal is related to unsatisfactory performance by the worker – whether the person had been warned about that bad performance before the release;
- The degree to which the size of the employer’s enterprise would be likely to impact the procedures followed in effecting the dismissal;
- The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would likely impact the procedures followed in effecting the dismissal.

In addition to the above factors, the Fair Work Commission will also need to determine whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and does the ‘punishment’ of the dismissal fit the ‘crime’ of the valid reason or it is a harsh and disproportionate response (i.e. should a warning be issued instead)?

Typical examples of instances where procedural fairness has not been observed may include:

- Failing to conduct a thorough investigation before deciding which affects a worker (e.g. by issuing a warning, counselling them or termination etc.);

- Not allowing a worker to bring a support person to any meetings addressing performance or conduct;
- Failing to provide a warning for underperformance or misconduct before termination;
- Denying the employee the opportunity to improve their performance before termination or disciplinary action (for example, failing to implement a Performance Improvement Plan and provide support to the employee);
- Not allowing a worker to respond to any allegations of underperformance or misconduct;
- Failing to apply disciplinary procedures equally and consistently to all employees.

Guidelines for Ensuring Procedural Fairness is Afforded

Clear policies and procedures for managing underperformance, misconduct and termination.

Organisations must clearly state policies and procedures for managing underperformance, misconduct, discipline, and termination. The rights of employers and employees during the process should be displayed and include a series of escalated steps from informal performance management discussions to formal termination as proportionate and commensurate with the employee's conduct.

The reasons for having structured performance management and disciplinary process are two-fold:

- To ensure that Managers responsible for addressing performance deficiencies and unsatisfactory conduct understand the importance of fairness and consistency in their approach and are supported by a structured procedure to minimise room for uncertainty, error and legal risk; and
- To ensure that employees are aware of the steps involved in performance management, disciplinary, and termination processes and to provide certainty of the consequences if performance and conduct are not improved.

Policies and procedure documents, whilst essential, will have less effect if not implemented properly and are not well communicated to employees. A well-established, documented, and well-known policy and procedure will minimise the ability of employees to claim they were mistreated in disciplinary and termination processes. The employer needs to be able to show that employees understood and were aware of the existence of relevant policies. This is precisely why SBAAS recommends structured induction and training processes **regardless of the size of your organisation.**

Clearly expressed standards for performance and conduct

Standards of performance and conduct need to be clearly defined to staff if they are to have any effect. This can take the form of performance standards as specified in a position description (job-related requirements) and in company policy documents relating to standards of behaviour and conduct in the workplace.

Management of investigations and disciplinary activity

The key points to note in managing investigations into underperformance and misconduct to afford procedural fairness include:

- Acting swiftly to investigate a matter once an allegation has been made;

- Following a fair and reasonable investigation process, ensuring:
 - Employee has adequate notice that the investigation interview will take place and has an opportunity to prepare (this will, of course, depend on the allegations against the employee, and in the case of serious misconduct, immediate meetings may be deemed necessary);
 - Support person allowed;
 - Investigator is free from bias and unconnected with the allegation;
 - Employers must not ask leading questions in interviews, e.g. “You stole from the petty cash tin, didn’t you?”
 - Employees should not be coerced into agreeing to allegations or pressured;
 - Further investigation interviews should be held with all relevant parties as well as a thorough investigation into employees’ defence to allegations;
 - Employees who are suspended on full pay pending investigation procedures should not be required to stay away from work for unnecessarily long amounts of time;
 - Principles of confidentiality must always be upheld;
 - All meetings, interviews and investigation procedures are well documented.
- Opportunity to respond to allegations, and the employer must decide based on an assessment of all relevant facts where an employee does not wish to respond. Again, documentation here is essential and needs to emphasise that the worker did not want to provide a comment.

Managing the Consequences of Investigations

Drawing conclusions

Employers need to be convinced that it is more likely than not that an employee is guilty of misconduct or underperformance. This is known as the “balance of probabilities” test.

It is essential to remember that management action must be proportionate to underperformance/misconduct and will vary depending on the severity of the performance or behaviour complained of.

Whilst often not focussed on, managers need to be honest about the reasons for making decisions and where a manager does not feel they can make a logical and unbiased decision about the employee’s behaviour/performance. They should take reasonable steps to ensure an independent party (usually a member of the HR department or a manager from another group) handles the process to maintain integrity.

An example of this might be where an employee and their supervisor have had a history of animosity or have a personal relationship outside of work which may affect either party’s judgement.

Following this, employers need to ensure they are making decisions for the right reasons and not merely deciding first and then trying to create a paper trail to support their decision-making process after the fact for an “acceptable” reason.

For underperformance issues, this means making decisions based on factors relevant to the employee’s ability to perform their job, which are measurable and ideally evidenced in some way, for example, sales records, video footage, customer complaint records and comparison to the position description to demonstrate deficiencies etc. For misconduct, this includes evidence of

breaches of company policies or conduct that is inconsistent with the continuation of employment generally.

If employers cannot convincingly prove they have decided for the right reasons, they risk legal action being taken against them by employees.

Counselling for underperformance and/or misconduct

Aside from the initial investigation into misconduct or severe underperformance, there should be a follow-up performance counselling meeting to address the employee's unsatisfactory behaviour and performance formally.

Warnings, Performance Improvement Plans, and further disciplinary action may follow after such counselling meetings; however, it is essential to allow the employee to be heard before this occurs to ensure procedural fairness is observed.

Performance Improvement Plans

Where the underperformance or misconduct issue is not severe enough to warrant instant dismissal, employees should be allowed to improve their performance and behaviour. Performance Improvement Plans (PIPs) are specific management tools used to assist performance / behavioural improvement of underperforming employees. Essentially PIPs stipulate the desired level of performance for an employee to attain within a set timeframe.

Employees should be aware of the consequences of failing to meet these expectations within the allotted timeframe, e.g. further disciplinary action or potential termination, depending on the level of misconduct/underperformance. Giving employees this chance demonstrates an employer's commitment to affording fairness before further disciplinary action is taken and providing time to improve.

Please see the Performance Improvement Program (PIP) for more information on performance improvement.

Warnings

Whether or not a warning is issued for underperformance and/or misconduct will depend on several factors. Of most importance will be the seriousness of the offending activity and whether the employee has been counselled for the same or similar conduct/performance in the past.

In more severe circumstances, an employee may be given a final written warning in the first instance; however, as a general rule, there should be a series of escalating steps before final warnings and termination are resorted to.

Please see Warnings for more information about appropriateness and the different types of warnings.

Termination

As reiterated above, performance management and disciplinary processes should follow a series of escalating steps toward termination. Despite this, in some instances, the conduct or underperformance of an employee can be so severe that it warrants instant dismissal.

Procedural fairness in this regard is primarily put aside as the conduct complained of is inconsistent with the continuation of the relationship of mutual trust and confidence between employer and employee. Before deciding to terminate an employee's employment, it is essential to be clear about the reasons for doing so and to ensure that legal risk is minimised.

