



Managing Poor Performance  
and Misconduct  
A Handbook for Employers

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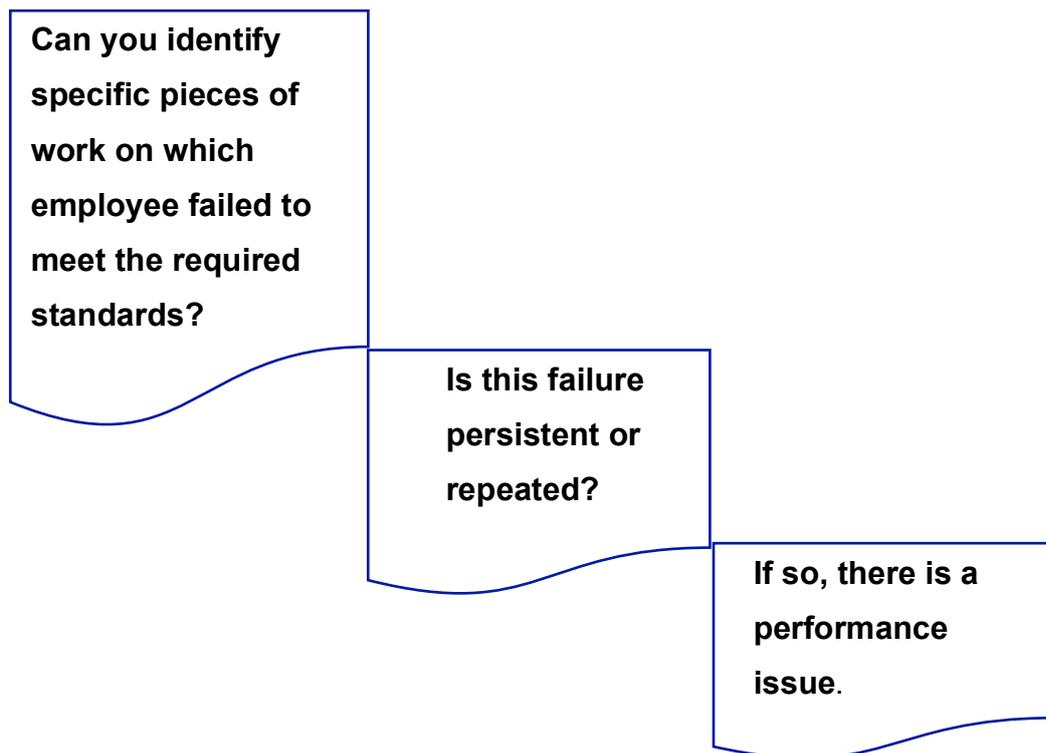
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# MANAGING POOR PERFORMANCE AND MISCONDUCT: A HANDBOOK FOR EMPLOYERS

## What is poor performance?

Poor performance is a consistent failure on the part of an employee to complete their work to the required standard. It requires managers to look at the quality of the work being done by the employee. It could involve failing to reach work targets, producing inaccurate or sloppy work, or failing to meet deadlines.



## What is misconduct?

Misconduct is deliberate or reckless misbehaviour by the employee. It requires managers to look at the behaviour of the employee. It could involve an employee breaching the staff Code of Conduct, failing to follow a reasonable direction, being dishonest or bullying other employees.

## How should I plan for performance and misconduct issues?

It is essential that employers have a sound performance and conduct management strategy in place before any performance or misconduct issues arise. Employers must have a suite of policies and procedures available to staff and employees, and should integrate performance and conduct management responsibilities into the position descriptions of human resources managers and team leaders.

The sorts of policies that should be in place include:

### a) A disciplinary policy.

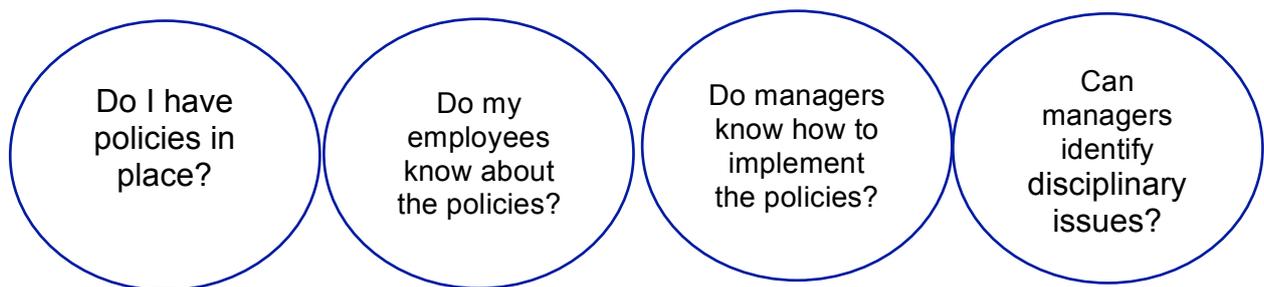
A disciplinary policy governs the way in which performance and misconduct issues are handled by the employer. It lets employees know where they stand, and provides a valuable guide to human resources managers and team leaders. A draft policy is included in this booklet.

### b) A workplace investigation policy.

A workplace investigation policy outlines the way in which investigations of gross misconduct will be carried out.

### c) A grievance policy

A grievance policy outlines the process through which employees can complain about the misconduct of others. It provides a framework for the quick and meaningful resolution of such disputes at the workplace level.



## Dealing with misconduct

### How should I deal with minor performance and misconduct issues?

Minor performance or misconduct issues should be dealt with by way of informal counselling. This involves an informal discussion about the matter between a manager and an employee.

The manager should outline his or her concerns about the employee's performance, and the employee should be given an opportunity to respond. You will work together to reach a mutually agreed pathway to better performance and conduct.

Such a mutually agreed pathway requires commitments to be made on both sides. The employee should commit to try to meet specific outcomes or to adopt specific practices to improve his or her performance or conduct. The manager should provide the employee with support and guidance to help reach these outcomes.

### **How should I deal with more serious performance and misconduct issues?**

More serious performance or misconduct issues should be dealt with by way of formal counselling. This involves a formal discussion about a disciplinary matter between the employee and the manager.

The employee should be provided with a written notice of the formal counselling. It should state:

- (a) that the employee is required to attend a formal counselling meeting;
- (b) the date and location of the meeting;
- (c) the names and positions of any people who will be attending the meeting;
- (d) that the employee is entitled to bring a support person if they wish;
- (e) a brief outline of the reason for the meeting; and
- (f) a brief outline of the process that will be adopted at the meeting.

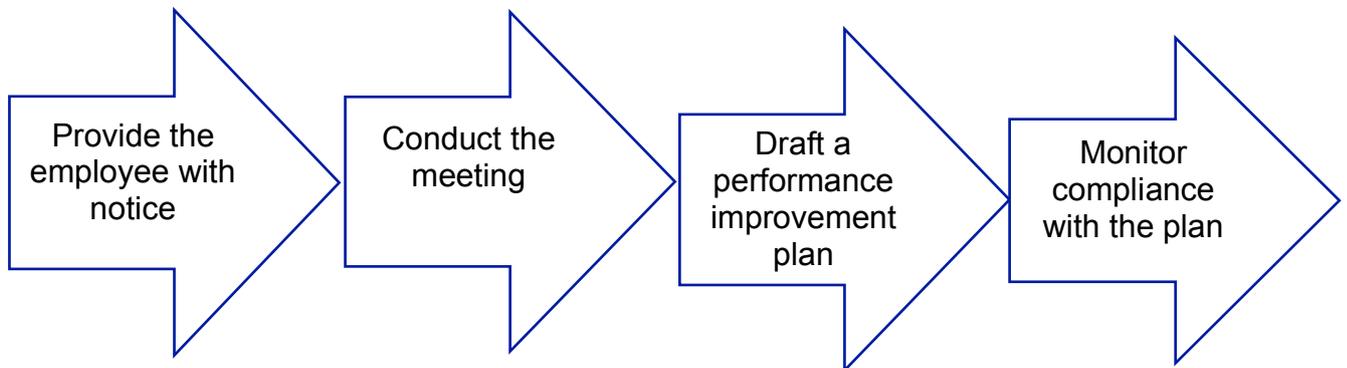
At the meeting, the manager should outline his or her concerns about the conduct or performance of the employee. The employee should be given a reasonable opportunity to respond.

At the conclusion of the meeting, the manager should issue the employee with a formal performance or conduct improvement plan. This should be signed by the employee. The plan should specify:

- (a) goals that the employee is required to meet;
- (b) the time frame in which the goals need to be met;
- (c) that the employee will be required to report to the manager on his or her progress towards the goals;
- (d) The potential consequences of not complying with the plan;

- (e) the date and time at which those reports are to be made; and
- (f) the form in which those reports are to be made.

You may also be issue a formal warning to the employee. This warning should be given in writing and recorded in the employee's file.



### **What if a performance improvement plan is not complied with?**

If a performance improvement plan is not complied with, the employee should be issued with a final formal warning and a written notice requiring them to attend a final formal counselling discussion. A further performance improvement plan should be issued.

If this performance improvement plan is not complied with, you will be in a position to either demote the employee or terminate his or her employment with notice.

### **How should I deal with gross misconduct?**

The employment contract of an employee who is found to have engaged in gross misconduct can be terminated summarily. This means that no notice needs to be given or paid, although accrued entitlements like annual and long service leave will need to be paid.

Gross misconduct could include illegal or unlawful behaviour, behaviour that creates a serious risk to the health and safety of colleagues and clients, and the harassment of colleagues and clients.

If you suspect that an employee has engaged in gross misconduct, you must commence a formal workplace investigation. The employee in question should be stood down without pay while the investigation takes place.

The investigation may be undertaken by the human resources manager, but should be conducted by an external person. That person should be provided with a document specifying the investigation's terms of reference.

The employee should be provided with a written notice specifying:

- (a) that he or she is being stood down;
- (b) that he or she is being subject to a workplace investigation;
- (c) the time frame of the investigation and the name and position of the investigator;
- (d) the alleged conduct which has given rise to the investigation;
- (e) the time at which the employee will be given an opportunity to respond.

The investigator will publish a confidential final report. If the investigator finds on the balance of probabilities that the employee did engage in gross misconduct, the employer may decide to terminate the employee's contract may be terminated summarily.



**No termination before an investigation**

### **What should I keep in mind when establishing or conducting a workplace investigation into gross misconduct?**

Workplace investigations should be fair and reasonable, and should be conducted in a manner that accords procedural fairness to the employee. Whilst employers in the private sector are not legally required to accord procedural fairness, a failure to do so could result in an unfair dismissal claim being upheld.

To this end, it is important to keep in mind five key principles laid out below when carrying out a workplace investigation into suspected gross misconduct.

**a. The decision maker cannot conduct the investigation**

It is important to ensure that the investigator is an independent person who will have no part in making the final decision on the outcome of the investigation. This enhances the legitimacy of the investigation, increases the likelihood that the employee will be treated fairly and impartially, and helps to guarantee procedural fairness. In order to ensure the independence of the investigator, the employer could contract a person from outside the organisation.

**b. Confidentiality must be maintained**

Workplace investigations into alleged gross misconduct often require employers to compile confidential information. It is important that this information is not disclosed to other employees or to third parties. Confidentiality can be maintained by requiring employees who are interviewed as part of the investigation to read and sign a confidentiality agreement, and by ensuring that the investigator is a person who is removed from the day to day operations of the employer.

**c. A communications plan must be set up**

Workplace investigations require investigators to communicate to a number of stakeholders. The investigator must provide the employee who is the subject of the investigation with a clear statement as to the nature of and reasons for the investigation, and all of the evidence that has been raised against him or her. The investigator must also make sure that other participants in the investigation are aware of and understand their confidentiality obligations. A good way to ensure that no details slip through the cracks is for a comprehensive plan to be developed.

**d. Observe legal standards of proof**

When determining whether the evidence proves that the employee engaged in gross misconduct, the decision maker should make its decision on the 'balance of probabilities'. This means that the evidence must satisfy the investigator that the gross misconduct 'more probably than not' occurred. It is not necessary for the decision maker to be satisfied 'beyond reasonable doubt'.

The *Briginshaw* doctrine should be applied where the alleged misconduct is particularly serious, such as if it involves criminal activity. In these circumstances, decision makers should be wary of relying on inexact or unclear evidence to reach a decision.

**e. Remember your reporting obligations**

It is important to keep in mind that instances of gross misconduct by employees may engage mandatory reporting obligations for organisations dealing with children or disabled persons. Some may require employers to inform the police about the misconduct.

**What should I do when employees are performing well?**

Positive performance reviews should be undertaken on an annual or biannual basis, each employee completing a self-evaluation form. The form should prompt employees to reflect on their performance, and to set some goals and priorities for the short, medium and long term.

Employees should then discuss their self-assessment with their supervising manager on a confidential basis. The meeting should conclude with the setting of a number of mutually agreed upon goals and objectives for the employee to work towards with the assistance and support of the supervising manager.

# DRAFT DISCIPLINARY POLICY

## **What is this policy?**

This policy sets out the way in which we will deal with all disciplinary matters. It ensures that disciplinary matters will be handled fairly and consistently. It helps us to comply with the letter and spirit of our legal obligations.

This policy is not a contract. It does not create any legal rights or obligations in addition to those contained in your contract of employment and the relevant legislation.

We may amend this policy at any time when we think that it is appropriate to do so. We will send you an update copy of the policy if we do.

## **What are disciplinary matters?**

Disciplinary matters tend to fall into one of two categories. These are:

### 1. Underperformance

Underperformance matters arise when an employee consistently fails to perform their role to the required standard. Examples of underperformance include:

- (a) Failing to meet position description requirements or agreed work targets;
- (b) Frequently being late for work without a good reason;
- (c) Frequently being absent from work without good reason;
- (d) Consistently failing to meet deadlines;
- (e) Unsatisfactory behaviour towards other people; and
- (f) Producing substantially inaccurate or incorrect work.

### 2. Misconduct

Misconduct matters arise when an employee does something with a wrongful intention.

Examples of conduct matters include:

- (a) Being dishonest;
- (b) Failing to comply with our policies and procedures, including the Code of Conduct;
- (c) Neglecting to perform duties or failing to follow a reasonable direction;
- (d) Obstructing the work of others; and
- (e) Demonstrating unprofessional behaviours.

### **What will we do if a disciplinary matter arises?**

If a disciplinary matter arises, we will seek to manage the situation in a way that gives you the best opportunity to improve your performance or conduct in a timely manner.

The course that we will take will depend on the seriousness of the matter and all of the relevant circumstances surrounding it. Generally, we will try to resolve the matter through the following process:

#### **1. *Informal counselling***

Informal counselling is an informal discussion about a disciplinary matter between you and your manager. It will be used for minor matters, or as a starting point for more serious matters.

Your manager will outline his or her concerns about your performance, and you will be given an opportunity to respond. You will work together to reach a mutually agreed pathway to better performance and conduct. This may involve setting performance goals, and providing you with support. A record will be kept of the discussion.

Your performance or conduct will be monitored in light of the mutually agreed pathway. If you meet the required level of performance or conduct, a second counselling discussion will not take place.

If, however, you do not meet the required the required level of performance or conduct, further counselling discussion may take place.

### **2. Formal counselling**

Formal counselling is a formal discussion about a disciplinary matter between you and your manager. It will be used as a starting point for more serious matters, or if informal counselling has not achieved an appropriate result.

You will be provided with a written notice of the meeting by the Human Resources Manager. The notice will say that you will be allowed to bring a support person if you would like to. The Human Resources Manager may also be present at the meeting, as may a note taker.

During the discussion, your manager will outline his or her concerns about your performance or conduct. You will be given an opportunity to respond to these concerns. Your manager will listen to your response and take these into account.

At the conclusion of the meeting, the manager will formulate a performance or conduct improvement plan. This is a formal plan which specifies objectives which you must meet, outlines the support services which will be available to you to help you meet these objectives, and states the consequences of failing to meet the objectives. It will set a reasonable timeframe within which you must meet the relevant objectives. You will be required to report regularly to your manager on your progress with the plan.

You may also be issued with a formal warning. This warning will be given to you in writing and will be recorded in your employee file.

If you do not meet the specified objectives within a reasonable period of time, your manager may give you a final formal warning. This warning will be given to you in writing and will be recorded in your employee file. You will be required to attend a final formal counselling discussion, which will take the

same form as the first formal counselling discussion. You will be issued with a further performance or conduct improvement plan.

If you do not meet the objectives specified in the further performance or conduct improvement plan, we may take disciplinary action to remedy the situation. Such action could include demoting you or terminating your employment with notice.

### **3. Summary dismissal**

Summary dismissal involves the termination of your employment without notice. It may occur in cases of serious or gross misconduct.

Such serious or gross misconduct could include:

1. Conduct that causes a serious risk to the health and safety of others;
2. Unlawful or illegal conduct, such as theft, fraud, assault or property damage;
3. Refusing to follow lawful and reasonable instructions;
4. Discriminating against or harassing your colleagues or our clients; and
5. Being severely intoxicated at work.

If we suspect that you have engaged in serious misconduct, we will commence a formal workplace investigation. This may be conducted by the Human Resources Manager or an external investigator.

You will be provided with notice of the investigation. It will inform you of the serious misconduct that you have been accused of, and the time frame of the investigation. You will be stood down while the investigation takes place. You will be given an opportunity to participate in the investigation and to put your case to the investigator.

If the investigation concludes that you engaged in serious or gross misconduct, we will summarily terminate your employment.

### **Can I appeal?**

If you wish to complain about, or appeal against, a formal disciplinary decision, you can contact our Grievance Officer.

