



vegetablesWA

Managing Poor Performance

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## Managing Poor Performers



There are many reasons why managers avoid dealing with poor performance –

“I don’t want to rock the boat”  
“What if they get defensive?”  
“I can’t solve personality clashes”  
“What do I say?”

Dealing with staff performance is part of a manager’s or supervisor’s role and this responsibility is now backed by legislation ensuring employees have every opportunity to improve their performance before facing dismissal.

In particular, principles of procedural fairness and natural justice require that, prior to any decision being made about their future employment, an employee is entitled to:

- Not be unreasonably denied support person of their choice;
- Know in detail the allegations against them;
- The opportunity to provide an explanation and any mitigating factors;
- Know the consequences of their behaviour;
- Fully informed, impartial decision making by their employer.

As well as the legal requirement imposed through the unfair dismissal laws, by providing counselling and discipline a manager meets his or her:

- Responsibility to the organisation to ensure its goals are achieved;
- Responsibility to ensure poor performing employees are given a fair opportunity to change their ways and keep their job;
- Responsibility to other employees so they don’t carry the load of a poor performer.

## Unfair Dismissal



There are no fixed rules about what constitutes an unfair termination; every case is judged on its own facts.

The relevant industrial tribunal deals with claims alleging unfair termination and considers the reasons for dismissal and whether the employee has been fairly dealt with by the employer before dismissal. This means employers must:

- have a valid reason for termination;
- ensure the employee is afforded procedural fairness prior to making a decision to terminate.

Procedural fairness encompasses the following factors:

- the employee was notified of the reason for dismissal;
- the employee was given an opportunity to respond;
- the employee was not unreasonably denied the services of a support person present;
- if the dismissal related to unsatisfactory performance – that the employee had been warned about that unsatisfactory performance before the dismissal;
- the degree to which the size of the employer's business or the absence of human resource specialists would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters the tribunal considers relevant.

Reinstatement is the primary remedy unless it can be demonstrated that reinstatement is inappropriate or impractical. If reinstatement or re-employment is not practical, the FWC may order an amount to be paid as compensation (capped at six months remuneration).

The industrial tribunals may combine an order for reinstatement/re-employment with an order for back pay of remuneration lost, or likely to have been lost, because of the dismissal. Back pay is not subject to the six month cap.

If a union makes an unfair dismissal claim on behalf of a member in the WAIRC, the Commission can make an interim order for reinstatement pending the resolution of the claim.

### **Who can lodge a claim in the Fair Work Commission?**

To make a claim to the Fair Work Commission (FWC), employees must be employed by a National System Employer.

Effective from 1 January 2013, the claim must be lodged within 21 days after the dismissal took effect. The FWC may approve an extension of the application period if there are exceptional circumstances warranting such an extension.

Employees earning above the high income threshold are excluded in most cases from making an unfair dismissal claim. This means that tribunals must not deal with unfair dismissal claims if the employee is not covered by an award or agreement and remuneration exceeds \$138,900 per year (as at 1 July 2016, indexed annually).

For National Systems Employers, other specified categories of employees are ineligible to claim unfair dismissal, including employees:

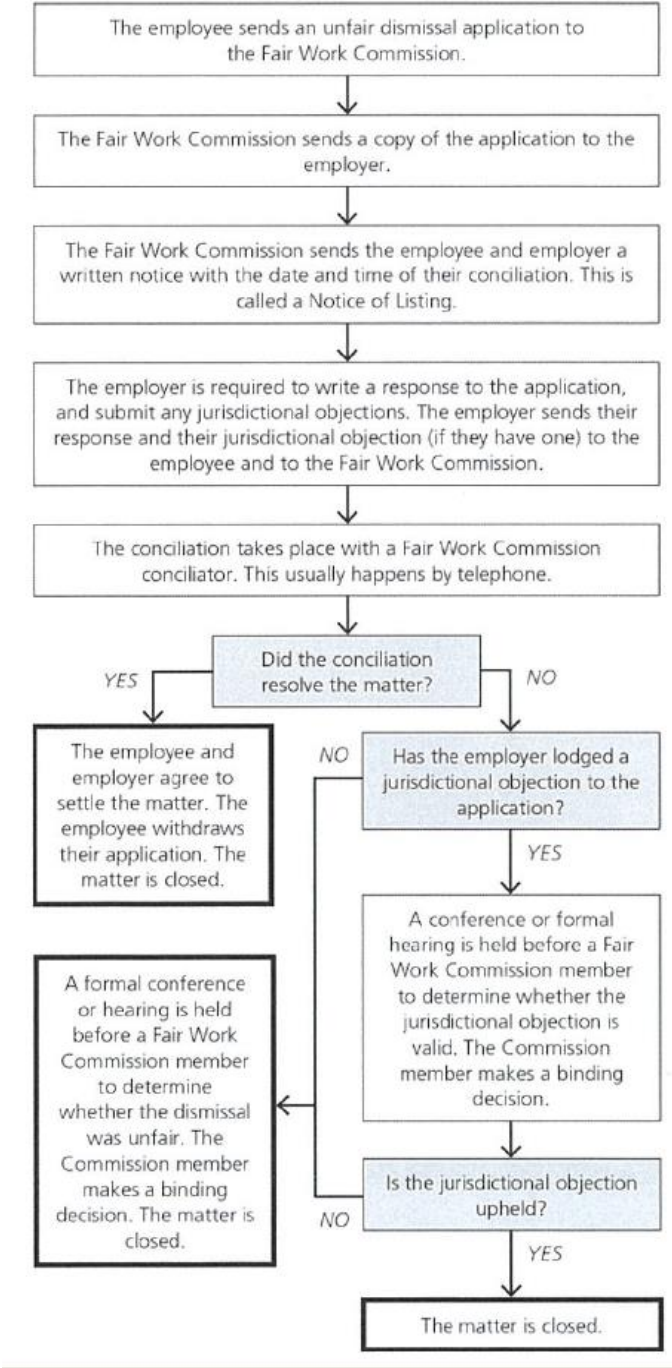
- serving a qualifying period of six months (12 months for small businesses with fewer than 15 employees);
- engaged on a fixed term contract for a specified time, for a specified task or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season;
- who are casuals and not engaged on a regular and systematic basis and do not have a reasonable expectation of continuing employment;
- engaged under a traineeship agreement and the employment was for a specified period of time or limited to the duration of the training arrangement and the employment was terminated at the end of the training arrangement;
- who were demoted in employment but the demotion did not result in a significant reduction in remuneration or duties and the employee remains in employment with the employer that effected the demotion; and



**Even employees excluded from claiming for unfair dismissal at the FWC may still be able to make a claim for general protections, unlawful termination or breach of state and federal anti-discrimination laws in the relevant jurisdiction.**

**How does a claim proceed in the Fair Work Commission?**

Below is a flow chart that shows the process an unfair dismissal claim takes through the Fair Work Commission.



If the dismissal is found to be unfair, the employee can be reinstated to their former position or awarded compensation of up to 6 months wages

## General Protections Claims



The *Fair Work Act (Cth) 2009* contains a general protections provision which is aimed at protecting workplace rights, freedom of association and providing protection from workplace discrimination.

Under these provisions an employer must not take adverse action against an employee because they have a workplace right, they have exercised that right or intend to exercise that right.

'Workplace rights' refers to the entitlements that a person has under an award, agreement or law and is able to initiate a complaint or inquiry in relation to their employment under a workplace law.

'Adverse action' includes dismissing or refusing to employ someone, discriminating against someone or injuring someone in their employment, for example, by demoting them.

Where an employee believes that they have been dismissed in contravention of the general protections provision of the Act they may apply to the Fair Work Commission to deal with the dispute.

These matters are conciliated by the Fair Work Commission, but are currently arbitrated in the Federal Court of Australia. From 1 January 2014, where the parties consent, the Fair work Commission is able to arbitrate general protections dismissal disputes.

The onus of proof rests on the employer, who must demonstrate that the employee was not terminated for a prohibited reason. Therefore, although an employee may not have the protection of unfair dismissal, an employer should ideally have documented evidence of a valid reason for any termination and have evidence of the procedural fairness afforded to the employee to assist in the defence of any unlawful claim.

Further, it is imperative that an employee have a 'right of reply' before being terminated to ensure that the reason for the termination is not due to an unlawful ground. For example, an employee terminated for refusing to work extra shifts, may be able to make a general protections claim if their refusal to work the shifts was reasonable due to family responsibilities. If the employer did not give the employee a 'right of reply' before termination, the employer would not be aware that they were leaving themselves open to a claim under General Protections.

# Discrimination



An employee may also make a discrimination claim related to the termination of their employment.

State and federal legislation prohibits discrimination on a number of grounds, including the following:

- sex or sexual harassment
- religion
- impairment
- family responsibility, family status or marital status
- race, ethnic origin or racial hatred
- pregnancy or potential pregnancy
- political opinion
- social origin
- age
- criminal record or spent convictions
- medical records
- sexual preference
- trade union activity
- gender history



An employee cannot be terminated on any of these grounds, unless the employee is unable to fulfil the inherent requirements of the job.

If a complaint is lodged with the Equal Opportunity Commission, the employer can be ordered by the State Administrative Tribunal to pay up to \$40,000 under state legislation and an unlimited amount under federal legislation.



## Workplace Bullying



Bullying is referred to in the Fair Work Act as occurring when an individual or group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers which the worker is a member of, and that behaviour creates a risk to health and safety.

Importantly, the Act recognises that reasonable management action carried out in a reasonable manner is not considered bullying at work.

If a worker makes a bullying application, the FWC must start to deal with the application within 14 days of receipt. If the FWC finds that the worker has been bullied at work and there is a risk that the worker will continue to be bullied, it may make an order it considers appropriate to stop the worker from being bullied at work. The focus of these orders is on resolving the matter and preventing the worker from being bullied further, and will not take the form of a pecuniary penalty or compensation, or reinstatement.

Orders that the FWC may make include:

- Requiring the individual or group of individuals to stop the specified behaviour;
- Regular monitoring of behaviours by an employer;
- Compliance with an employer's workplace bullying policy; and
- The provision of information and additional support and training to workers

These orders may apply to the employer, but may also apply to other parties such a co-workers and visitors to the workplace.

If an order is made to apply to a person, and that person contravenes the order, there may be a civil remedy, which means the employer or the individual may face fines. The maximum fine for contravening an order is \$10,800 for an individual and \$54,000 for a company.

### **Breach of common law**

An employer may be liable under common law if it breaches its duty of care to provide a safe workplace and negligence is proved.

This could be evident in cases of workplace practical joking. If the risk of harm to the employee is reasonably foreseeable by the employer, and he/she fails to take any preventive action, the employee may bring a successful civil law claim for negligence.

This means employers have a duty of care to prevent their employees from being exposed to injuries in the workplace that the employer should have reasonably foreseen.

### **Breach of anti discrimination legislation**

Anti-discrimination legislation does not outlaw bullying. However, bullying behaviour may be related to an attribute listed in legislation in order to constitute discrimination or sexual harassment within the meaning of that legislation.

### **Breach of occupational safety and health legislation**

Under the Occupational Safety and Health Act employers and employees must meet their legal obligations in relation to safety and health at work.

In Western Australia, the Violence, Aggression and Bullying at Work Code of Practice was released in July 2006. This gives employers guidance as to how to fulfil their requirements under the Occupational Safety and Health Act.

Employers have a general duty to provide safe systems of work, information, instruction, training and supervision to enable employees to perform their work so that employees are not exposed to hazards.

Employees also have a general duty of care to ensure their own safety and health and to avoid adversely affecting the safety and health of others.

## Dealing with Poor Performance



### Best Practice

Given the risks of claims for unlawful termination and discrimination, many employers will choose to follow a fair process when terminating an employee. Aside from a risk management approach, many employers also recognise the importance of building a strong relationship with employees based on mutual trust and respect. Employees will be more likely to work hard and be loyal to an employer if they know they and their co-workers will be treated fairly.

Employers often like to be regarded as 'employers of choice'. By following best practice, these employers will have a strategic advantage and potential employees will view them as favourable employers.

In addition, staff turnover can be costly. It makes financial sense to improve the performance of current employees rather than incur the cost of finding a replacement.

A fair procedure may include:

- letting the employee know specifically what they are doing wrong and where improvement is necessary; and
- giving the employee an opportunity to address these issues.

If their explanation is not acceptable:

- advise the employee of what is expected and the consequences of failure; and
- offer the employee assistance, such as training, counselling, mentoring or coaching.

Follow the discussion with the employee with a letter outlining what was discussed at the meeting. Allow them the time and resources to fix the problem before deciding whether to terminate their employment.

**Many employers will also want to set in place a 'Fair Treatment Process' to ensure that employees have an avenue to follow if they feel they have been treated unfairly.**

## What is underperformance and its causes?

Underperformance or poor performance can be exhibited in the following ways:

- low productivity
- work that fails to meet quality standards
- inability to meet realistic deadlines
- persistent lateness, unexplained absences
- lack of attention to detail, resulting in errors
- excessive personal telephone calls
- personal conflicts in the workplace
- unacceptable attitude – uncooperative, slow to help others, non communicative.

There are a number of factors which impact on how well an individual works. Knowing what these factors are enables an employer to find out what is going on in a particular situation and not just blame an employee's attitude.

The main causes of poor work performance that are identified generally relate to one of the following areas:

- Role clarity gives a clear understanding of what the job involves and what the responsibilities and expectations are.
- Competency is the ability to do the job or work to a stated standard. The necessary ingredients of competency are having the relevant knowledge, skills and ability to perform the required work.
- Environment factors relate to having the work environment that provides employees with the technical and people support needed and the appropriate structures, reporting relationships and systems to enable them to get the job done.
- A person's value system is the deeply held beliefs or convictions they hold about basic rights and wrongs. To be successful at work there should be a reasonable fit between the employee's personal value system and the values recognised, reflected and practised by the organisation.
- Preference fit is about people being in the job they enjoy and having duties that they like doing. If there is a preference mismatch between a person and their job then this is likely to lead to conflict between the two.
- Rewards are one of the most significant factors that motivate an employee's level of work performance. What each person finds rewarding is to a large extent determined by their own personal motivation.

Being aware of these factors and how they may impact adversely on an employee's work performance enables managers/supervisors to address the issues.

## What level of Action is appropriate

An important element in effectively dealing with the performance problems of an employee is choosing the right level of action. Is the behaviour serious enough to warrant a one-on-one counselling session or will a casual comment be sufficient?

There are three levels of action that may be taken:

### **The casual comment**

Sometimes just a casual comment will be sufficient to steer the employee back on track. However, an employer should make sure that it is a casual comment and not a put down or a threat in disguise.

### **Performance counselling**

This is a collaborative one-on-one process whereby the manager and employee try to solve the problem together. It involves communication, exploration, understanding and trust rather than just a transfer of information or skills.

### **Discipline**

Discipline comes into play when the casual comment and performance counselling fails to solve the problem, or when the incident is serious enough as to warrant a warning. Unless it is a more serious matter complete the first two levels, before moving to the discipline phase.

## **Casual comment**

The casual comment is a method you may adopt when addressing a minor issue or a matter that has arisen for the first time. Sometimes just a casual comment will be sufficient to steer the employee back on track. However, make sure that it is a casual comment and not a put down or a threat in disguise.

An example of a casual comment when an employee is late for work could be looking at your watch and saying “you’re 5 minutes late today, is everything ok?”

This allows you to get a message to the employee in a timely fashion that you are concerned about the situation without it becoming a major issue.

You may want to keep a note in your diary on each occasion that you pass a casual comment about work performance to an employee. This can be useful in case you need to refer back to it in the future and to assist in decision making if the employee’s performance does not improve.

If a casual comment doesn’t improve performance or result in an employee modifying the unacceptable behaviour you can move on to the performance counselling stage.

## Performance Counselling

Performance counselling is a collaborative one-on-one process where the manager and employee try to solve the problem together. It involves communication, exploration, understanding and trust rather than just a transfer of information or skills.

There are many approaches to performance counselling. This section looks at the three step approach developed by Peter Quarry:

There are three steps suggested in this approach to carry out an effective performance counselling session:

- reaching agreement with the employee that specific poor performance exists and needs to be resolved;
- exploring and determining what may be causing the poor performance; and
- developing an action plan to assist the employee to improve their performance in the future.

These three stages will be dealt with in more detail in the following pages.

# 1

## Counselling Step 1

### **Reach agreement with the employee that poor performance exists and needs to be resolved**

The first step in solving any work problem is to be clear about just what the problem is. This may sound obvious but often organisations will deal with what they think is the problem but is only a symptom or a side issue to the main problem.

To know what the problem is managers must be clear about the standards required and the employee's actual level of performance. Once the problem has been clearly identified then it is a matter of communicating this to the employee.

The key to reaching a common ground on poor performance is to adopt a collaborative approach by allowing the employee to have input and contribute their ideas and suggestions.

It is very important not to blame an employee for a problem with their performance – it may or may not be their fault. Blaming makes people defensive which makes it very difficult to have a constructive conversation.

Make sure that you are specific when outlining the issue you have with their performance or behaviour. The feedback should be specific and relate to a person's work performance and behaviour. Vague or unclear feedback will only lead to ambiguity and misunderstanding.

Show the employee any evidence or examples you have about their performance. Being able to back up feedback with concrete examples will help to counter any areas of dispute between the manager and the employee.

Only once there is agreement that a performance problem exists should the manager and employee move on to step 2.

## Counselling Step 2

# 2

### Exploring and determining what may be causing the poor performance

When determining the cause of the problem it is vital to keep an open mind to ensure that misdiagnosis does not occur. Poor performance can be caused by all sorts of factors and it is necessary to accurately determine the cause if an appropriate and effective solution is to be found.

Try to avoid jumping to conclusions and instead explore all possible causes of poor performance with significant input from the employee.

Some possible causes of poor performance include:

- inappropriate or unclear individual performance plan – job description lacks clarity, objectives have been set too high/are irrelevant or there is confusion about priorities;
- lack of knowledge or capability – the person does not have the competence to do the job;
- inappropriate tools, equipment, work groups, leadership, or other constraints – it is clearly difficult to do a particular task if the equipment needed is not available, the work group is not functioning properly, or systems or procedures are inappropriate;
- personal values are in conflict with organisation values – value conflicts do occur at work and people do withdraw their efforts, totally or partially, based on their individual concepts of 'what's right';
- the job includes tasks which the individual does not like – preferences do affect application, effort and performance;
- insufficient or inappropriate feedback – the result is that the person does not know that more effort or different contributions are expected or that a shortfall exists.

Once all possible causes of poor performance have been explored the manager and employee should agree on which cause(s) they will work on. This ensures that you are both moving in the same direction to solve the problem.

### Counselling Step 3

# 3

#### **Developing an action plan to assist the employee in improving their performance in the future**

To solve the problem you should consider what can be done to close the gap between the existing level of performance and the desired level.

A good place to start is to generate as many possible solutions for a problem, before choosing the best one. Don't make the mistake of assuming that the first idea will be the only option.

It is important that the employee is involved in generating ideas. If the manager alone generates ideas then there is less ownership of the solution by the employee and a greater tendency to avoid taking responsibility. If the employee resists attempts to resolve the issue, it may be that step 1 and 2 need to be revisited. Alternatively, the next page looks at ways to overcome resistance.

Once a solution has been agreed, an action plan should be developed. An action plan is a document detailing the things that are to be done by who and when. The plan allows both the manager and employee to have a clear understanding of what follow up action will take place.

It is good organisation practice to keep a record of any performance counselling discussions you have with an employee. You may need these in the future if the agreed actions do not result in improved work performance and you decide to move to the disciplinary stage or to terminate the employment of a poor performer.

As well as an action plan, a review date should always be set. This is a specified time at some stage in the future when the manager and the employee can together see if the performance problem has been solved.

If the problem has been solved this is a good opportunity for the manager to give the employee some positive feedback and reinforce the improved performance.

If the problem has not been solved, the manager and employee need to review their problem solving efforts and take any further action necessary. This may require you to move to the discipline or termination stage. Further information follows with respect to discipline and termination.



## **Suggestions for Running an Effective Counselling Meeting**

### **Before the meeting:**

- Define the purpose of the meeting.
- Where appropriate, ensure that the employee is aware of the purpose so that they can prepare for the meeting.
- Create an agenda - make sure it tailors to the employee's individual needs.
- Choose an appropriate meeting time.
- Choose a quiet, private location – one that limits interruptions.
- Set a time limit.
- If more than one person is attending, arrange the room so that people will be facing one another, i.e. in a circle or a semi-circle.

### **During the meeting:**

- Keep on time – try and stick to your time limit.
- Adopt open body language and a calm, positive tone of voice.
- Monitor the employee's body language – pay attention to their posture, tone of voice, eye contact (or lack thereof), gestures, and facial expressions.
- Keep on topic - if the meeting starts to drift off topic say something like “it looks like we've drifted a bit, can we come back and focus on (purpose of the meeting)”.
- Stay in control of the conversation - while you should welcome feedback from the employee, you do not want to turn the meeting into a complaint session. If the employee goes off on a tangent, bring the conversation back to the issue at hand (see above).
- Use specific examples to help the employee understand what you are saying.
- Focus on behaviours, actions, and results.
- Avoid comparing the employee with other employees.
- Give the employee an opportunity to ask questions or make suggestions.
- Carefully listen to the employee – take notes where appropriate.
- Ask questions and paraphrase - this demonstrates interest and also helps you understand what the employee is saying.
- Use open-ended questions.
- Do not interrupt the employee - respect them by letting them finish what they are saying.
- If a disagreement occurs, ask questions to uncover the underlying reasons for this difference of opinion.

- Set goals and expectations – make sure that they are mutually agreed upon to increase employee buy-in.
- At the end of the meeting validate your understanding and summarise the agreements reached.
- Set a date and time for the next meeting (if required)
- Close on a friendly note ensuring that anything raised in the meeting will be kept confidential.
- Encourage the employee to keep open lines of communication for future discussion.

**After the meeting:**

- Document your discussion with the employee.
- Give the employee a summary agreed action points
- Always complete promised actions.
- Notice when the employee improves

## **Skills Required for Performance Counselling**

There are four key communication skills required for effective performance counselling:

### **Joint Problem Solving**

This skill is where the manager gets the employee “on side” to work with them to solve the problem. Simply telling the employee is not enough, in fact, it will probably be ineffective or at worst destructive; the employee must be a partner in the process.

For the manager, developing this skill means being open to the employee’s comments and feedback about themselves so that it is very much a two way process.

### **Active Listening**

In exercising this skill the manager hears what the employee is saying and tells them so by summarising or paraphrasing their words back at them. This allows the manager to check that they have understood what the employee is saying and shows the employee that the manager is listening.

Active listening also involves listening for the “hidden messages” – what the employee is really saying. Some hints on Active Listening are contained on the following page.

### **Maintaining Control**

In any discussion about performance the manager must exclude emotions such as anger and loss of temper. The manager’s job is to keep the discussion on track and not lose sight of the objective – regardless of the behaviour of the employee.

A useful tactic for regaining control is to ask a question and continue to ask questions until the discussion is again going in the direction the manager wants.

### **Agreement Building**

Throughout any discussion of performance the skill of gaining the agreement of the employee at various stages is critical to achieving an effective outcome.

As with maintaining control, a useful tactic to elicit agreement from the employee is to ask questions. Some example questions that are useful for overcoming resistance are contained in the following pages.

## Active Listening – Some Helpful Hints

Things to Try	Things to Avoid
✓ Put the focus of attention totally on the speaker.	✗ Avoid talking about yourself.
✓ Repeat conversationally and tentatively, in your words, your understanding of the speaker's meaning.	✗ Reject introducing your own reactions or well intentioned comments.
✓ Feed back feelings, as well as content (probe, if appropriate, eg. "How do you feel about that?" or "How did that affect you?").	✗ Try not to ignore feelings in the situation.
✓ Reflect back not only to show you understand, but also so the speaker can hear and understand his or her own meaning.	✗ Avoid advising, diagnosing, baiting, reassuring, encouraging or criticising.
✓ Try again if your active listening statement is not well received.	✗ Dispense with thinking about what you will say next.
✓ Be as accurate in the summary of the meaning as you can.	✗ Avoid parroting the speaker's words or only saying "mm", or "ah, hah".
✓ Challenge powerlessness and hopelessness subtly	✗ Don't pretend that you have understood if you haven't.
✓ Allow silences in the conversation.	✗ Resist filling in every space with your talk.
✓ Notice body shifts and respond to them by waiting. Then, e.g. "How does it all seem to you now?"	✗ Don't neglect the non-verbal content of the conversation.
	✗ Don't change topics.
	✗ Avoid letting the speaker drift to less significant topics because you haven't shown you've understood.
	✗ Avoid fixing, changing, or improving what the speaker has said.

## Responding to Resistance

Some employees will resist when attempts are made to change their behaviour. When faced with a statement that has potential to create conflict, ask open questions to reframe resistance. Explore the difficulties and then re-direct discussion to focus on possibilities:

<b>EXPLORE – clarify details</b>		
Its too expensive	⇒	Compared to what?
Too many/ much / little / few	⇒	Compared to what?
I want the best	⇒	What would be best for you?
<b>EXPLORE - find options</b>		
You can't do that around here	⇒	What would happen if we did?
He (she) would never....	⇒	How can we find ways for it to happen?
They always....	⇒	Are there times when they don't?
We've tried that already.	⇒	What was the outcome?
This is the only way to do it.	⇒	Yes, that's an option. What else could we consider?
<b>REDIRECT – move to the positive</b>		
It will never work	⇒	What would it take to make it work?
I won't....	⇒	What would make you willing?
It's a failure	⇒	How could it work?
It's a disaster	⇒	What would make it better?
He's (she's) useless	⇒	What is he (she) doing that <i>is</i> acceptable?
It's impossible	⇒	What would it take to make it possible?
I can't	⇒	You can't see a way to do it at the moment?
I don't want to	⇒	What would you like?
<b>REDIRECT - go back to legitimate needs &amp; concerns</b>		
He's (she's) a hopeless case!	⇒	It's hard to see how to work with him (her)?
You fool (and other insults)!	⇒	What do we need to do to sort this out?
How dare you do such a thing!	⇒	What do you dislike about it?
It should be done my way!	⇒	What makes that seem the best option?
His / her place is in a pig sty!	⇒	He / she put a different emphasis on tidiness to you?
He / she doesn't do his / her fair share!	⇒	Where do you think his / her priorities lie?

## How do I develop a performance standard or KPI?

Another skill required for effective performance management is the setting of good performance standards. Performance standards or KPIs are 'result statements' – the condition which exists when the job result is accomplished. Before you start drafting you need to think about the main responsibilities of each job and how they can be transformed into meaningful performance standards or KPIs that assist you to meet your organisation goals and objectives.

Establishing a link between your organisations plans and employee performance is essential. Sometimes organisations set performance standards or KPIs without considering their organisation plans and this can be detrimental to the organisation.

Performance standards or KPIs typically have the following characteristics:

- performs what action? (they start with a verb);
- by what method or how? (e.g. what process, tools);
- to whom or what? (e.g. object or verb);
- to produce what? (e.g. expected output);
- when? (e.g. a time-frame).

## Effective performance standards or KPIs are S.M.A.R.T.

The key elements of effective performance standards or KPIs are:

**Specific:** Should set out exactly what is required to be achieved in detail so it is clear to the employee what is required.

**Measurable:** Outcomes must be capable of being either measured or observed in order to avoid a subjective assessment.

**Agreed:** Generally, employees are more committed to achieving goals and objectives that they have set jointly with their employer.

**Realistic:** Must be achievable and realistic given the resources and working conditions or they can de-motivate an employee.

**Time-framed:** Include clear timeframes so that employees understand when particular achievements or milestones are required.

Here are some examples:

- deliver at least three volunteer information seminars each month to potential volunteers located in the Perth Southern Area to increase understanding of the positions available;
- assist in promoting the volunteer information seminars by developing a range of relevant promotional materials and ensure distribution via appropriate media in sufficient time to maximise attendance rates;
- make at least 10 unsolicited cold contacts with potential new volunteers in the Perth Southern Area each week, achieving a successful conversion rate of at least 1:10 on an annual basis.

### **Tips for setting challenging but realistic targets**

- Try to be consistent with the expectations of employees.
- Avoid completely focusing on the employee who is currently doing the job but also on the job itself and the desired results.
- Assign measures to each objective which are clear and understandable. Measures should be something 'concrete' that both the employee and manager can assess their progress against.
- Targets should be simple but specific.
- Time frames for performance should be reasonable having regard for what the target is.
- Be realistic – targets should not be so challenging that the employee is unlikely to be successful in the time frame allowed.

# Discipline



## What is the difference between performance counselling and discipline?

When an employer is dealing with an employee's poor work performance it is best to start out with a performance counselling process. When performance counselling is not successful after the employee has been given a reasonable opportunity to improve it is appropriate to progress to a disciplinary procedure.

In some situations it may be appropriate to discipline and/or terminate an employee without adopting a performance counselling process first. Some circumstances where this may be appropriate are:

- performance problems are more serious, some examples include:
  - there is a serious breach of safety rules;
  - an employee disregards a policy or procedure and there is a significant adverse impact on the organisation.
- employee's conduct is totally unacceptable, some examples include:
  - an unprovoked assault on someone in the workplace;
  - attending work after consuming an excessive quantity of drugs or alcohol.

## How do I conduct a disciplinary session with my employee?

There are three essential steps in any disciplinary meeting:

- preparation and planning;
- conducting the interview;
- recording and implementing the outcomes.



## Step 1

### Preparation and planning

The objective of the preparation and planning stage is to gather enough information to allow you to conduct a meaningful discussion with an employee about their performance or conduct. Prior to any disciplinary interview employers should conduct a thorough investigation. This involves:

- investigating and accumulating all of the facts relevant to the situation you wish to discuss with the employee;
- collecting any factual evidence that is relevant to the situation, this may include documents, work samples, reports etc;
- interviewing other employees if it is appropriate to do so in the circumstances;
- reviewing policies, performance standards, KPIs or rules that may be relevant to the situation. You should also consider whether or not the employee is aware of them before taking any action;
- determining whether this is an isolated incident or if similar incidents have occurred and how they were resolved (for consistency purposes);
- considering the possible causes of poor performance;
- reviewing the personnel file for previous performance reviews and/or counselling/disciplinary proceedings (i.e. work history);
- arranging a suitable time for the review with the employee in advance (eg. time, location, purpose, duration, etc ;)
- informing the employee that they may bring a support person to the interview if they wish to;
- arranging a neutral witness to observe and verify what is said and agreed to at the interview;
- ensuring you allow adequate time for the interview – this will depend on the nature of issues to be discussed;
- ensuring the meeting is conducted in a distraction free environment;
- critically reviewing all of the information gathered, summarising the issues and preparing a plan for the interview.

Where appropriate, you may need to provide an interpreter to ensure the employee fully understands the discussion.

When planning for the interview, you should make sure that you have a clear understanding of all performance issues you are dissatisfied with and be prepared with specific examples. Broad or ambiguous statements like, “You just don’t fit in” or “You’ve got a bad attitude” are not appropriate.

## Step 2

### Conducting the interview

How you open the interview will set the scene for the interview so it is important to make sure that you start out appropriately. Remember that during the interview you should be encouraging the employee to provide you with additional information that enables you to make a decision as to whether disciplinary action or termination is appropriate or not. This is important to ensure that you give an employee a “fair go”.

There are a number of things you need to do in a disciplinary interview, including:

- meeting at the pre-set time and location;
- setting the climate, explaining what is going to happen and making the interview purpose clear;
- informing the employee that you will be making a written record of the interview and a copy will be provided to them;
- referring to any previous meetings if appropriate;
- coming to the point quickly and outlining the allegations succinctly and clearly;
- providing specific examples and evidence of poor performance or inappropriate conduct/behaviour;
- allowing the employee adequate opportunity to respond and exploring their perspective;
- explaining the consequences of the employee not responding, if necessary;
- encouraging two way communication and open discussion;
- listening carefully to what the employee has to say - show interest, don't get distracted and ask further questions if you need to;
- keeping an open mind - consider any additional issues that the employee raises and avoid making final assessments until the interview is over;
- keeping the discussion on track – this is easier to do if you have developed a checklist of issues as part of your planning process;
- if the employee provides a satisfactory response, ending the interview and disciplinary process;

But if the response is not satisfactory consider:

- conducting a further investigation if necessary,
- obtaining expert advice and guidance on how to deal with the situation,
- issuing a verbal or written warning advising the employee of the consequences of not improving, including termination of employment,
- advising the employee that you are considering terminating their employment and seek their response,
- developing a plan for improving performance and reviewing progress,
- clarifying the performance standards or KPIs required;
- ensuring you and the employee have a common understanding/agreement on all issues and outcomes at the end of the disciplinary process;
- making closing comments - summarising points made, areas of agreement/disagreement, goals agreed and consequences;
- setting up a follow-up date for further review or discussions.

### **Step 3**

#### **Recording and implementing the outcome**

After the interview there are a number of actions that are necessary. Firstly, you need to consider all of the information you have and decide what action is appropriate given the circumstances. This may involve:

- no action at all;
- developing an action plan to assist the employee to improve their performance;
- issuing a formal warning; or
- terminating the employee's employment.

In any disciplinary process it is important to make a record of the interview and have the employee sign the record to confirm that it accurately reflects what was discussed.

In deciding whether to terminate employment an employer should consider all of the facts and circumstances and determine if it is appropriate to do so given the specific situation. Some of the factors to consider are:

- whether or not you have given the employee enough time to improve their performance;
- if their conduct is sufficiently serious to warrant termination;
- if there were any mitigating factors that may explain poor performance or inappropriate conduct/behaviour;
- if there are any other suitable alternatives to termination, such as a transfer to a different role or location and/or demotion;
- the employee's length of service and past record;

- whether previous warnings have been given to the employee and the length of time since they were given.
- If termination is not an option it is important to:
- complete any other documentation necessary, such as a written warning;
- produce an action plan with the employee, if appropriate;
- ensure any agreed actions are followed through and implemented;
- meet again if necessary or for interim review.

### What should I include in a written warning?



Written warnings should only be prepared after the interview and a thorough review of the information received during the investigation. Once you have determined that a written warning is the most appropriate course of action you can commence preparation of the letter.

Generally a letter of warning should include:

- a summary of the poor performance issues or unacceptable conduct;
- a clear outline of the performance standards or behaviour that is expected in the future;
- any timeframe for improvement if it is appropriate in the circumstances. In some situations it would not be necessary. For example unacceptable conduct that must not be repeated;
- the consequences if improvement is not forthcoming, including termination of employment if it is appropriate in those circumstances;
- a summary of the assistance that will be provided to the employee, including:
  - coaching and mentoring you have agreed to offer to the employee,
  - training and development that is appropriate to assist the employee to improve their performance,
  - personal counselling the employee has agreed to attend under your employee assistance scheme should you have one.

Generally it is good practice to make sure that the employee signs a copy of any letter of warning issued to them and employers should always retain a copy on the employee's file. This may be required at a later date in the event of the employee lodging an unfair dismissal claim. If an employee refuses to sign a letter of warning a copy should still be retained for future reference with a note from the person who issued the warning confirming that it was given to the employee.

## Draft letter of warning

*(Insert date)*  
*(Insert name)*  
*(Insert address)*

Dear *(insert name)*

Written warning of *(insert unsatisfactory performance/misconduct)*

I refer to your meeting with *(insert name of interviewer/s)* on *(insert date)* in the presence of *(name)*.

I confirm that at the meeting the following matters were put to you concerning your employment.

- *(insert matters discussed at meeting)*
- *(insert particulars of alleged unsatisfactory performance/misconduct)*
- *(refer to any previous written/verbal warnings concerning similar matters, including dates when such warnings were given, who issued the warnings, etc)*

I further confirm that you were given an opportunity at the meeting to respond to these matters. *(Insert Company name)* has fully investigated the facts surrounding these matters. After carefully considering your response, I do not consider it to be acceptable.

The following aspects of your employment require immediate attention and satisfactory improvement:

- *(insert aspects of work requiring improvement or misconduct to be avoided in future)*

*(Insert Company name)* will endeavour to assist you achieve these goals. If you require any assistance, please contact *(insert Company representative)*. We also have a counselling service available to employees. Further information concerning this service can be obtained from me.

I will review your employment in *(insert number of days/weeks)* or earlier if any repetition occurs before that date. At this time, a further meeting will be held and an assessment made of your suitability for continued employment with *(insert Company name)*.

*(Insert Company name)* considers the matters discussed in this letter to be serious. Failure to satisfactorily address these matters may result in the termination of your employment.

Should you have any queries, please contact me on *(insert contact number)*.

Yours faithfully

*(Insert name)*  
*(Insert position)*

## Termination



If a decision is made to terminate, a letter of termination should be prepared setting out the reasons for the decision and specifying the date termination is effective.

An employer must give the employee at least the following notice (or payment in lieu):

**Employee's period of continuous service**

**\*Notice period in weeks**

Not more than 1 year .....	1
More than 1 year but less than 3 .....	2
More than 3 years but less than 5 .....	3
More than 5 years .....	4

\*Increase the notice period by one week if the employee is more than 45 years old and has completed at least two years of continuous service.



Please note that an organisation needs to apply the notice periods in the employee's contracts awards/agreements if these notice provisions are more generous than those listed in the table above

Certain employees are excluded from these notice periods:


- an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
- an employee whose employment is terminated because of serious misconduct;
- a casual employee;
- an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;

## Serious Misconduct



Only extremely serious incidents constitute gross misconduct. Each case is judged on all surrounding circumstances. Gross misconduct *may* include:

- a. theft, fraud or assault in the course of employment;
- b. willful damage of employer's goods or property;
- c. breach of confidence, e.g. disclosure of company secrets or working for a competitor; and
- d. refusal of a reasonable and lawful instruction when warned such action may be regarded as serious misconduct and result in termination without notice.
- e. conduct that causes serious and imminent risk to the health or safety of a person
- f. the employee being intoxicated at work



**Be aware**

Industrial Tribunals only view extremely serious incidents as gross misconduct and insist that the employer's investigations are immediate, thorough, meticulously fair and unbiased.

It is recommended that when responding to alleged serious misconduct organisations seek advice from an employee relations adviser before taking action.

Employers should:

- have a policy defining what constitutes gross misconduct;
- educate employees on the meaning of the policy;
- provide regular policy refreshers; and
- apply the policy consistently on all occasions.

The employer should investigate any alleged incidents of gross misconduct immediately.

- Ask all witnesses to give written and signed statements.
- Keep all investigation details in writing.
- Clearly explain specific details of the alleged misconduct to the employee.
- Ask the employee to respond on the evidence and allegations against them.
- Give the employee's response proper consideration.

An employer must have reasonable grounds for genuinely believing the employee is guilty of the alleged misconduct; mere suspicion is not sufficient.

When deciding whether to terminate, consider the employee's comments and the following issues:

- any mitigating circumstances associated with the employee's misconduct or work record; and
- alternatives to dismissal, eg final warning or demotion by agreement.

If dismissal is appropriate, the employee must be informed of the decision and provided with a letter of termination outlining the reason for the decision and the termination date.



## Termination due to Abandonment

Abandonment refers to the situation where an employee leaves their employment - without notice - with no intention of returning. Where a genuine abandonment has occurred, an employer is entitled to treat the contract as at an end and does not need to give notice.

The difficulty in establishing abandonment is proving that an employee has no intention of returning to their employment. Employers, who terminate contracts without establishing there is no intention to return to work, or where an explanation period for the employee to explain their absence is not reasonable, expose themselves to a claim from the employee that the employer has terminated their employment unfairly.

An employer cannot assume that an employee absent from work without explanation has abandoned their employment.

Where an employer believes an employee has abandoned their employment, they must establish the employee no longer intends being bound by their employment contract.

An employer should:

### **Step 1:**

Establish that the employee's absence has not been authorised by any manager or other authorised person.

### **Step 2:**

Contact the employee as soon as possible to determine the reason for the absence and whether the employee plans to return to work.

Unsuccessful attempts to contact the employee personally or by telephone should be documented, including the date and times the attempts were made. Failing contact with the employee, attempts to contact the employee's next of kin should be made and also documented. Where contact can not be made, a written enquiry by registered mail to the employee's last known address should then be issued.

This letter should include:

- the facts which suggest an abandonment and the last date on which the employee attended work;
- a requirement to immediately notify the reason for the absence and intentions about returning to work, and;
- advice that if such notification is not received within a reasonable period, say no less than one week, or if such reasons are unacceptable, it will be assumed that employment has been abandoned and the contract treated as at an end.

### **Step 3:**

If no reply is forthcoming within the nominated period, the employer should confirm the contract is ended through abandonment. Without that, the contract remains “alive” with certain benefits and entitlements continuing to accrue.

Written advice of termination should outline:

- the circumstances constituting the apparent abandonment;
- the decision to terminate employment for failure to attend work or notify the employer of satisfactory reasons;
- the date of termination (the date of the written enquiry by registered mail), and;
- the details of any termination payments and how these might be collected by the employee.

The termination of any employment contract must comply with any relevant award or agreement, any statutory requirements (e.g. unfair dismissal laws) as well as the terms of the contract itself. The way in which an employer ends an employment contract has important implications for payments owing to employees, as well as the options open to employees to challenge the decision.

### **How long does an employee need to be away from the workplace before it is considered abandonment of employment?**

It is hard to know at what stage it can be determined that an employee has abandoned their employment. Abandonment of employment is when an employee leaves their employment, with no intention of returning. In most cases of genuine abandonment, the employee will not return to work and there will be no explanation to follow.

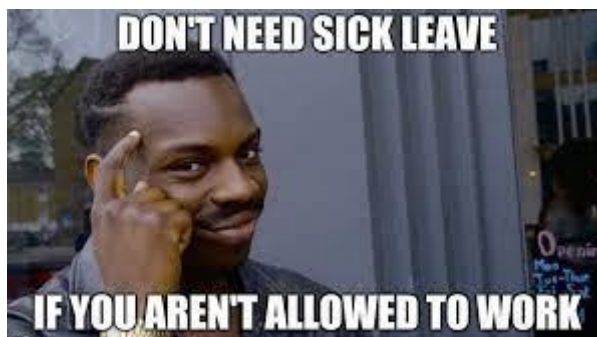
Abandonment is an indication that either by the employee’s words or actions, they have indicated that they no longer wish to be bound by their contract of employment. The law regards this as a repudiating the contract of employment. It is important to note, that if at any stage during the abandonment process we are able to establish contact with the employee, then the abandonment process will no longer be tenable.

Employers need to be aware, that two days off with no contact may not necessarily be considered abandonment of employment. In the case of *Moore v Levelan Pty Ltd*, the employer argued that the employee had abandoned his work on the basis that he had left the office for the day with no reasonable explanation as to where he was going. The employer deemed this to be abandonment of employment. However, as soon as the employee received the letter confirming he had abandoned his employment, he contacted the office. It was also relevant to note that in this case was attention drawn to the employee’s intention and whether or not the intention was to permanently leave the workplace.

### **Does notice need to be paid out?**

In the case of abandonment, it is not a termination at the employer’s initiative. As a result, it is not required that the employer pay the employee out a notice period. The final payments that should be made should include any accrued annual leave or long service leave.

## Excessive sick leave absences



Employees who have taken excessive unpaid sick leave can be dismissed in certain circumstances. The *Fair Work Act 2009* (“the Act”) provides guidance on what constitutes “excessive” sick leave.

The Act prohibits the dismissal of any employee for an absence due to illness or injury which lasts **three months or less**. Employers must take care as this provision does not sanction dismissal at or after three months, it merely prohibits dismissal prior to that time.

If an employee has been absent for more than 3 months (or for a series of absences which total more than 3 months in a 12 month period) and has exhausted their paid sick leave, an employer can then give consideration to whether it would be appropriate to dismiss the employee.

The employer must have:

- a valid reason (being sick or injured is *not* a valid reason); and
- dealt with the termination in a procedurally fair manner.

## Valid reason

An employer should only consider terminating if it is clear the employee is unlikely to be able to return to his employment in the medium to long term. The employer’s decision must be rational and informed, based on medical evidence.

A valid reason can only be established if the employer has answers to the following:

- Is the employee currently physically or mentally incapacitated for his position?
- If the employee is presently incapacitated, what is the prognosis for the future?
- Are there any other roles in the employer’s organisation which would suit the employee’s level of capacity?
- How long has the employee been incapacitated for work; and
- What is the employee’s length of service?

The first two issues must be considered in light of professional medical opinion. The employer is required to obtain medical reports on these issues itself.

If the employee is incapacitated but likely to improve in the short term, an employer should wait until the employee is fit to return to work. The employer should not consider dismissal. If the employee is unlikely to improve, procedural fairness requires the employer to consider offering the employee any other available and suitable positions. If no such positions exist, there is *no* obligation on the employer to create a suitable position.

Overall, a valid reason will only be demonstrated if termination is a reasonable response in all of the circumstances, based on the known facts.

## **Procedural fairness**

Procedural fairness requires that the employee is kept informed of, and permitted input into, decisions about their continuing employment.

Once medical opinion is received, the employee and their support person/representative should be invited to meet with the employer and discuss employment options. A similar discussion process to that outlined in earlier for dealing with poor performance can be followed, although in this case the work performance problem is the employee's absence from work and the difficulties the absence causes.

In particular the employee must be advised when and why the employer is considering termination and invited to provide reasons against this.

## **Discrimination Issues**

The *Fair Work Act 2009* prescribes a list of unlawful reasons for termination, one of which is physical or mental disability. However, the Act states that this does not prevent termination where the reason is based on the inherent requirements of the job.

Employers still need to consider federal and state equal opportunity legislation. Legislation prohibits discrimination on certain grounds, including physical or mental disability or impairment. However, in some situations it is lawful to discriminate in employment.

## When is it lawful to discriminate?

- Cannot perform inherent requirements

It is lawful to discriminate against an applicant if they cannot perform the job's inherent requirements. A job's inherent requirements include some of the terms of the employment contract, as well as the functions the employee is required to perform.

- Unjustifiable hardship is caused

It is lawful to discriminate against an employee with a disability if special services and/or facilities are required to accommodate the applicant's disability which will result in an 'unjustifiable hardship' to the employer.

In determining whether an adjustment would be an unjustifiable hardship, all relevant costs and benefits need to be considered. These would include financial costs, the ability of the employer to meet the costs and the benefits and detriments for other employees, potential employees and customers.

## Special Considerations When Terminating Employees on Workers Compensation

Employers are not prevented from terminating the employment of an employee who is receiving workers' compensation payments or who is undergoing an injury management program however, any termination of employment must be in accordance with the *Workers' Compensation and Injury Management Act 1981*, equal employment opportunity legislation and workplace legislation.

Section 84AA of the *Workers' Compensation and Injury Management Act 1981* specifically obliges an employer to preserve an injured worker's job for a 12-month period of incapacity. Failure to provide the same or an equivalent position may result in a penalty of \$5,000 being imposed on the employer. A termination within that 12 month period may attract penalties under workers' compensation legislation even if it is permitted under equal employment opportunity and workplace legislation.

Section 84AB obliges employers to notify the injured worker and WorkCover of any intended termination within the 12 month period at least 28 days before the termination is to take effect. Failure to provide the notice in the prescribed form and manner may result in a \$2,000 penalty being imposed upon the employer. Notification must be in accordance with Form 15G of the *Workers' Compensation and Injury Management Regulations*.