




# Performance Management & Termination

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Workplace Law Queensland is a division of  msl  
MELBOURNE SOLICITORS & LAWYERS

## Performance Management



### Introduction & background

Bringing an underperforming employee up to an acceptable standard, or preparing for their termination without prospects for further legal recourse, is one of the most difficult challenges in HR practice.

Surveys and common sense tell us the cost of replacing an employee (recruiter costs, downtime, loss of productivity etc.) often equates to a significant sum. It is cheaper to repatriate an underperforming employee (where possible) than to replace them.

Whilst the devil is indeed in the detail, and individual circumstances must be assessed, these guidelines provide a basic framework upon which a sophisticated and difficult to challenge HR performance management system can be based.

# Performance Management



The stages of performance management:

- Step 1 – Performance coaching
- Step 2 - Performance counselling
- Step 3 - Written warning/s
- Step 4 - Final written warning
- Step 5 - Termination of employment

# Performance Management



## **Set clear expectations from the outset**

Many businesses, in the afterglow of a successful courtship of a new employee, fail to clearly document what the employment expectations are. This can create difficulties with performance management later when it comes to defining why or where there has been underperformance.

Accordingly, an employee should not be commenced without some form of written employment contract and formal induction program that appropriately details key performance criteria, so both employer and employee know what constitutes acceptable performance.

# Performance Management



## Be Fair

Performance management is not a process to be conducted only after you have already made the decision to terminate an employee.

Performance management should be pursued at an early stage before the relationship sours irreparably; be approached with an open mind and with a view to identifying the issues of concern, exploring the causes of underperformance and their potential solutions, establishing an acceptable timeline and benchmarks for improvement, and re-establishing rapport.

# Performance Management



## Be formal

Performance management is a serious step in the employment relationship, so it should be conducted formally.

The notice requiring the meeting should:

- set out the matters to be discussed (in a non inflammatory way);
- invite attendance with a support person (and a witness for the employer too);
- allow sufficient time to arrange for attendance and
- warn of the potential consequences of the meeting (informal warning, written warning, termination).

# Performance Management



## Don't prejudge

In many decided cases, the Courts have determined dismissals to be unfair (and ordered compensation as a result) where it can be shown that the employer had already decided to terminate and was using this process to appear to be fair.

Any indication that the process is a foregone conclusion (pre prepared termination letters etc) will potentially result in a successful challenge being made to any resulting warning or termination.

# Performance Management



## Document and follow through

If performance management results in an agreed way forward, with agreed benchmarks and a review period to assess improvement, then document it. If performance doesn't improve, employers will want to rely on the failure to meet these new targets as a basis for further action and this is easier if there is not a further dispute as to what was agreed.

If there is agreement from the employer to do certain things and review by certain dates then it is important to meet those commitments, especially where the employee is being expected to honour their side of the agreement.

# Performance Management



## Other performance management issues:

- Investigations
- Confidentiality and the role of the employee's representative
- Harassment, discrimination and bullying

# Termination



## Relevant legislative provisions:

- Federal unfair dismissal provisions
- Adverse action/ general protection

## Unlawful termination

## Effecting termination:

- Summary termination;
- Termination on Notice; or
- Termination with payment in lieu of notice

## Case Studies



### ***M v G Pty Ltd*** (U2010/6455)

G was small business employer. "Unusual" relationship between M & G (work "pauses" & loans etc)

Employment terminated after G hires an investigator and establishes M was in a relationship

**HELD: Reason for summary dismissal not valid - 9 weeks pay.**

### ***Mrs Carolyn Bolger v Shamrock Consultancy Pty Ltd T/A Allied Express*** (U2010/8538)

14 year employee - various issues with performance and issued with formal warnings and moved into a "last chance" role and issued with final written warning - summarily dismissed, not allowed a support person in final meeting and no letter of dismissal provided

**HELD: Valid to terminate for inadequate work performance however because no support person allowed and no written letter of dismissal, there was no procedural fairness - reinstatement was inappropriate - compensation of \$3000.**

## Case Studies



### ***Applicant v Respondent*** (2010/6297)

Applicant promoted within business but not meeting targets while on probation - submitted incident report against management following performance meeting - attended another meeting about complaint - said she was being bullied and was stressed - lodged workers compensation claim (rejected) - Respondent arranged medical assessments but Applicant did not attend most of them - eventually terminated as she wouldn't/couldn't perform her role and no successful RTW plan established

**HELD: Valid reason for termination - Application dismissed.**

### ***Nicole Aleckson v Tewantin Noosa RSL*** (U2010/721)

Applicant returned from holiday and found other positions had been made redundant. Then attended meeting and was terminated. Respondent argued redundancy based on a management meeting held during her holiday leave

**HELD: No sufficient consultation or sufficient discussion regarding redeployment. Respondent should have provided more time to find another position - lack of reasonable process - 4 weeks compensation & statement of service provided.**

## Case Studies



### ***Birt v K&S Freighters Pty Ltd*** (U2009/12294)

Applicant terminated for refusal to comply with the Respondent's policy that employees pay for damages to vehicles caused by the employee's negligence

Applicant not advised of the Respondent's policies or procedures at initial interview and this policy was never mentioned to him - Applicant initially offered to pay \$50/wk but later withdrew this as he did not believe he had been careless - As soon as he advised he would not pay he was terminated

**HELD: valid reason for termination but no procedural fairness  
termination harsh, unjust & unreasonable - \$21,000.00**

## Case Studies



### ***Robert Anthony Richards v Regional Express Holdings Ltd t/as REX Airlines*** (U2010/299)

Applicant terminated as a result of 7 counts of alleged misconduct relating to misuse of company cars - Conduct was deliberate and foolish - Terminated - Other staff not terminated in similar instances/ conduct

**HELD: Valid reason for termination but regardless of conduct being deliberate and foolish, termination was harsh, unjust, unreasonable and disproportionate. Ordered reinstatement but Applicant also issued with written warning for conduct.**

### ***Bilson v Mission Australia*** (U2010/5506)

Applicant terminated for alleged serious misconduct - Respondent did not properly investigate the allegations, nor give appropriate consideration to all circumstances, otherwise process was correctly followed.

**HELD: no valid reason for termination (inadequate investigation), therefore it was harsh, unjust and unreasonable. Reinstatement not appropriate in the circumstances, Applicant awarded \$18,255**

# Termination FAQ



- How do I handle employee theft?
- Does an employer have to pay notice in a summary dismissal?
- What are the pitfalls in summary dismissal
- Is a confession of serious misconduct reasonable grounds for summary dismissal?
- What constitutes misconduct?
- Is an employer obliged to provide a reference?
- Can an employer deduct money owing to it from an employee's final pay?
- Can an employee take sick leave during the notice period?
- How is a final payment on termination to be calculated?

# Termination FAQ



- Can I rely on an indemnity signed by an employee not to sue for unfair dismissal?
- What reasons should an employer give for a dismissal?
- What standard of proof must be met to satisfy a dismissal?
- Do employees on probation have any right to claim unfair dismissal?
- Can an employee who resigns sue for unfair dismissal?
- Can an employee with pre-existing injuries sue for unlawful dismissal if terminated when those injuries become apparent?
- Can an employer dismiss an employee who deliberately withheld details of a pre-existing injury?
- Can an employee be dismissed when they cannot carry out their duties due to an injury?

# Termination FAQ



- Can an employee be dismissed for being absent on sick leave?
- Can you dismiss an employee for fraudulently claiming sick leave?
- Can you dismiss an employee when their illness goes on for longer than the business can afford?
- Can an employee be dismissed for misconduct outside the workplace?

# Contact Details



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