

DISCIPLINARY PROCEDURES & TERMINATION OF EMPLOYMENT

Introduction

Whilst management sets guidelines and procedures, the operation of the company substantially relies on the employees. Underperformance or poor performance can lead to unhealthy and unproductive workplaces and so it is crucial that it be addressed promptly in an organised manner. Underperformance is distinct from misconduct, which is very serious behaviour such as theft or assault and which may warrant summary (instant) dismissal. If you suspect that misconduct has occurred in your workplace, you should contact LPA for advice.

Underperformance can be exhibited by employees in the following ways:

- unsatisfactory work performance, ie. a failure to perform the duties of the position or to perform them to the standard required;
- non-compliance with workplace policies, rules or procedures;
- unacceptable behaviour in the workplace;
- disruptive or negative behaviour that impacts on co-workers;
- failure to obey a lawful direction.

Ongoing feedback and discussion about performance issues in the open can assist the supportive culture of a business. Most importantly there needs to be a clear system for managing underperformance in a workplace and an intention to solve the matter in a positive manner. A clear performance management system generates more credibility and consistency, assists the productivity of the business and ensures that the employees are aware of the expected level of performance for their duties.

Minimum Employment Period

In accordance with the provisions of the Fair Work Act 2009 (the Act), employees may not have a claim for unfair dismissal in the following periods:

- the first 6 months of employment where the employer employs more than 15 employees; and
- the first 12 months of employment where the employer employs less than 15 employees (includes casual employees and is based on a simple head count) (a Small Business Employer).

Therefore during either the first 6 or 12 months (as the case may be), should an employee's performance, attitude or behaviour not be up to the standard required, the employer has the ability to terminate the employee's services without the fear of having an unfair dismissal case taken against them by the employee.

Should an employer decide to terminate an employee during the first 6 or 12 months (as the case may be), the employer is required to give notice of termination in writing outlining the reason for termination as well as giving at least one week's notice of termination or paying one week's pay in lieu of notice of termination. For weekly employees, this may also fall within their probationary period and a template letter is provided below.

For employees who have been employed for more than 6 or 12 (as the case may be), the following procedure should be followed.

[Print on your business letterhead]

[Date]

Private and confidential

[Insert employee's full name]

[Insert employee's residential address]

Dear [insert name]

Termination of employment

Your probation period with us at [insert business name] is due to end on [insert date].

[I/We] confirm that [I/we] have decided not to continue your employment beyond your probationary period. As a result, your employment will end on [insert date].

You must ensure that the date entered here is at least one week later than the date the letter is provided or that you are paying the person in lieu of receiving the notice. If the employee has more than 12 months service (which is unlikely for a probationary period) you should contact LPA regarding notice of termination.

We wish you well in your future endeavours.

Yours sincerely,

[Insert name]

[Insert position]

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SUGGESTED PROCESS FOR MANAGING UNDERPERFORMANCE

Step 1: Identify the Problem

The first and definitive step is to identify *specifically* the problem with regard to underperformance. This includes determining:

- how serious the problem is;
- how long the problem has existed;
- how wide the gap is between what is expected and what is being delivered;
- what steps (if any) you have already taken to address the problem;
- what you are going to do next.

Once the problem has been identified and assessed, the employer (or manager or supervisor) should organise a meeting with the employee to discuss the problem. The employee should be informed in advance of the purpose of the meeting so that they can adequately prepare and they should be informed that they are entitled to bring a support person to the meeting if they want to.

Step 2: Meet with the Employee

The meeting should take place in private. The employer, manager or supervisor should have a *witness* present who may take notes. The meeting should commence with an explanation of the problem as identified in specific terms including:

- what the problem is;
- why it is a problem;
- how it impacts on the workplace; and
- why there is a concern.

The meeting should be an open discussion that gives the employee a reasonable opportunity to respond to the employer's concern. It also clarifies for the employee what the employer's expectations are with regard to their level of performance. A verbal warning may be given, but the employee must be given a reasonable chance to rectify the problem. This may include the employer providing a clear job description or providing further training to the employee. It is important that if requirements or targets are set, that they are not discriminatory, unlawful or otherwise unreasonable. If in doubt, please contact LPA for advice.

The improvement required and the consequences of continued poor performance (ie. termination) should be clearly outlined in the meeting and the parties could begin outlining a solution as provided in **Step 3**. The meeting should set a date for the matter to be followed up, to determine if the problem has been addressed, if there has been improvement, or if there has been no improvement at all.

The details of any performance or conduct discussion held with an employee should always be documented in writing as soon as possible. If other people are present in the meeting, you may wish to ask them to sign your record to verify it (if they agree with it – you may need to amend the record based on their comments) but they are not required to do so. A copy of the formal record should also be provided to the employee to keep.

The record should include:

- *the date of the meeting, and the date of the record;*
- *the participants of the meeting;*
- *what, in specific terms, the problem is;*
- *the employee's response;*
- *the steps taken or offered for improvement;*
- *if a date is set for following up the matter; and*
- *any other relevant information.*

Step 3: Devise a Solution & Monitor Performance

A clear plan should be developed with the employee to implement a solution to the problem. This can be a performance agreement or action plan. It should be clear and easy to follow using everyday language, provide clear expectations of the employee's level of performance and be devised with the employee's input if possible so that they can address any further training or assistance that they may require.

The agreement or plan can:

- reflect an understanding of the performance expectations and what is to be achieved over the specified time period (performance improvement milestones);
- clarify the roles and responsibilities of the employee;
- include strategies for training and career development; and/or
- include timeframes for improvement (these may vary depending on the issue and the needs of the business, however it is important to give an employee adequate time to improve their performance).

The employee's performance should be monitored and feedback should be provided to the employee. A date should be set for another meeting with the employee to review their progress and discuss the employee's performance against the agreed action plan.

PLEASE NOTE: Any steps set out in an applicable industrial instrument such as a modern award or enterprise agreement, the employer's policies and procedures and the employee's employment contract concerning performance management should be followed.

Step 4: Following Up the Problem

The employer, manager or supervisor should follow up the first meeting with a second meeting to discuss with the employee their progress or the employer may choose to give a first written warning to the employee if sufficient progress has not been made, the employee has not sufficiently responded to the employer's concerns or another incident takes place. Again, if the employee is required to attend a meeting, they should be informed that they can have a support person attend the meeting with them and a record should be kept of the meeting. The employee should be informed that further indiscretions or lack of improvement could result in their termination.

If the employer has chosen to draft a first warning letter (on company letterhead), it should include:

- details of the performance or conduct issue that is being raised;
- what has been discussed with the employee about the issue;
- what the employer will do to assist (where relevant);
- an action plan of what steps the employee needs to take (where relevant);
- a reasonable timeframe in which the changes or improvements need to occur; and
- that termination is a possible consequence if sufficient improvement is not made.

Warnings should clearly set out:

- what the issue is;
- guide the employee about what to do to improve;
- what the consequences are for the employee if things should not improve; and
- warnings become a formal record of the counselling the employer has done with the employee about the issue.

It is important that the employee reads and understands this letter. Depending on the circumstances, the employer could ask the employee to sign and return a copy of the letter, or follow up with the employee to make sure they received it and keep a note of this. Employees are not required by law to sign a copy of a warning letter. The employee has the right to discuss the letter with their supervisor and may supply written comments.

[Date]

Private and confidential

[Insert employee's full name]
[Insert employee's residential address]

Dear [insert name]

Warning letter

I am writing to you about your [performance/conduct] during your employment with [insert company/partnership/sole trader name and the trading name of business] (the employer).

On [insert date] you met with [insert name of others at the meeting]. At this meeting you were advised that your [performance/conduct] has been unsatisfactory, and that immediate improvement is required. In particular you were advised that [insert explanation of unsatisfactory performance or conduct, for example regularly attending work late or not completing required tasks.]

In the meeting you were asked if you had anything you wished to say or to respond to the situation and you [insert details of the employee's response or if no response was provided you can note here that the employee 'did not respond'].

After considering the situation it is expected that your [conduct/performance] improves and specifically that you [insert advice given to employee regarding improvement of performance or conduct, for example outline deadlines for improvement, specific performance targets set (ensure whatever you require is reasonable and fair in the circumstances and that you have considered any response or reasons from the employee)]

This is your [first/second] warning letter. Your employment may be terminated if your [conduct/performance] does not improve by [insert date that is reasonable in this situation].

I propose that we meet again on [insert date] to review your progress. Please let me know if this time is convenient to you. If you wish to respond to this formal warning letter please do so by contacting me on [insert phone number] or by replying in writing by [insert date].

Yours sincerely

[insert name]
[insert position]

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Step 5: Performance Management

If the action plan or performance agreement with regard to the problem has not resulted in significant improvement, then a second written warning may be required. This should be in a similar format to the first warning letter, and once again if a meeting is held with the employee (and if they elect it, their support person) then a record should be kept of that meeting. The employee should be informed that further indiscretions or lack of improvement could result in their termination.

If appropriate, the employer may choose to give a final warning letter. Please contact LPA before you do so. Unless the employer is a Small Business Employer as defined in the Fair Work Act 2009 (see the Small Business Fair Dismissal Code), employees should receive at least 3 written warnings (including the final warning) before being terminated. As with other warning letters, the employee needs to read and understand the letter. If possible, it is recommended that the employer ask the employee to sign and return a copy of the warning letter however they are not under law required to do so. A suggested format is provided below.

[Print on your business letterhead]

[Date]

Private and confidential

[Insert employee's full name]

[Insert employee's residential address]

Dear [insert name]

Final warning letter

I am writing to you about your [performance/conduct] during your employment with [insert company/partnership/sole trader name and the trading name of business] (the employer).

On [insert date] you attended a meeting with [insert name of others at the meeting]. At this meeting you were advised that your [performance/conduct] has been unsatisfactory. You were issued with a formal warning letter dated [insert date], which stated that if your [performance/conduct] did not improve your employment may be terminated.

At our meeting on [insert date], your [performance/conduct] was again reviewed and you were advised that improvement had not been achieved to the level required by the employer. You were provided with a second warning letter dated [insert date] [remove this sentence if you are going straight from a first to a final warning letter].

As I advised at our meeting on [insert date], your performance has not improved and continues to be unsatisfactory.

This is a final warning letter. If significant improvement in your [performance/conduct] is not achieved by [insert date] your employment may be terminated. To reiterate, our expectation is that you [insert details of expected outcomes].

I propose that we meet again on [insert date] to review your progress. If you wish to respond to this final warning letter please do so by contacting me on [insert phone number] or by replying in writing by [insert date].

Yours sincerely

[insert name]

[insert position]

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Step 6: Termination of Employment

If the issues cannot be resolved after the employee has had a reasonable opportunity to rectify the issues that have been identified and discussed, the employer may terminate the employee's employment. Notice of termination must be written, must specify the date of termination (which cannot be before the day the notice is given) and must state the reason for the employee's termination. The written notice should specify the period of notice given (or payment in lieu thereof) which should at least meet the National Employment Standards (NES) and the date that the employment will end. The employer should also check the employment contract to see if a period of notice is specified in that agreement that is greater than that provided in the NES. If it is, then the greater amount of notice must be given as a matter of contract law.

In accordance with the provisions of the NES, the amount of notice will be based on the employee's continuous service as follows:

- not more than 1 year – 1 week notice;
- more than 1 year but less than 3 years – 2 weeks' notice;
- more than 3 years but less than 5 years – 3 weeks' notice; or
- more than 5 years – 4 weeks' notice.

Employees over 45 years old who have completed at least 2 years of continuous service with the employer are entitled to an additional week's notice. An employer can make payment in lieu of notice, which should be based on the **full rate of pay** for hours the employee would have worked, including penalty rates, bonuses etc. during the period of notice. Notice is not required if the employee is being terminated for serious misconduct (ie. the employer has a reasonable belief that there has been some fraud, theft or assault).

Casual employees are not treated any differently from permanent employees unless they are engaged on an irregular and non-systematic basis. If a casual employee had an expectation that work would be available then they cannot be terminated without due process. Casual employees who are regularly employed for a specific number of shifts (or even 1 shift) per week and who have a continuing expectation that such work will be provided will have to be treated as though they are a weekly employee. Therefore, casual employees will need to go through a disciplinary procedure process should you wish to terminate their services. They cannot just be left off the roster.

The employer should organise a meeting with the employee, and the employee should be informed in advance that they are entitled to bring a support person to the meeting. In the meeting the employee should be given the notice of termination letter and the reasons for their termination. They should also be given an opportunity to ask questions. It is important that the information in the letter of termination is explained clearly and to ensure that the employee understands. The employer should retain a copy of the letter of termination for their records.

[Print on your business letterhead]

[Date]

Private and confidential

[Insert employee's full name]

[Insert employee's residential address]

Dear [insert name]

Termination of your employment

I am writing to you about the termination of your employment with [insert company/partnership/sole trader name and the trading name of business].

On [insert date] you met with [insert name of others at the meeting]. In that meeting, you were advised that [insert advice given to employee regarding improvement of performance or conduct, for example any deadlines for improvement, new targets set etc]. You were issued with a formal [warning/counselling] letter on [insert date].

On [insert date] you had a second meeting with [insert names of other people at the meeting] and you were advised that your [performance/conduct] had not improved to the level required. You were issued with a second [warning/counselling] letter on [insert date].

You also attended a meeting with [insert name of others at the meeting] on [insert date]. In that meeting you were issued with a final [warning/counselling] letter. This letter indicated that your employment may be terminated if your [performance/conduct] did not improve by [insert date].

[I/We] consider that your [performance/conduct] is still unsatisfactory and have decided to terminate your employment for the following reasons:

- [Insert reasons relating to performance or conduct]

[Option A (use this option if you want the person to work their notice period):

Based on your length of service, your notice period is [insert number] weeks. Therefore your employment will end on [insert future date to cover all of the weeks you need to give notice].

[Option B (use this option if you want the person to be paid in lieu of notice):

Your employment will end immediately. Based on your length of service, your notice period is [insert number] weeks. In lieu of receiving that notice, you will be paid the sum of \$[insert amount].

You will also be paid your accrued entitlements and outstanding remuneration, including superannuation, up to and including your last day of employment.

Yours sincerely

[Insert name]

[Insert position]

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Conclusion

Despite following a clear and thorough disciplinary procedure, a terminated employee may nonetheless chose to submit a complaint or claim against the employer such as unfair dismissal or discrimination. The documenting of meetings and the performance management process as well as the warning letters will assist an employer to prove that the dismissal was fair and not harsh, unjust or unreasonable. It is important to set achievable goals for the employee and to monitor their performance closely and provide them with feedback. If a complaint or claim for unfair dismissal or discrimination is made against you, please contact LPA for advice.