



EMPLOYERS' GUIDE TO PERFORMANCE

HR/IR is a Human Resources business in Wollongong. We are legally trained and focus on workplace/employment problems solving and Human Resources issues. We help managers with performance management and unfair dismissal claims.

Performance in the Workplace?

Workplace performance falls into two areas:

Poor or inadequate performance such as not doing the job properly or failing to comply with workplace policies.

And

Conduct issues such as breaching the employment contract (eg. fraud) or failing to follow lawful directions. Conduct issues will be discussed in a separate eBook.

This eBook will help managers, business owners and SMEs effectively and lawfully manage performance to avoid costly unfair dismissal claims and general protection claims in the Fair Work Commission.

1. Poor and Inadequate Performance

Poor and inadequate performance is when the employee fails to meet the standards and levels of performance expectations reasonably required by the employer.

Minor poor performance:

Minor poor performance can fall into the category of a one-off mistake, a failure to meet a performance target, late attendance to the workplace without a reasonable excuse, or failure to provide a receipt for office expenditure.

Minor issues with performance initially should be handled informally by way of discussion.

The manager would keep a note of the discussion and the agreed outcomes.

Two or more performance issues within a period of time (say 3-6 Months) could then result in a formal performance management meeting.

At this stage of the performance process, the meeting can be held fairly and the manager and the employee can communicate openly the issue can resolve with counselling that may stay on the employee's employment file for about 6 months.

Serious performance issues

Serious performance issues fall into a number of categories

- Performance targets that have been set in the employment contract or agreed upon and are not met regularly.
- Accurate and timely completion of workplace records such as client files not being up to date, delivery logs not complete or inadequately completed.
- Regular late attendance without reasonable explanation.

Each workplace will have different essential performance requirements of each role.

Managers of SMEs must ensure that they communicate to each employee what the business expectations are with respect to adequate performance.

This communication can be at a workplace meeting, in the employment contract or a face-to-face meeting with the employee.

SMEs and managers should always keep a record of their communications. The expectations must always be reasonable. The employee does not need to sign the record.

An unreasonable expectation would be that the SME requires the employee to work 45 hours a week at a minimum.

Terminating an employee for not meeting an unreasonable expectation would result in an Unfair Dismissal Claim in The Fair Work Commission.



Once you begin the process of discipline and performance management, each step is incredibly important to get right if you decide to terminate the employee. Call John on 040706507 for help


2. Workplace Policies Relating to Poor Performance

Every Business and SME should have a workplace policy for the management of poor performance and the investigation/management of such workplace management issues.

These workplace policies must NOT form part of the employment contract but MUST require the employee to comply with the policy.

With these policies, you can inform your employees of your expectations in terms of performance and conduct. This makes it easy to point to failures down the line which need to be discussed and/or investigated. The policies should be specific to your expectations. The performance management policy will set out the steps the employer will take when determining what is poor performance. It will also speak to the possibility of warnings/termination and the investigation process.

A properly drafted workplace investigations policy will ensure that your employee understands the procedure and make sure that you yourself follow the procedure. Should a business owner or SME not follow the correct steps for a workplace investigation, you will open yourself up to a claim of unfair dismissal or a general protection claim in the Fair Work Commission.

	Workplace policies are important for any business that wishes to both avoid unnecessary trouble with employees and wish to perform their duties during investigations properly.
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3. Performance management meetings for poor or inadequate

Informal Performance Meetings

Informal performance meetings are simple and should be one-on-one with the employee and the employer. The meeting should:

- Be clear about what the issues or concerns are
- Be a two-way conversation
- Discuss potential solutions, with clear and reasonable steps for improvement

The employee should know that they have time to improve and that this is simply the first step in the process. It should also be clear that further underperformance will lead to an official warning and an official meeting.

The meeting could result in counselling or no action being taken. Usually, the action taken will be recorded on the employee's employment file.

Formal Performance Meetings for alleged poor performance:

Formal meetings are more complex.

- Notice must be given to the employee about when and where the meeting will be held.
- The notice must specify what the meeting is about
- The notice must be clear that a support person can be present in the meeting.

The meeting should ultimately achieve three major objectives:

1. The concerns and evidence for such concerns should be explained and shown to the employee.
2. The employee is given the right to respond and tell their side of the story.
3. The meeting should discuss the next steps of the process. Which may be drafting a performance improvement plan (PIP), an intention to issue a formal written warning or no action/counselling.

You should send a letter to the employee, informing them they have been counselled and provide the PIP if relevant.

4. Formal Warnings

A formal warning must not be given until the employee has been able to respond within the meeting, and should not be given within the meeting itself. Only after the employee's response should the employer issue a warning.

Issuing a warning at the meeting may be considered to be a breach of the employee's right to natural justice and may result in an Unfair Dismissal Claim in the Fair Work Commission.



If you are unsure about your responsibilities as an employer or require independent help, you should seek professional advice. HR/IR Solutions can help prevent *and* deal with misconduct and poor performance.

What should a formal warning say?

A formal warning is useful to confirm and address a performance issue with an employee. Remember that casual employees will also need a formal warning. It also helps prove that you have attempted to help the employee perform their role. The formal warning should be a letter and include:



- Details of the performance issue of concern
- What has previously been discussed with the employee about this issue
- What the employer will do to assist
- An action plan of what steps the employee will need to take
- A reasonable timeframe in which the changes or improvements need to occur

You may choose to add some other pieces of information which you find relevant, such as consequences for non-improvement. Remember that this formal warning may be used in an investigation.

How many warnings can an employee receive in a period of time?

There is no minimum or a maximum number of warnings that an employee can receive in any period of time.

Additionally, if you choose to dismiss your employee, there is no number of written warnings that must be given for the dismissal to be valid. If you choose to, technically you do not need to give any written warning prior to termination.

This is not a good idea. It is always a good idea to give one written warning. A written warning will demonstrate a willingness to give your employee a chance, and it will serve as a document that will allow you to show a consistent pattern of poor performance.

Terminating the employee


After you give out at least one written warning, you can consider termination of the employee.

Termination should be the final step in the process and only used when strictly necessary. Unnecessary termination of the employee can lead to workplace investigations which often lead to fines and increasingly commonly, reinstatement.

You should consider termination after you have given your employee full procedural fairness. This means that you have a meeting prior to any discussions about termination, allowing your employee to give their side of the story. After this, a written warning should be issued and then a performance management plan should be implemented (see below). If things do not improve with the employee, you can now consider termination.

5. Performance improvement plans

Performance improvement plans double both as an efficient way to improve results in your business, but also as excellent evidence that your employee has had every possibility to improve their work before dismissal.



HR/IR Solutions can draft a performance improvement plan for your business that is professional, effective and independent. Call us today on 040706507 for a consultation.

Before instituting a plan, you should consider a few questions:

- Is there actually an issue that can be documented and shown through evidence?
- Are you using this plan as a way to help the employee or have them terminated? You must show that you are trying to help your employee better their performance.
- Does the job lend itself to a plan? Some jobs such as sales can have set targets, whereas jobs like a receptionist will be hard to attach targets to.
- Has proper training been given to the employee to ensure success?

Designing a plan

The Plan should include:

- Information as to what the target performance levels are and how the current performance does not meet this mark
- Specific and measurable objectives that are achievable, time-bound and relevant
Normally, plans are 30, 60 or 90 days long
- How the employee can achieve these goals more effectively
- When the employer will have a meeting with the employee to discuss and assess the employee's performance
- Clear consequences for not meeting the objectives of the plan

The plan should be introduced and discussed in a meeting which you have set. The employee should have input into how the plan might work for them or suggestions for improvements to the plan.

Example of a good PIP:

The following is an example of a good PIP for a Data Analyst:

Target Area	Performance Concern	Expected Standard of Performance	Agreed Improvement Actions	Support	Review Date	Date to Achieve Expected Standards
Data Research Accuracy	Repeated inaccuracy of data	To produce accurate and meaningful data analysis	Double check work, keeping records of data collected, Supervisor to double check work	Further training in writing research papers, time management training	4 weeks' Time	6 Months

6. Poorly managed performance management examples

Incorrectly performed performance management, leading to termination can lead to investigations by the Fair Work Commission, and findings of unfair dismissal.

Harsh, Unjust and Unreasonable

Dismissals will be found to be unfair if they are harsh, unjust and unreasonable according to s387 of the Fair Work Act.

Harsh means the dismissal was disproportionate to the offence committed.

Unjust means there was no valid reason to sack your employee.

Unreasonable means unreasonable actions from the employer or denial of procedural fairness.

This is a fairly broad set of circumstances, but will include:

- Whether there was a valid reason for the dismissal related to capacity or conduct
- Notification and opportunity to respond
- Warnings
- Unreasonable refusal of a support person
- Size of the business
- Any other matters deemed relevant

Other matters can include things such as age as found in the recent case *Club Assist v Yen Yap*

Essentially, the Fair Work Commission can look at all of the circumstances which lead up to the dismissal of the employee and make a decision on whether they believe it to be harsh, unjust and unreasonable. It is important to follow all the correct steps, as missing one important step *will likely* lead to a finding of unfair dismissal.



Scripting a Meeting:

Scripting a formal performance meeting can result in a claim for unfair dismissal. In *Joshi v Panasonic*, it was found that a pre-scripted meeting and warning meant that the meeting had pre-determined outcomes. It is important to remember that all meetings are conversations that should allow for new information. Go in with objectives and a general plan, but allow the meeting to evolve.

Denying a choice of a support person

Denying an employee free choice of a support person can result in a claim for unfair dismissal. In *Dewson v Boom Logistics*, the employee requested a specific union official to be present. This request was refused and a different official was nominated. This made the entire process unfair and therefore the claim for unfair dismissal was approved.

Not notifying the employee of reasons for dismissal

When dismissing an employee, if they are not notified of the reason for the dismissal, the dismissal may be harsh, unjust or unreasonable. In the case of *Sabeto v Waterloo Car Centre*, the employee was questioned about unaccounted for cash, left work and could not be contacted. The employer dismissed the employee but could not notify them of the reason. Despite there being a valid reason for termination, not notifying the employee of the reason for termination was enough to make the dismissal harsh, unjust and unreasonable. Compensation was ordered.

Having outdated performance management policies can be incredibly dangerous for your business. Contact us at HR/IR Solutions for a new set of policies or a free consultation.

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