



Performance Management Issues

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WLQ is a division of  **msl**
MILNERSONS & LAYTON

Performance Management



Focus of presentation and discussion

Dealing with:

- Unsatisfactory performance and standards
- Unsatisfactory workplace behaviour
- Disciplinary process
- Consequences of dismissal
- Cases

Performance Management



“Performance management” of existing employees can include:

- Performance in the workplace;
- Attitude in the workplace;
- Behaviour inside and outside work hours;
- Approaches to the way work is performed – “culture”

Performance Management



“Performance management” covers:

- Regular informal feedback to employees
- Formal performance reviews
- Warnings for poor performance
- Termination of employment for poor performance.

“Performance management” is the key – it’s a matter of “warnings” on file and taking appropriate action in a timely fashion.

Performance Management



Out of hours behaviour and Conduct

Typically involve sexual harassment

- Office/Christmas parties and post -office/ Christmas party parties
- Conferences (what goes on tour.....)
- Degree of connection with employment
- Vicarious Liability issues

Performance Management



See Telstra v Streeter

- Telstra sacked a female worker for conduct at a post Christmas party, party.
- 3 female staff privately booked into a hotel room
- Streeter arrived after occupants asleep.
- Engaged in sexual intercourse with 2 fellow employees in front of the others
- Dismissed from position for serious misconduct
- Initially held to be harsh unjust and unreasonable because behaviour not connected with employment, and was away from workplace, and not so serious as to warrant dismissal
- On Appeal held dismissal was fair and that the conduct was sufficiently serious and connected with employment as to warrant dismissal.

Performance Management



Nick Kolodjashnij v J Boag and Son Brewing Pty Ltd [2010] FWAFB 3258

- Boags had a clear policy about alcohol use that made it clear that any poor behaviour surrounding alcohol in or out of work would lead to disciplinary consequences
- Kolodijashnij charged with drinking and driving outside of work while driving a non company vehicle
- Kolodijashnij told Boags about the charge
- Was stood down and later summarily dismissed after 2 meetings
- Kolodijashnij made application for unfair dismissal
- FWA held that dismissal was not harsh, unjust or unreasonable and that termination was based on valid reasons.

Performance Management



- “An employer is entitled to have policies designed to protect the interests of the business and a legitimate interest in ensuring that such policies are observed by the workforce. There would be little point in having policies that were not enforced”
- Policies that regulate the behavior of employees in areas which may impact on the employer’s business are reasonable.

Performance Management



Kolodijashnij and Boags provided guidance to employers in respect of when they can regulate out of work behaviour and what is required:

1. The employer must have policies that are values/product based and purport to extend beyond work hours. The policies must expressly state the effect of the policy.
2. The reason for the extension of the policy must be relevant to the business, for example:
 - Responsible drinking - brewery.
 - Responsible use of money – bank.
 - Responsible alcohol use, behaviour, communication – organisations support children and adults at risk of drugs, alcohol and violence.

Performance Management



Kolodijashnij and Boags

3. All workers must be trained in the policy and be aware of the consequences of breaching the policy
4. In reviewing the unacceptable behaviour the employer must act proportionally (crime fits the punishment), with procedural fairness, and after weighing the workers work history and personal circumstances.

Performance Management



“Performance management” requires:

- Clear position descriptions,
- Clear “Duties & Responsibilities” clauses in Letters of Offer.
- Clear provisions in Annual Performance Agreements.
- Annual Performance Agreements that are up to date.
- Clear Counselling and Discipline Guidelines*
- A desire and commitment by management to deal with performance issues.
- Consistency of application
- Timeliness of action and response

Why Performance Manage?



- Poor performance,
- Poor Attitude
- Conflict/hostility/aggression

Leads to

- Organisation disfunctionality
- High staff turnover
- Increased claims

Policy or Guidelines?



“Policy” or Guideline”:

- Policy as part of Contract?
- Guideline can provide flexibility?
- Policy can be more restrictive
- If a Policy is not consistently applied, can lead to waiver of rules and tolerance of poor conduct becoming entrenched.

Performance Management



“Performance management” procedures are underwritten by six key elements:

- Evidence of non-performance
- Procedural Fairness
- Substantive Fairness
- Contractual terms
- The Award
- Compliance with the FW Act in most cases

Risks of Failing to Properly Performance Manage



- Unfair dismissal claims
- General protection claims
- Sham redundancies
- Stress claims by other employees.

Unfair Dismissal Cases



There are four possible outcomes:

- Reinstatement to same position
- Reemployment within company
- Up to 26 weeks compensation
- Employer wins.

When is termination “too harsh?”



- Developing line of authorities which indicate that for employers, there may be a greater exposure to employees being reinstated
- Due to the harshness of the penalty of termination
- This is especially so in country areas /restricted markets where loss of a job can mean leaving town.

Recent cases include:

Unfair Dismissal Cases



Robert Anthony Richards v Regional Express Holdings Ltd T/A REX Airlines [2010] FWA 4230

- An airline pilot's employment was terminated without notice for **seven** counts of alleged misconduct relating to misuse of company cars.
- FWA was satisfied that **two** of the alleged counts of misconduct occurred and that, as the conduct was deliberate and foolish, they were a valid reason for termination.
- However, Richard's had had a spotless record during 14 years employment. His termination had a severe financial effect on him both in terms of him finding alternative work and because he was obliged to sell his house in Melbourne. It also appeared that other employees may also have misused cars at around the same time without being terminated.
- FWA decided that Richards was unfairly dismissed. The termination was harsh since the penalty imposed on him was **disproportionate to the misconduct**. It decided that he should be reinstated as there had been no irrevocable loss of trust and confidence. Reinstatement was ordered. FWA also decided that Richards should forego part of his total salary and receive an official warning, which would be placed on his personnel file.

Unfair Dismissal Cases



Paul Quinlivan v Norske Skog Paper Mills (Australia) Ltd [2010] FWA 883

- The applicant was dismissed for two species of misconduct on 2 September 2009, being breach of safety policies – repeated failure to wear safety glasses and refusal to obey a lawful direction – failing to modify a tool and use it correctly.
- In the trial, the applicant also admitted to using abusive language and that it was inappropriate.
- The applicant did not contest that the repeated failure to wear safety glasses constituted a valid reason for dismissal. The other allegation was not made out.
- The applicant was 44 years old, married, with kids 9 and 11 and had worked for the company for 20 years. He owned a house in Albury with a \$70k mortgage. He left school at 16 and had no formal skills or qualifications. He could not find alternate work.
- FWA held that the termination was not unjust or unreasonable, but that it was **harsh**. It noted the adverse personal consequences on him.
- Reinstated, with continuity of employment, but with no back pay (\$18,000).

Unfair Dismissal Cases



Jurisdictional Issues – Income:

Section 332(1) of the FW Act defines “earnings”:

- Wages;
- Amounts applied or dealt with in any way on the employee’s behalf;
- The agreed money value of non-monetary benefits;
- Amounts or benefits prescribed by the Regulations.

Section 332(2) of the FW Act excludes:

- Payments, the amount of which cannot be determined in advance ;
- Reimbursements;
- Superannuation contributions; and
- Amounts or benefits prescribed by the Regulations.

Redundancy is NOT Performance Management



Sham redundancy is NOT performance management:

Section 389 of the FW Act deals with “genuine redundancy”.

- s.389(1) of the FW Act, a person’s dismissal is a genuine case of redundancy if:
 - (a) the person’s employer no longer requires the **person’s job** to be performed because of changes in the operational requirements of the employer; and
 - (b) the employer has complied with any obligation in a Modern Award or EBA that applies to the person, to consult about the redundancy.

Genuine Redundancy



- Section 389(2) of the FW Act provides that a person’s dismissal is not a “genuine redundancy” if it would have been reasonable in the circumstances for the person to have redeployed within :
 - a) the employer’s enterprise; or
 - b) the enterprise of an associated entity of the employer.
- A sham redundancy will lead to an unlawful dismissal or adverse action claim

General Protection Claims



Failure to afford procedural and substantive fairness can lead to a general protections claim.

- Chapter 3 Part 3-1, Division 3, of the FW Act deals with Workplace Rights (esp ss.341-345).
- Chapter 3 Part 3-1, Division 5, of the FW Act deals with Discrimination (esp s.351).
- Chapter 3 Part 3-1, Division 4, of the FW Act deals with Industrial Activities.
- These provisions are headed “General Protections.”

General Protection Claims



Section 340(1) of the FW Act provides that a person must not take adverse action against another person:

- (a) because the other person:
 - (i) has a workplace right; or
 - (ii) has, or has not, exercised a workplace right; or
 - (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
- (b) to prevent the exercise of a workplace right by the other person.

General Protection Claims



Section 341(1) of the FW Act defines **workplace right**

- (1) A person has a **workplace right** if the person:
 - (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
 - (b) is able to initiate, or participate in, a **process or proceedings under a workplace law or workplace instrument**; or
 - (c) is able to make a complaint or inquiry:
 - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
 - (ii) if the person is an employee—in relation to his or her employment.

General Protection Claims



Section 341(2) of the FW Act provides that each of the following is a **process or proceedings under a workplace law or workplace instrument**:

- (a) a conference conducted or hearing held by FWA;
- (b) court proceedings under a workplace law or workplace instrument;
- (c) protected industrial action;
- (d) a protected action ballot;
- (e) making, varying or terminating an enterprise agreement;
- (f) appointing, or terminating the appointment of, a bargaining representative;
- (g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;
- (h) agreeing to cash out paid annual leave or paid personal/carer's leave;
- (i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);
- (j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;
- (k) any other process or proceedings under a workplace law or workplace instrument.

General Protection Claims



Recent cases include:

Jones v Queensland Tertiary Admissions Centre [2010] FCA 399.

- Federal Court rejected adverse action claim by a CEO. She was being investigated for bullying, despite being QTAC's bargaining representative and had workplace rights under s.340. She alleged that QTAC had improperly investigated the ASU and several employees claim. She argued that QTAC was motivated by ASU pressure and there was an orchestrated campaign against her bargaining conduct.
- The Court held she had a workplace right, under s.341(1)(a) not only because she was a bargaining representative but because of her involvement in the bargaining process. Also held to have rights under s.341(1)(b) and s.341(2)(e).
- The CEO argued that the adverse action was that QTAC had injured her in her employment or altered her position to her prejudice or threatened to do so.

General Protection Claims



Jones v Queensland Tertiary Admissions Centre (Continued).

- This was due to QTAC commencing the investigation, issuing a show cause letter, reliance on company secretary's notes to establish a pattern of unreasonable treatment of staff, failure to provide natural justice, refusal to set aside the report of the investigation.
- The Court was not satisfied that the investigation was held without reasonable cause. The show cause letter noted that while giving the employee the opportunity to respond, it noted she could be sacked. This was held to be adverse action.
- The Court also held that the QTAC had not not accepted the events in the company secretary's notes per se, but asked her to respond to them. The allegation of failure to provide natural justice was not made out. The mere existence of the report did not alter the CEO's position to her detriment. Unequivocal acceptance of reliance on it may be adverse action but AQTC continued to seek her responses to it.

General Protection Claims



Jones v Queensland Tertiary Admissions Centre (Continued).

•The Court then considered the effect of finding adverse action with regard to the show cause letter.

•Was that action taken because of her workplace right?

•The Court held that it was not. QTAC had discharged the onus under s.361(1) of the FW Act. *"I do not consider that the action taken by QTAC against the CEO was because of a reason prohibited by the Act."*

•The only reason for the QTAC action was the Board's concern for the QTAC and its employees that the CEO was mistreating staff members and a belief that it was essential to investigate the allegations, in a proper way with the CEO being given the opportunity to respond to the allegations.

•**Note** that the case went to the Federal Court as the CEO sought an injunction. This delayed the investigation.

The Toxic Personality



Discussion: The Toxic Personality

- Bullying
- Intimidation
- Hostile
- Aggressive
- Non cooperative
- Negative/poor attitude
- Absenteeism/sick leave

Absenteeism



Practical Measures

- Purchasing sick leave entitlements
- Bonus days rewarding healthy attendance records
- Counselling for long week-end sickies
- Checking Medical certificates

Absenteeism



Australian Medical Association (AMA) Guidelines:

- **Responsibility of Employers:**
 - Employees right to keep details of their medical condition confidential;
 - Should not expect to see a diagnosis on the certificate;
 - Recognize that the certification by the medical practitioner of an employee's unfitness for work is sufficient.
 - Responsibility to inform the employee of the requirements for sick leave.
- **Certificate Requirements:**
 - Name and address of the medical practitioner issuing the certificate;
 - Name of the patient;
 - Date on which the examination took place;
 - Date on which the certificate was issued;
 - Date(s) on which the patient is or was unfit for attendance;
 - Supplementary information of assistance to the patient in obtaining the appropriate leave especially where there is a discrepancy in the period for which the certificate is issued and the date of the certificate.
 - A diagnosis is not usually required
 - Certificate should be legible and written so a non-medical person is able to read and understand it
 - Medical practitioners have a responsibility to obtain and note sufficient factual information through history and examination to issue a sickness certificate.

Performance Management



Summary

- Good documentation as to performance expectations and process
- Fair and effective systems to set and maintain performance
- Natural justice and procedural fairness in investigation and action
- Consistency of response
- Management support for policy and process
- Timeliness of response
- Appropriate and lawful response
- Tolerating poor and unacceptable performance and inappropriate becomes acceptance of it.

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