

DISCIPLINARY AND WARNING PROCEDURES

If an employee's performance/conduct is not at the level required, the employee should be advised their performance/conduct is not acceptable. The employer should determine how serious the problem is and how they are going to deal with it.

If required, the employee should be provided with appropriate training and/or guidance to assist them to reach an acceptable level within a reasonable timeframe (e.g. mentoring or coaching). The employee should be made aware of the consequences if they fail to improve to an acceptable standard. If the performance is not improved, the consequence will be disciplinary procedures up to and including termination of their employment.

Employers should be aware of qualifying periods ("probation") and apply them properly. The qualifying period represents the period of time in which an employee would be unsuccessful in pursuing an unfair dismissal claim and is an opportunity to assess an employee's competency in their role. Due to other claims that can arise (e.g. discrimination or general protections) it is important to maintain a clear and transparent process so the employer can, if required, demonstrate reasons for a termination that are clearly related to performance or conduct.

If the employer can display that they have given the employee every reasonable opportunity to improve their performance/conduct, they will be in the best position to defend any claims in relation to the employment relationship if employment is terminated.

Staff not fulfilling the requirements of their role generally fall into one of the following categories:

- > **Underperformance:** This occurs when someone is falling below the standard required. It is not a conduct issue as much as a shortfall in performance. It often relates to matters of quality or quantity of outputs, meeting targets or deadlines.
- > **Misconduct:** This occurs when a behavioural issue results in expectations not being met. It concerns the poor conduct of the individual, rather than any skill or knowledge deficit as with performance issues. It often relates to attitude issues, disregard for rules or failure to obey or adhere to set standards, for example attending work on time.
- > **Serious misconduct:** Is contained in the Fair Work Regulations and is considered to be matters of such seriousness that the employment relationship is unable to continue.

A warning process can include informal and formal procedures aimed at resolving a problem by one of two ways:

- > ideally, the employee improving their performance/conduct, or
- > if failing to get an improvement in response to warning/s and support, termination of employment.

Processes should be fair and transparent to both the employees and the employer in a delicate situation where both procedural and actual fairness is vital to uphold.

In general:

- > Matters relating to underperformance should be supported by clarification of expectations, training and support prior to using formal warnings or disciplinary action.
- > Misconduct can also be supported by clarification of expectations, training and support but may also attract disciplinary sanctions if evidence supports that the person did, or should have reasonably known, what was required and has breached a requirement.

- > Serious misconduct generally results in serious outcomes such as final warnings or termination of the employment relationship.

Informal Process

An informal process is appropriate for minor performance/conduct improvement where matters may not have been brought to the employee's attention, or expectations may not be clearly communicated or understood. For example, poor performance/conduct may be caused by different factors such as lack of skills, training and/or guidance.

Informal Discussion

This may include on the spot feedback or comments relating to a specific aspect of performance and may be enough to guide the employee in the right direction.

Informal Coaching / Counselling

Discuss performance/conduct with the employee giving examples where possible and detailing the employer's requirements and expectations:

- > Give the employee an opportunity to respond.
- > Detail any action required to rectify the issue. This may include counselling, training, workload adjustments or improved performance (give specific examples of where the improvement is required).
- > Document the discussion. The employee should sign the documentation to confirm the discussion in the counselling session. Keep a copy on the employee's file and provide the employee with a copy.
- > Include a review timeframe if appropriate/required.

The employee's performance should be monitored and if the informal process does not resolve the performance/conduct issues you may need to proceed to a formal warning process.

Formal Process

Before making any decisions on disciplinary matters, ensure the person has the opportunity to consider the claims against them and respond accordingly.

The following standards are often used when determining whether allegations of misconduct are substantiated:

1. the balance of probabilities, i.e. whether there is sufficient evidence to substantiate allegations; and
2. the *Briginshaw Standard*, which relates to the standard of evidence required if allegations involve a crime, fraud or other type of moral wrong doing, which if proven, would have serious consequences for the alleged wrong doer.

The *Briginshaw standard* outlines that the more serious the allegation against an individual is, the higher the standard of proof should be. Whilst this standard is not a requirement in workplace matters, it is a good test as to whether the matters and decisions would be defensible in a court.

The standard of proof differs between civil and criminal matters. In civil matters, the established standard is the 'balance of probabilities'. This is a lesser standard than the proof required in criminal matters, which is 'beyond reasonable doubt'.

First Written Warning

- > Arrange a formal meeting with the employee.
- > The Victorian Chamber recommends advising employees they have the option to have a support person present to assist with any discussions relating to their performance/conduct. The support person is of their choice; however,

the person must NOT act in a professional capacity (such as a lawyer) and is there only to support the employee, not to participate in the discussions.

- > For the manager/supervisor conducting the meeting, a representative from Human Resources, or an alternative representative, may also be present at the meeting.
- > Manager should explain the exact nature of the problem, giving examples where possible.
- > Detail any history of counselling (previous related matters within the last 12 months).
- > Detail any action required to rectify the performance/conduct. This may include counselling, training, workload adjustments or improved performance (give specific examples of where the improvement is required).
- > The Employee should be asked whether he/she fully comprehends the nature of the problem and the recommended solution.
- > Give the employee the opportunity to respond to the allegations.
- > Consider the employee's response to the allegations before deciding whether the matter warrants a warning.
- > Advise the employee of the consequences that, if there is no improvement within the required timeframe, or a repeat of issues in the case of misconduct, further disciplinary action may be taken, up to and including termination of employment.
- > Document the discussion. The employee should sign the documentation to confirm their understanding of the discussion.
- > Keep a copy on the employee's file and provide the employee with a copy.

Second or Further Written Warnings


Follow the above process.

Final Written Warning

- > Arrange for a formal meeting with the employee.
- > Advise the employee they have the option to have a support person present to assist with any discussions relating to their performance/conduct. The support person is of their choice; however, the person is NOT to act in a professional capacity (such as a lawyer) and is there only to support the employee, not to participate in the discussions.
- > For the manager/supervisor conducting the meeting, a representative from Human Resources, or an alternative representative, may also be present at the meeting.
- > Detail any history of counselling (previous related matters and warnings).
- > Clearly detail the employee's performance since the previous warning.
- > The Employee should be asked whether he/she fully comprehends the nature of the problem and the recommended solution.
- > Give the employee the opportunity to respond to the allegations.
- > Consider the employee's response to the allegations before deciding whether the issue warrants a final written warning.
- > Advise the employee of the consequences that, if there is no improvement within the required timeframe, or a repeat of issues in the case of misconduct, their employment may be terminated.

- > Clearly outline the action required to rectify the performance/conduct. This may include counselling, training, workload adjustments or improved performance (give specific examples of where the improvement is required).
- > Document the discussion. The employee should sign the documentation to confirm they understand and are fully aware of the consequences if there is no improvement.
- > Keep a copy on the employee's file and provide the employee with a copy.

Termination of Employment

 **Note:** Small business employers (those with fewer than 15 staff) should ensure they are familiar with the *Small Business Fair Dismissal Code* when considering terminations. A termination that is consistent with the *Small Business Fair Dismissal Code* forms a valid defence to an unfair dismissal claim.

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- > For the manager/supervisor conducting the meeting, a representative from Human Resources, or an alternative representative, may also be present at the meeting.
- > Detail any history of counselling (previous related matters and warnings).
- > Detail the employee's performance/conduct since the previous warning.
- > The Employee should be asked whether he/she fully comprehends the nature of the problem and the recommended solution.
- > Give the employee the opportunity to respond to the allegations.
- > Consider the employee's response to the allegations. If the response is not regarded as satisfactory, termination can follow.
- > Take sufficient time to weigh up the employee's response. Often this may involve scheduling a second meeting to advise decision and outcome.
- > Provide the employee with the reason for the termination in writing.
- > If the termination is not related to serious misconduct, ensure the employee is given the appropriate notice (or payment in lieu of notice), any outstanding wages and entitlements accrued such as annual leave, long service leave (if applicable) etc.
- > Payment for outstanding entitlements should be made on the day of termination or within the next pay cycle. Please refer to the relevant industrial instrument to confirm any outstanding entitlements and when they need to be paid by.

Serious Misconduct See the *Fair Work Regulations 2009* reg. 1.07

An employee who has committed serious misconduct can be dismissed without notice following the substantiation of allegations.

Serious misconduct includes, in the course of employment, the employee engaging in theft, fraud, assault, intoxication at work, a serious breach of policies and procedures or conduct that causes serious and imminent risk to the health or safety

of a person or the reputation, viability or profitability of the employer's business.

Serious Misconduct Process

Immediately arrange a meeting with the employee when you become aware of the employee's suspected misconduct:

- > Advise the employee of the allegations.
- > The Employee should be asked whether he/she fully comprehends the nature of the problem and the recommended solution.
- > Advise them of the process to be followed.
- > If necessary, suspend the employee with full pay while the employer investigates the allegation.
- > Alternatives to suspension include placing the employee on supervised shifts, or other interventions that minimise the potential risk of the person remaining in the environment at that time (for example, if someone is accused of assaulting a client, it would be unwise to leave them in an unsupervised environment whilst the matters are unresolved or unclear).

Ensure you:

- > Give the employee an opportunity to respond to the allegations during the process.
- > Document all conversations and findings of the investigation (this may include statements from other employees, clients etc.).
- > On completion of any investigation, arrange a meeting with the employee to discuss findings.
- > Advise the employee they have the option to have a support person present to assist with any discussions relating to their performance/conduct. The support person is of their choice; however, the person is NOT to act in a professional capacity (such as a lawyer) and is there only to support the employee, not to participate in the discussion.
- > For the manager/supervisor conducting the meeting, a representative from Human Resources, or an alternative representative, may also be present at the meeting.
- > Discuss the findings of the investigation with the employee and allow them to see any evidence, documentation, witness statements etc., and consider the employee's response.
- > Consider the employee's further response to the investigation. If not satisfactory, the employee can be terminated immediately.
- > Provide the employee with the reason for the termination in writing.
- > Pay the employee any outstanding wages and entitlements (always check the binding industrial instrument and seek further clarification if required).
- > Payment for outstanding entitlements should be made at the time following termination.

The role of a support person

Attending a disciplinary meeting can be a stressful and unpleasant experience for an employee. If asked to attend a meeting, employees may want to bring someone to provide support, assist with note taking, or act as a witness to the discussion.

Whilst it is good practice, there is no requirement for an employer to offer a support person at a disciplinary meeting.

However, an unreasonable refusal to allow an employee to have a support person present at a disciplinary meeting may contribute to a finding that a dismissal was unfair.

A support person **may**:

- > Give emotional support to the employee
- > Assist them in preparing for the meeting
- > Advise them of the various options they may have
- > Assist them to work through those options
- > Advise them of the likely process to be followed.
- > Assist the employee to present their views or concerns in the meeting
- > Ask for a break if the employee is becoming upset or emotional
- > Ask questions to clarify the process if needed
- > Take notes

A support person **may not**:

- > Take over the meeting
- > Ask as a representative of the employee
- > Speak for the employee
- > Tell the employee what they should or should not do
- > Be rude or aggressive to others in the meeting
- > Act as a support person if they are in some way involved (i.e. are a potential witness)
- > Provide personal opinions

Using a **paid agent or union delegate** as a support person

An employee may choose to bring their union representative or a paid agent such as a lawyer to a disciplinary meeting, if the request is reasonable or allowed for in your policy, employment contract or enterprise agreement. However, if they become obstructive, aggressive or attempt to take over the meeting, an employer should remind the person of their role in the meeting. If they continue to be uncooperative, the employer should adjourn the meeting.

Workplace Relations Consulting

The Victorian Chamber can assist in protecting your business with all aspects of unfair dismissal claims in a timely and professional manner, working collaboratively with your business toward solutions that deliver the best outcomes. We also refer you to the additional Quick Guides on related subjects.

Under the FW Act, employers are required to contend with a range of new employee entitlements and the expanded investigative and enforcement capacities of the Fair Work Ombudsman. Disputes around termination may arise with reference to workplace rights, which will require careful management and investigation.

Representation at FWC conferences and hearings

Unfair Dismissal is the most common claim made against employers. Our Workplace Relations Consultants are highly

experienced when it comes to dealing with conciliations (conferences) and arbitrations (hearings) facilitated by the Fair Work Commission. The consultants are able to provide employers with easy-to-follow guidance and advice, as well as providing experienced representation at conferences and hearings.

Coaching your managers to manage outcomes at the FWC

The Victorian Chamber's experienced consultants can coach your staff before attending a FWC conference or hearing.

Training your front line managers

We can re-train your supervisors and front-line managers to ensure your business is compliant with the necessary requirements of procedural fairness under the FW Act. Training can be tailored to your specific requirements, including managing any provisions relating to consultation and dispute resolution that may apply to your workplace.

Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

Disclaimer

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