

Performance Management

Managing Termination, Redundancy and
Unfair Dismissals



About us

- HR Consultants – 30+ years in HR / 20+ years in SME space;
- Download the very latest HR employment contracts, forms and letters, templates, policies and procedures;
- Support via email, phone or face to face;
- Recruitment and Coaching;
- Designed for Small to Medium sized businesses;
- No subscription or lock in contracts;
- Fair Work compliant documents and advice;
- Free HR Audits;
- **15% discount for RIAA Members;**

– **promo code RIAA15.**

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Managing Performance Issues

Managing Performance Issues

Verbal / Written Warnings

- Usually occurs after general feedback / discussions regarding performance has occurred.
- This process will be scrutinised at any Unfair Dismissal hearings.

Step 1: Identify the issue to be addressed

- Gather evidence - documents / notes / feedback / etc.
- **Either Performance or Conduct**
 - ability to do the job or attitude / behaviour.

Step 2: Assess the issue

- How serious is it.
- What are possible causes.

Managing Performance Issues

Step 3: Before the meeting

- Inform employee what the meeting is about prior.
- Allow employee to bring a support person.
 - Who is a support person?
- Consider having a senior employee as a witness.

Managing Performance Issues

Step 4: During the meeting

- Explain issue giving specific examples.
- Allow the employee to respond.
 - This may mean adjourning the meeting to decide next steps
- Decide on a plan / jointly devise a solution.
- Tell the employee if you are issuing a verbal / written warning.
- Offer support – i.e. training, etc.
- Explain the consequences if performance does not improve.
 - i.e. further warnings and / or termination of employment may occur.

Managing Performance Issues

Step 5: After the meeting

- Confirm discussion via written warning if req'd (not before the meeting!).
- Have a review period and then meet with employee to review progress.

Related documents:

- Managing Underperformance – Formal Steps Checklist and Performance Improvement Plan Template
- First / Second Written Warning template or the Final Warning Template.

Managing Performance Issues

Key Points to note:

- Give notice of the meeting.
- Offer a support person.
- Listen and consider employee's response.
- Offer support.
- Explain the consequences if performance does not improve.
- Set a review date and stick to it.

Termination of employment

- Performance / conduct
- Serious misconduct
- Redundancy
- Abandonment

Termination of employment – performance / conduct

Formal performance management process.

Step 1: Gather documentation to highlight expected standards.

Step 2: Meet with the employee / give notice of meeting.

Step 3: Ensure “due process” is provided during the discussion / support person.

Step 4: Discuss ongoing issue/s as in “Managing Performance Issues”.

Etc etc.

Termination of employment – performance / conduct

Then:

Step 5: Let employee know of your intention to terminate employment

- Ask if there is any reason not to terminate.
- Listen to the employee's response, before determining if a termination of employment is still warranted.
- A separate meeting may be required depending on response.
 - Further investigate if req'd (keep records).

Termination of employment – performance / conduct

Step 6: Provide the employee with the Termination letter

- This step also needs to happen face to face.
- Give the employee a chance to read the letter in the meeting.
- It is important that the employee understands the content of the letter and reason for termination.
- The employee should be given an opportunity to ask questions.

Termination of employment – serious misconduct

What is serious misconduct?

Serious Misconduct means “without notice”, also known as Summary Dismissal”.

The Fair Work Regulations define 'serious misconduct' as follows:

- willful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment; and
- 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.

Termination of employment – serious misconduct

The Regulations also list the following conduct as being deemed serious misconduct:

- theft, fraud or assault;
- being intoxicated at work;
- refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

Termination of employment – serious misconduct

Step 1: Identify the serious misconduct and consider seeking advice / investigation

- Identify exactly what the employee did that was unacceptable and the impact the misconduct had on the business.

Step 2: Discuss the misconduct with the employee

- You should keep a record of any meetings that you have with employees about their conduct.
- Again ensure due process:
 - notice of meeting;
 - support person offered;
 - Witness for yourself;
 - Take notes.

Termination of employment – serious misconduct

Step 3: Consider any alternate options

- Ask if any reason not to terminate.
- Take your time (you can adjourn the meeting) – may need to conduct further investigations.

Step 4: Draft and provide the letter

- Needs to state why they have been terminated.
- Needs to be face to face/ answer any questions, etc.
- No payment in lieu of notice.

Termination of employment – serious misconduct

Some further tips you should consider are:

- After the initial meeting, the employee should also be immediately suspended from duty.
- The time taken by an employer to 'consider' all of the evidence immediately prior to making a decision should be between 1-3 business days, depending on the circumstances.

Related Documents: Termination of Employment Letter – (Serious Misconduct)

Termination of employment – redundancy

What constitutes a Redundancy?

- At law, a genuine redundancy will arise if:
 - the employer decides that it no longer wishes the job an employee has been performing to be done by anyone;
 - this decision is not due to any personal act or default of the employee;
 - it leads to the termination of the employee's employment.
- An employer needs show it has a valid reason and had considered other alternatives to this action.
- As soon as an “in-principle” decision is made you must consult with the employee/s.

This requires the process to include more than one meeting.

Termination of employment – redundancy

Step 1. Conduct an initial meeting with affected employee/s

- Inform employees about changes within the business that may affect their working arrangements.
- Provide employees with an opportunity to ask questions and offer their own alternatives’.
- Let employee know you have considered options and alternatives to redundancies, such as redeployment, job sharing and reduced overtime.
- At the completion of this meeting provide the employee/s with an initial letter communicating the company’s intention to make the role/s redundant.
- A second meeting date should be confirmed with the employee/s to give them an opportunity to ask further questions and / or offer further alternative options to the employer.
- Offer support person for this meeting.

Termination of employment – redundancy

Step 2: Second meeting with affected employee

- Give the employee/s an opportunity to ask further questions and / or offer further alternative options.
- If, you decided to continue with the redundancy/s, this should be communicated to the affected employee/s.

Step 3: Create your letter of termination of employment

- Give the employee the final letter, explain the reasons the position has been made redundant.
- The written notice can also be delivered or posted to the employee's last known address.

Termination of employment – redundancy

Step 4: Find out about notice periods and redundancy entitlements

- Determine what the minimum notice of termination and redundancy pay entitlements are for affected employees.
- The employee can work the notice period or the employer can pay the employee in lieu of that notice.
- Redundancy does not occur because of the performance or conduct of the employee.

Note:

If you are a Small Business (headcount of 15 staff or fewer including casuals), check your Award as most Small Businesses are not required to pay Redundancy payments.

Inform Centrelink if you terminate the employment of 15 or more employees.

Don't underestimate the need to communicate to all employees not affected as early as possible in the process.

Termination of employment – abandonment

If an employee has been absent without making contact, and you cannot contact the employee directly, the next step you should take is to send them an abandonment of employment letter.

Step 1: Attempt to make contact with the employee

- Attempt to contact them or a relative or next of kin.

Step 2: Send initial letter to employee

- After an absence of more than three consecutive working days without your consent and no contact send the employee an initial letter of abandonment, asking them to make contact with you.
- This letter should be sent via registered post.
- Ask for an explanation and inform the employee that you will assume they have abandoned their employment if they do not respond within a specified timeframe.

Termination of employment – abandonment

Step 3: Send final letter to employee below

- A further 14-day period of absence without satisfying you that there is a reasonable cause for their absence, would result in the employee being deemed to have abandoned their employment.
- A final abandonment letter should now be sent, via registered post.

Related document: Letters of termination of employment (abandonment)

Important information

1. Small Business Dismissal Code?
2. Who can claim Unfair Dismissal?
3. What is Unlawful Termination?

Small Business Dismissal Code

In determining whether a dismissal was unfair, the Fair Work commission (FWC) will consider whether:

- the employee was employed by a small business
- the small business has complied with the SBFDC

What constitutes a Small Business?

- Fewer than 15 employees at the time of the dismissal (headcount).
- Small Business, employees cannot lodge an unfair dismissal application within the first 12 months of their employment **
- After this period, if an employer has complied with the requirements under the SBFDC whilst dismissing an employee, then it will be considered as fair.
- ** see Unlawful Termination

Small Business Dismissal Code

- Must provide the employee with verbal or written warning that they may be dismissed.
- The employee must be given an opportunity to rectify the problem/issue, which may entail additional training and ensuring that the employee is fully aware of his/her job expectations.
- After a reasonable amount of time has lapsed, and the employer is not fully satisfied with the employee's efforts in responding to or progressing, the employment contract may be fairly terminated.

Small Business Dismissal Code

Evidence

The employer will be required to provide the following forms of evidence:

- A completed checklist.
- Copies of written warnings (not including summary dismissals).
- Termination statements; and
- Signed witness statements.

Small Business Dismissal Code

Common mistakes

Misclassification

- An employer which is 'grouped' with other entities must include those other entities' employees in the headcount. Many employers also forget to include regular casual employees in their headcount.

Failure to follow the Small Business Fair Dismissal Code

- If an employee makes an unfair dismissal claim and a Small Business Employer is not able to demonstrate to the Fair Work Commission that they followed the guidelines in the Code, the claim would most likely fail.

Small Business Dismissal Code

No warning given

- Even though the unfair dismissal laws are comparatively lenient on Small Business Employers, there is still an expectation that those employers will give prior warning of risk of termination to an employee. Failure to provide at least one warning will make an unfair dismissal claim difficult to rebut.

Not 'genuine redundancy'

- Because of the general rule that Small Business Employers are not required to provide redundancy pay, some employers try to use this as a 'loophole' to terminate longer-term employees (i.e. employees who would otherwise be eligible to make an unfair dismissal claim). However, an employer cannot make an employee redundant just by calling them redundant.

Who can claim Unfair Dismissal?

A person can make an unfair dismissal claim if they have:

- completed the *minimum employment period*;
 - one year for employees of a small businesses (fewer than 15 employees based on a head count of total employees)
 - six months if the employer is not a small business; and
- are covered by a modern award or an enterprise agreement.
- If no award / enterprise agreement applies, a person will only be able to bring an unfair dismissal claim if the sum of their annual rate of earnings is less than the high income threshold (\$145,400 for full-time employees, as at 1 July 2018).
- **What are the remedies?**
 - reinstatement (getting the job back)
 - compensation (up to 26 weeks' pay)
 - non financial remedies such as a written statement of service.

What is Unlawful Termination?

What is unlawful termination?

The Act says that an employer must **not** terminate an employee's employment for one or more of the following unlawful reasons:

- temporary absence from work because of illness or injury
- trade union membership or participation in trade union activities
- non-membership of a trade union
- acting as an employee representative

What is Unlawful Termination?

- the filing of a complaint, against the employer
- race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin
- absence from work during maternity leave or other parental leave
- temporary absence from work for the purpose of engaging in a voluntary emergency management activity

Onus of proof is on the employer !!

How to ensure compliance

1. **Ensure your Employment Contracts are compliant.**
 - Based on the relevant Award/s and National Employment Standards.
2. **Ensure employees are aware of expectations.**
 - Implement HR Policies that stipulate requirements and processes, including performance management and termination.
3. **Keep records.**
 - Ensure documentation is relevant – have compliant HR letters and forms.
4. **Regularly Audit and Update these processes.**

Questions ??

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