MANAGING UNDERPERFORMANCE

How to reduce the risk of legal disputes over performance issues in your workplace and handle underperforming employees lawfully

Charles Power
Partner, Holding Redlich Lawyers
Managing underperformance comes with legal risks because Australian laws protect employees from unfair and unreasonable disciplinary action.

This means that your employees have legal rights that allow them to challenge the way they are treated in relation to performance issues.

This guide outlines how you can manage employees in a way that will minimise your legal risks as an employer.

Use the information in this guide to:

- understand the legal risks involved in managing underperformance;
- develop a legally effective performance management process; and
- put other relevant policies and procedures in place to minimise your legal risk when managing underperforming employees.

CHARLES POWER LLB BEc (Hons) (Monash)
Partner, Holding Redlich Lawyers
Accredited Workplace Relations Specialist

Charles Power is a Partner in the workplace relations department of Holding Redlich in Melbourne. He has practised in employment and industrial relations since 1992. Charles has a strong practice representing employers in all aspects of employment and industrial law, and is accredited by the Law Institute of Victoria as a workplace relations specialist. He is a member of the advisory board to the Centre for Employment and Labour Relations Law, the University of Melbourne and the Australian Human Resources Institute.
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CHAPTER 1
UNDERSTANDING UNDERPERFORMANCE

OVERVIEW
To effectively and legally manage an employee’s performance, you must understand:

- what underperformance is (see below); and
- the difference between underperformance and misconduct (see below).

UNDERSTANDING UNDERPERFORMANCE

Definition: Underperformance
Underperformance is an employee’s lack of capacity or competence to perform the job properly.

Examples of underperformance include failing to:

- meet sales targets;
- properly communicate to customers or employees;
- meet deadlines;
- take sufficient care with work, resulting in many mistakes;
- perform required tasks to an acceptable standard; and
- complete required paperwork.

Important: Underperformance isn’t a one-off instance of error; it is a consistent pattern of failing to meet performance standards.

HOW IS UNDERPERFORMANCE DIFFERENT TO MISCONDUCT?

Definition: Misconduct
Misconduct means unacceptable behaviour by an employee in the workplace that is not directly related to work performance.
Misconduct usually involves deliberate or intentional behaviour in contravention of a particular standard of conduct or behaviour in the workplace, such as:

- sexual harassment;
- providing false medical certificates;
- consistent absenteeism;
- abusive comments to work colleagues;
- stealing company money; or
- being intoxicated at work.

**Tip:** Misconduct is more severe than underperformance. Underperformance will require you to undertake performance management, whereas misconduct will usually result in disciplinary action, e.g. a disciplinary meeting, final warning or dismissal.

See page 6 for how to develop a performance management process.

**Caution:** Never treat underperformance as misconduct.
CHAPTER 2
PREVENTING UNDERPERFORMANCE

OVERVIEW
Steps you can take to minimise the risk of employees underperforming, include:

- giving your employees position descriptions (see below);
- using probationary periods when employing someone new (see below); and
- educating your employees in your policies and procedures (see page 4).

POSITION DESCRIPTIONS

Definition: Position Description
A position description is a document outlining the key duties, responsibilities and competencies that a role requires.

If you clearly explain the duties, responsibilities and key competencies of a role at the outset of employment, it can help a new employee to understand their role and make it more likely they will meet the requirements of the role.

Important: A position description provides a point of reference when you are managing an employee’s underperformance. If an employee knows what they have to do in a job, steps taken by you to make that happen are less likely to give rise to workplace bullying or workers’ compensation claims.

PROBATIONARY PERIODS

Employment contracts will often provide for a probationary period.

Definition: Probationary Period
A probationary period refers to an initial period of service during which the employer and the employee can determine whether ongoing employment will be suitable.
A probationary period provides you with an opportunity to assess an employee’s suitability for a role and makes it clear to the employee that their work performance will be under review and they are not guaranteed ongoing employment.

Probationary periods are commonly for terms of 3, 6, or even 12 months. **Important:** Except for unfair dismissal rights, probationary employees have the same rights and entitlements as non-probationary employees. This means they are entitled to all the employment conditions under the *Fair Work Act 2009 (Cth)* (FW Act), including paid annual leave and personal/carer’s leave, and minimum notice periods.

**Important:** An employee must serve a minimum employment period before they have access to unfair dismissal rights under the FW Act. This is 6 or 12 months if the employer employs fewer than 15 employees. Therefore, if you have a 6-month probationary period, you can let that employee go during the probationary period without facing unfair dismissal risk.

See page 5 for an end of probationary period checklist.

**POLICIES AND PROCEDURES**

**Definition: Policy**

*A policy is the documented principles, objectives, obligations and commitments that guide decision-making within your business.*

**Definition: Procedure**

*Procedures are the documented processes that guide practices in your business. They set out step-by-step instructions on how a job or task should be conducted.*

It is your responsibility to ensure that your workers are trained and competent in your policies and procedures.

**Example**

*Bethlehem Steel employees are required to use a piece of machinery that can be hazardous if operated incorrectly. Bethlehem Steel therefore has a procedure that stipulates how this machine is to be used to ensure it is safe. John uses the machine incorrectly – not in accordance with the procedure. As John was never properly trained in the procedure, his underperformance cannot be held to be his fault.*
END OF PROBATIONARY PERIOD CHECKLIST

To be completed before the end of the staff member’s probationary period.

Employee’s name:  
Job title & team:  
Manager’s name:  
End date of probation period:  

<table>
<thead>
<tr>
<th>Assessment of skill or attribute</th>
<th>Yes</th>
<th>No</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Has the employee demonstrated the required knowledge and skills to perform the job well?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the employee applied those skills in a competent and efficient manner? Has the employee developed positive, cooperative working relationships with their colleagues?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the employee’s attendance been regular, reliable and punctual?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Do you believe the employee will be able to handle untested tasks? (e.g. requirements of the job that the new employee has not completed yet, such as annual reporting)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Will you recommend confirmation of ongoing employment?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Recommended by:  
[Insert name and title]  
Date  

Recommendation approved by:  
[Insert name and title]  
Date

This document is a starting point to help you develop a document appropriate to your individual situation. It will need to be tailored to your specific circumstances in light of any applicable laws that apply in your jurisdiction. You should seek your own advice about the necessary amendments. © Portner Press 2019
CHAPTER 3

PERFORMANCE MANAGING AN UNDERPERFORMING EMPLOYEE

OVERVIEW

If you have an underperforming employee, you should undertake a performance management process (see below). This includes:

- defining the performance issues (see page 7);
- identifying and isolating external contributing factors (see page 7);
- identifying and isolating protected attributes and activities (see page 9);
- undertaking informal counselling (see page 11);
- developing a performance improvement plan (see page 12); and
- reviewing the employee’s progress (see page 16).

WHAT IS PERFORMANCE MANAGEMENT?

Definition: Performance Management

Performance management is the process of evaluating and managing an employee’s performance to ensure it is consistent with your business’s objectives, and with the specific goals and standards of that employee.

Your performance management process should be spelled out in a performance management procedure to ensure you apply the process fairly and consistently.

When your business has a proper process in place for dealing with underperformance, you are better able to ensure managers follow processes that will protect your business from legal action.
Tip: See page 12 for a checklist template you can use as a ‘cheat sheet’ to guide your line managers and supervisors in the basic principles of performance management.

Important: Ensure that your performance management procedure is not available to other employees, as employees may argue that you are promising to follow this procedure as a term of their employment.

DEFINING PERFORMANCE ISSUES

If you have an underperforming employee, you must identify the specific performance issues in terms that can be objectively proven. To do this:

- describe what the employee is doing or not doing that is causing the issue, and provide examples; and
- determine whether the issue amounts to misconduct or underperformance (see page 1). This will indicate the appropriate response to the behaviour.

Next, critically analyse why the employee’s behaviour is an issue. Consider the relationship between the problematic behaviour and the workplace, including whether the employee’s behaviour:

- affects your business, including potential and actual harm caused by the behaviour;
- has breached a workplace policy; and
- measures up against:
  - the key job requirements;
  - the terms and conditions of employment; and
  - the employee’s capacity to perform the job.

Tip: Refer to the employee’s position description (see page 3) when considering these points.

IDENTIFYING AND ISOLATING EXTERNAL CONTRIBUTING FACTORS

Identify possible reasons for the underperformance (in consultation with the employee if possible) and take these into account when developing the appropriate response.
The following table sets out some examples of external contributing factors and possible responses that would isolate and help manage these factors:

<table>
<thead>
<tr>
<th>External contributing factor</th>
<th>Possible response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Workplace bullying</td>
<td>Refer the employee to the workplace policy that enables workplace bullying complaints to be resolved.</td>
</tr>
<tr>
<td>Poor mental health</td>
<td>Seek relevant medical information about how this affects the employee’s work and consider reasonable measures to reduce this impact.</td>
</tr>
<tr>
<td>Lack of training, supervision, support and resources</td>
<td>Consult with the employee about areas in which more support is required.</td>
</tr>
<tr>
<td>Poorly constructed role</td>
<td>Redesign the role in consultation with the employee to minimise role conflict and ambiguity.</td>
</tr>
<tr>
<td>Unreasonable expectations of clients or customers</td>
<td>Consult with the employee about measures to manage customer demands.</td>
</tr>
<tr>
<td>High job demands</td>
<td>Consult with the employee about changes that could be made to avoid the employee becoming overworked. Consider flexible work arrangements.</td>
</tr>
<tr>
<td>Poor communication</td>
<td>Train line managers and supervisors to communicate more effectively.</td>
</tr>
<tr>
<td>A strict and directive management style, which does not allow workers to be involved in decision-making</td>
<td>Train management in a more effective management style.</td>
</tr>
<tr>
<td>Job insecurity and organisational change</td>
<td>Engage in consultation and information sharing regarding threats to ongoing employment. Make an Employee Assistance Program (EAP) available (see page 9).</td>
</tr>
<tr>
<td>Unreasonable performance measures or timeframes</td>
<td>Direct disgruntled employees to raise a grievance under the applicable policy.</td>
</tr>
<tr>
<td></td>
<td>Train managers and supervisors regarding effective performance management.</td>
</tr>
<tr>
<td>Work group hostility</td>
<td>Encourage formal and informal reporting of anti-social behaviours under the workplace anti-bullying policy.</td>
</tr>
<tr>
<td>Inappropriate and informal delegation of responsibilities to employees</td>
<td>Redesign the job in conjunction with the employee.</td>
</tr>
</tbody>
</table>
Definition: Employee Assistance Program

An Employee Assistance Program (EAP) is a confidential and free personal counselling service funded by the employer. EAPs provide professional counsellors to help employees and their immediate family members who may be affected by personal or work-related problems.

IDENTIFYING AND ISOLATING PROTECTED ATTRIBUTES AND ACTIVITIES

The general protections under the Fair Work Act 2009 (Cth) (FW Act) and anti-discrimination laws protect employees from being subject to adverse action for:

- possessing certain attributes, e.g. being ill or injured; or
- undertaking certain activities, e.g. participating in industrial activities and raising employment queries or complaints.

The following table provides:

- examples of performance issues;
- related general protections or anti-discrimination claims you may be exposed to; and
- possible approaches you could take to mitigate your legal risk.

<table>
<thead>
<tr>
<th>Performance issue</th>
<th>Protection</th>
<th>Possible approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee is taking excessive sick leave and not complying with workplace policy regarding notification of sick leave absences.</td>
<td>You cannot take adverse action against an employee because they are exercising their lawful right to take sick leave (subject to certain conditions).</td>
<td>Counsel the employee about the importance of complying with sick leave requirements. Ask for medical information to ensure that the excessive sick leave does not have a work-related cause.</td>
</tr>
<tr>
<td>Employee raises a safety issue with a supervisor in a rude manner.</td>
<td>You cannot take adverse action against an employee because they raise a complaint or query about their employment.</td>
<td>Investigate the complaint and query in the same way as you would if it was raised in the proper manner. Counsel the employee about the importance of raising complaints or queries in a proper manner.</td>
</tr>
</tbody>
</table>
### General protections (cont...)

<table>
<thead>
<tr>
<th>Performance issue</th>
<th>Protection</th>
<th>Possible approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee is underperforming because of poor mental health.</td>
<td>You cannot take adverse action against an employee because of their mental impairment.</td>
<td>Ensure you can show that the inherent requirements of the employee’s position (see page 10) require the person to perform at the requisite level. Consult with the employee and obtain relevant medical information to explore options to reduce the impact of their poor mental health on performance.</td>
</tr>
<tr>
<td>Employee is underperforming because of a flexible work arrangement.</td>
<td>You cannot take adverse action against an employee because they are exercising their statutory right to request a flexible work arrangement.</td>
<td>Review the arrangement in conjunction with the employee to determine whether there are reasonable business grounds to change or cease the flexible work arrangement.</td>
</tr>
</tbody>
</table>

### Anti-discrimination protections

<table>
<thead>
<tr>
<th>Performance issue</th>
<th>Protection</th>
<th>Possible approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee is always unprepared for regular 9am Monday team meetings because she has to drop off her children at child care.</td>
<td>You cannot subject an employee to less favourable treatment because of parental responsibilities.</td>
<td>Discuss options with the employee that might allow her to start late and finish late, as well as participate in team discussions.</td>
</tr>
<tr>
<td>Shift worker refuses to work on Sundays due to Christian beliefs.</td>
<td>You cannot subject an employee to less favourable treatment because of religious beliefs.</td>
<td>Consult with employees to see if you can reasonably work the roster around the employee’s needs.</td>
</tr>
<tr>
<td>Employee in a wheelchair cannot attend weekly meetings with a client, as they are located in the upstairs conference room.</td>
<td>You cannot subject an employee to less favourable treatment because of a disability or impairment.</td>
<td>Consider installing a ramp so that the employee can access the conference room, or move the meeting to an accessible location.</td>
</tr>
</tbody>
</table>

**Definition: Inherent Requirements**

*Inherent requirements of a role are the essential activities that a job involves. Inherent requirements do not involve peripheral or non-essential tasks. If an inherent requirement of a role is removed, the position would be a different role.*
UNDEARTAKING INFORMAL COUNSELLING FOR POOR PERFORMANCE

If an employee is underperforming, you may need to counsel them.

**Definition: Counselling**

*Counselling is the process of reviewing an employee's performance and conduct with a view to clarifying expectations and assisting them to meet specified objectives.*

The goal of counselling is to help the employee recognise a performance problem and develop effective solutions to it.

**Important:** A dismissal for poor performance will be easy to challenge if you cannot show that you tried to help the employee improve.

Counselling should occur before any disciplinary action is taken, including issuing written warnings.

Informal counselling is generally preferable to formal counselling by an external party in cases where the underperformance issues are not serious, but may not be appropriate if the performance issue is serious, having regard to:

- the degree to which the employee does not meet key job requirements; and
- the adverse impact on your business.

**Tip:** If the performance issue is serious, have the employee undertake a performance improvement plan (see page 12).

Informal counselling is less confronting than formal counselling and is usually undertaken by the employee’s line manager or supervisor.

**Caution:** Keep in mind that informal counselling may attract significant legal risk since it is undertaken by managers who may not have the training to effectively and safely communicate to employees about underperformance.

**Tip:** Before counselling an employee about their performance, investigate the performance issue so that you can be sure of the facts. You may need to discuss the issue with managers, witnesses and other employees.
CHAPTER 3 PERFORMANCE MANAGING AN UNDERPERFORMING EMPLOYEE

DEVELOPING A PERFORMANCE IMPROVEMENT PLAN

If counselling does not solve the performance issue, conduct a formal meeting with the employee to discuss the issue and develop a performance improvement plan.

**Definition: Performance Improvement Plan**

A performance improvement plan is a document that outlines the performance goals an employer expects its employee to achieve.

The proposal to enter into a formal performance improvement process is a serious step in relation to an employee’s employment. It poses a serious threat to the employee’s future with the business.

**CHECKLIST: HOW TO CONDUCT A PERFORMANCE IMPROVEMENT PLAN MEETING**

A performance improvement plan meeting should be attended by at least two representatives of your business, one of whom should be the employee’s direct supervisor or manager.

Use the following checklist to conduct the meeting:

- Explain the performance issue to the employee.
- Provide examples of the performance issue.
- Explain why it is unacceptable with reference to:
  - the requirements of the employee’s role; and
  - the impact on the business.
- Explain that the purpose of the meeting is to develop a plan to rectify the underperformance.
- Invite the employee to respond to the performance issue (if appropriate, prompt the employee as to possible causes or explanations).
- Consider the employee’s explanation.
- Identify actions to address possible causes.
- Indicate the proposed period for the performance improvement plan, e.g., you may allocate 1, 3 or 6 months, depending on what is a fair and reasonable period in which to address underperformance, and review progress under the plan, such as via weekly or fortnightly meetings with a supervisor. (To determine a reasonable period, think about how long it would take a reasonable person with reasonable support to address the underperformance.)
Indicate that a proposed plan will be drawn up and provided to the employee.

See page 36 for a template letter to notify an employee of a meeting to develop a performance improvement plan; page 21 for a template performance improvement plan; and page 22 for a template letter to accompany a proposed performance improvement plan.

**MUST THE EMPLOYEE HAVE A SUPPORT PERSON PRESENT AT PERFORMANCE IMPROVEMENT PLAN MEETINGS?**

You are not obliged to offer an employee the opportunity to have a support person during meetings about underperformance, even if the meeting is about potential dismissal.

However, if an employee asks to have a support person present in a discussion relating to dismissal, if you unreasonably refuse, this will count against you in any unfair dismissal claim.

**Case Law**

In *Laker v Bendigo and Adelaide Bank Limited* (2010), an employee facing dismissal for underperformance requested a meeting be rescheduled to allow for the attendance of a union representative. The employer refused to reschedule the meeting. It was held that the request for adjournment was not an unreasonable burden on the employer. It was found that the dismissal was unfair because the refusal to reschedule the meeting was unreasonable.

**Important:** A support person does not act as an advocate, i.e. a support person does not present or defend a case on behalf of the employee.

If the employee insists on being represented in the meeting by a lawyer, industrial consultant, or union delegate or official, you should verify whether this representation is permitted under the applicable enterprise agreement or established workplace policy or procedure.

If it is not permitted, you can indicate that it is your preference to deal directly with the employee. You can justify this on the need to verify that the employee understands the gravity of the matter.

Some businesses have strict rules prohibiting advocates and representatives speaking on behalf of employees during performance discussions.

**Tip:** If this leads to the discussion not taking place at all, it may be preferable to depart from the policy in the individual case.
IMPLEMENTING THE PERFORMANCE IMPROVEMENT PLAN

Once you have prepared the performance improvement plan, provide it to the employee, and give them time to consider it and raise any queries or issues.

If necessary, amend the plan in consultation with the employee.

**Important:** Do not negotiate the plan with the employee. Listen and consider any issues the employee raises, but it is your right as an employer to give directions on how work should be improved, provided the directions are lawful and reasonable.

Once the plan is finalised, the employee should sign it to acknowledge that they understand:

- the contents of the plan; and
- that if they fail to make satisfactory progress under the plan at any time, their ongoing employment will be in jeopardy.

You may still implement the plan, even if the employee refuses to sign it. However, if the employee refuses to sign because they do not accept there is a performance issue, the likelihood of the plan succeeding is low.

**Tip:** In this situation, you may consider an agreed separation (see page 17).

Ensure that the plan and accompanying correspondence is retained on the employee’s personnel records.

**Important:** The performance improvement plan must be fair and reasonable (see below).

**CHECKLIST: HOW TO ENSURE THE PERFORMANCE IMPROVEMENT PLAN IS FAIR AND REASONABLE**

Use this checklist to ensure that your performance improvement plan is fair and reasonable:

- Develop the plan after consulting with the employee.
- Allow the employee to have a support person present during the consultation if they request one.
- Clearly set out the goals to be achieved.
- Clearly set out how achievement of the goals will be demonstrated and measured.
Give the employee sufficient time and support to achieve the goals set out in the plan.

Include a warning of the disciplinary consequences, including possible dismissal, if the employee does not achieve the goals.

Ensure the plan is genuine. The Fair Work Commission (FWC) is very good at identifying ‘tick and flick’ processes and performance management situations where dismissal is a predetermined outcome.

Case Law

In Joshi v Panasonic Australia Pty Ltd (2010), the FWC ruled that a performance improvement process suggested the employer was engaging in a ‘mechanical process’ and was not genuinely affording the employee an opportunity to respond to the warnings or affect the outcome of the meeting. The employee was dismissed for poor performance following a process in which the employer had pre-prepared a script regarding the warnings to be given before meetings took place. The dismissal was ruled unfair.

WHAT IF THE EMPLOYEE GOES ON INDEFINITE PERSONAL LEAVE IN RESPONSE TO THE REQUEST TO ATTEND THE MEETING?

If, in response to a request for a meeting to discuss a performance improvement plan, the employee goes on personal (sick) leave, you should approach the situation having regard to the following principles:

- Assume the employee’s claim to be unfit for work is genuine and, if the opportunity arises, express concern for the employee’s wellbeing;
- If the leave extends for an unusually long period, e.g. 3 or 4 days, make contact with the employee and invite them to discuss ways the business might facilitate their return to work;
- Don’t resume performance management until the employee is certified by a medical practitioner as fit for work;
- Do not dismiss the employee until it is lawful to do so – if you dismiss the employee for unsatisfactory performance under these circumstances, you will be exposed to unfair dismissal claims (assuming the employee can access FW Act unfair dismissal laws) because you have not implemented a fair and reasonable process regarding the performance issues;
suggest that the employee obtain and provide you with a medical report from their doctor or, alternatively, ask the employee for permission to talk to their doctor. If you choose the latter option, you should:

- make a record of the conversation and give a copy to the employee; and
- have the employee provide their consent in writing, as doctors often require a signed medical authority (consent form) from their patients before they will release any medical reports or discuss a patient’s condition;

- if the employee refuses to cooperate with your request for medical details, inform them that they must provide the information within a reasonable period;

- if the information the employee provides is incomplete, out of date, unclear or ambiguous, don’t be afraid to request more information from the employee or their doctor (with the employee’s consent); and

- if the employee’s doctor cannot clarify the situation, you can ask the employee to undergo an examination by an independent doctor paid for by the business. However, if the employee once again refuses to cooperate, inform them that they must provide the information within a reasonable period. If they do not, you will have no option but to act in relation to their performance issue without considering the impact of their health.

Once you have undertaken these steps, you will be able to discipline or dismiss the employee lawfully if the absenteeism continues to an unacceptable degree.

**REVIEWING THE EMPLOYEE’S PROGRESS**

Conduct regular meetings, e.g. weekly or fortnightly, to review how the employee is progressing in their performance improvement plan.

The aim should be to give the employee constructive feedback on their efforts to address their performance issue.

The employee’s direct manager or supervisor usually undertakes these meetings.

**Tip:** Use the template on page 23 to create a record of a review meeting.
DISCIPLINING AN EMPLOYEE FOR POOR PERFORMANCE

If the employee’s performance does not improve to a satisfactory level, it may be appropriate to discipline them or issue a final warning. Clearly indicate in the final warning letter that their employment will be terminated if their performance does not improve to the satisfaction of management.

See page 24 for a final warning letter template.

Disciplinary measures you may take include dismissal and suspension.

Remember: Ensure you counsel employees and give them time to improve before seeking to discipline them—unless the conduct is severe.

WHEN MIGHT YOU CONSIDER AN AGREED SEPARATION?

If you believe that the employee has limited prospects for remaining with the business beyond the short-term, you may wish to consider an agreed separation instead of proceeding with a performance improvement plan.

Definition: Agreed Separation

An agreed separation occurs when an employee resigns in return for a statement of service and an ex gratia termination payment, i.e. a monetary payment over and above what the employee would be entitled to if you dismissed them.

Caution: You should only make this agreement if the employee agrees to release you, as the employer, from all claims and liability relating to the cessation of employment.

Important: Never indicate that the employee will be dismissed unless they agree to such terms and always give the employee reasonable time to consider your proposal.

Example

“We believe you are falling significantly short of our performance expectations for your role. We intend to put in place a performance improvement plan. This will involve us setting out the areas in which you need to improve to the required standard. We will provide you with the necessary support that is reasonable to meet these standards and will have regular meetings to review your progress. If your progress is unsatisfactory, your ongoing employment will be in jeopardy.
"We are committed to doing what we can to allow you to turn this situation around. However, we are not sure that you share that commitment.

"If that is the case, we are willing to discuss a voluntary separation. This is entirely up to you. If you want to have that discussion, we are prepared to offer you a termination payment equal to 8 weeks’ salary in return for your resignation and full release. We will agree not to make any statement that might disparage you and will keep the circumstances of your departure confidential.

"We want to emphasise that it is entirely up to you whether you want to leave on these terms. If you don’t wish to take this course, we will proceed down the formal performance management route and, with goodwill and effort on both sides, you will hopefully turn the situation around.

"Let us know what you wish to do once you have considered our offer."

If the employee expresses interest in an agreed separation, provide them with a letter to formally propose the agreement and express its terms. See page 26 for a template.
**CHECKLIST FOR MANAGING UNDERPERFORMANCE**

Use this checklist to guide you when managing an underperforming employee:

<table>
<thead>
<tr>
<th>Actions</th>
<th>Completed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carefully define the performance issue, making sure that it can be objectively proven (don’t exaggerate – remember that you may have to prove the issue in a court or tribunal).</td>
<td></td>
</tr>
<tr>
<td>Recognise, and make reasonable allowance for, the contributing factors that are not related to the employee’s conduct or capacity, e.g. market downturn, the employee’s poor health, etc.</td>
<td></td>
</tr>
<tr>
<td>Warn the employee that there is a performance issue, and that it may result in their dismissal if it is not rectified.</td>
<td></td>
</tr>
<tr>
<td>If the underperforming employee accuses you of bullying, discrimination or some other unlawful behaviour in the course of your performance management process, refer them to the applicable complaints procedure and do not get involved in resolving the complaint (except as required by the person handling it).</td>
<td></td>
</tr>
<tr>
<td>Always give an employee a fair, reasonable and genuine opportunity to fix their underperformance before considering dismissal. You may wish to undertake informal counselling or, if that doesn’t help, implement a performance improvement plan.</td>
<td></td>
</tr>
</tbody>
</table>
| If you believe there are grounds to dismiss the employee because they have not satisfactorily overcome the performance issue, ask the employee to attend a meeting about their employment and invite them to bring a support person. At the meeting:  
  • explain why you consider there are grounds for dismissal, referring to evidence as required; and  
  • give the employee an opportunity to respond – consider this response when determining whether to dismiss the employee. | |
| If a decision to dismiss is made, issue a written letter citing the performance-related reasons. Because poor work performance will rarely justify summary dismissal, you will generally need to give the employee:  
  • a notice period; or  
  • payment in lieu of notice. | |
LETTER NOTIFYING AN EMPLOYEE OF A PERFORMANCE IMPROVEMENT PLAN DEVELOPMENT MEETING

[Insert date]

Dear [insert employee’s name],

I would like to meet with you to discuss aspects of your work performance and the measures that can be implemented to improve the standard of your work.

The meeting will take place at [insert time] on [insert date] at [insert venue].

Yours sincerely,

[Insert name and position title]
## PERFORMANCE IMPROVEMENT PLAN

<table>
<thead>
<tr>
<th>Field</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of organisation</td>
<td></td>
</tr>
<tr>
<td>Name of employee</td>
<td></td>
</tr>
<tr>
<td>Employee’s role</td>
<td></td>
</tr>
<tr>
<td>Employee’s workgroup/section/department</td>
<td></td>
</tr>
<tr>
<td>Date and time of initial performance meeting</td>
<td></td>
</tr>
<tr>
<td>Performance issue</td>
<td></td>
</tr>
<tr>
<td>Examples</td>
<td></td>
</tr>
<tr>
<td>Job requirement/s not being met</td>
<td></td>
</tr>
<tr>
<td>Potential/actual impact on business</td>
<td></td>
</tr>
<tr>
<td>Agreed actions to support improved work performance</td>
<td></td>
</tr>
<tr>
<td>Process for monitoring the employee’s progress in improving work performance under this plan</td>
<td></td>
</tr>
<tr>
<td>Employee’s comments in relation to performance issue and plan, as conveyed during meeting</td>
<td></td>
</tr>
<tr>
<td>Effective commencement date of plan</td>
<td></td>
</tr>
<tr>
<td>Date plan issued to employee</td>
<td></td>
</tr>
</tbody>
</table>

I [insert employee’s name] acknowledge and understand the contents of this plan; and acknowledge and understand that my employer has informed me that if I do not make satisfactory progress in improving my work performance under this plan at any time, my ongoing employment will be in jeopardy.

Signed by employee: ___________________________ Date of signing: ___________________________

Date plan returned by employee to supervisor or HR: ___________________________
LETTER TO ACCOMPANY PROPOSED PERFORMANCE IMPROVEMENT PLAN

[Insert date]

Dear [Insert employee’s name],

Following our discussion on [insert date] about your unsatisfactory work performance, I attach the company’s proposed performance improvement plan.

If you wish to raise any queries or points of clarification about the plan, please let me know as soon as possible.

The company asks you to sign and return the plan to acknowledge your receipt and understanding of its contents and some of the important matters communicated at our meeting.

Regardless of whether we receive the plan from you, signed or unsigned, the company will commence the plan after [insert number of days] working days.

Yours sincerely,

[Insert name and position title]
# RECORD OF PERFORMANCE IMPROVEMENT PLAN REVIEW MEETING

<table>
<thead>
<tr>
<th>Performance review meeting number</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of employee</td>
<td></td>
</tr>
<tr>
<td>Date and time of meeting</td>
<td></td>
</tr>
<tr>
<td>Attendees</td>
<td></td>
</tr>
<tr>
<td>Date performance review commenced</td>
<td></td>
</tr>
<tr>
<td>Performance issues (as described in original plan)</td>
<td></td>
</tr>
<tr>
<td>Additional issues arising since the plan was written</td>
<td></td>
</tr>
<tr>
<td>Feedback on performance improvement</td>
<td></td>
</tr>
<tr>
<td>Employee’s comments</td>
<td></td>
</tr>
<tr>
<td>Agreed actions</td>
<td></td>
</tr>
<tr>
<td>Employer</td>
<td></td>
</tr>
<tr>
<td>Employee</td>
<td></td>
</tr>
<tr>
<td>Date of next meeting</td>
<td></td>
</tr>
<tr>
<td>Signed</td>
<td></td>
</tr>
<tr>
<td>[Insert name of employee’s supervisor]</td>
<td></td>
</tr>
<tr>
<td>[Insert name of employee]</td>
<td></td>
</tr>
</tbody>
</table>

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FINAL WARNING LETTER

[Insert date]

Dear [insert employee’s name],

Re: Final warning

This letter confirms details of our discussions during a meeting that took place in [insert location] on [insert date] with [insert name of any witnesses] also present. During our discussion, you were advised of my concerns regarding [insert brief summary of performance issue]. You will recall that I had previously raised this issue verbally with you on [insert date of verbal warning] and in writing on [insert date].

To date, I have not been satisfied with your work performance. I do not believe that your work is of a standard I expect of a person at your level within [insert business name] (the Company). In particular, the specific issues of concern raised during our meetings include:

• [insert description of specific performance issues]

During our meeting you were unable to offer a satisfactory explanation for why these performance issues remain unresolved, despite our discussion, other than to state that [insert any relevant employee comments].

[Insert name of employee], the performance issues listed above are not acceptable to the Company and you must resolve these issues. We agreed that you would implement the following actions so these issues may be resolved:

• [insert list of actions]

To assist you, we have agreed that [insert list of any additional support offered to help improve performance, e.g. training].

The Company is committed to taking all reasonable measures to ensure satisfactory conduct and performance by all its employees at work. If there is any reason or explanation for your failure to resolve these matters to the Company’s satisfaction, please do not hesitate to contact me so that we can discuss this.
However, you should appreciate that failure to resolve these matters to date jeopardises your continuing employment with the Company. In the interest of your future career with the Company, I strongly recommend you endeavour to address these issues without delay. Please be assured of continued commitment by the Company and myself in assisting you in every way possible.

We have agreed to meet again on [insert review date] to review your progress in this matter. Should you have any further questions regarding the issues outlined in this letter, please do not hesitate to let me know.

To acknowledge your agreement that this letter accurately summarises the details of our discussion, please sign the enclosed copy and return it to me.

A copy of this letter will be placed on your file.

Yours sincerely,

[Insert name and position title]
CHAPTER 3  PERFORMANCE MANAGING AN UNDERPERFORMING EMPLOYEE

TEMPLATE: LETTER TO PROPOSE AN AGREED SEPARATION

LETTER TO PROPOSE AN AGREED SEPARATION

[Insert date]

Dear [insert employee’s name]

Separation

I confirm that [insert business name] (the Employer) offers you the following terms for separation:

1. Your employment with the Employer will end on [insert termination of employment date] by reason of your [insert reason, e.g. resignation/mutual separation].
2. The Employer will pay you $[gross total], less applicable tax deductions, which sum includes an amount in lieu of notice and an ex gratia payment.
3. The Employer will pay you $[gross total], less applicable tax deductions, in satisfaction of your unpaid employment entitlements accruing to your termination date, being the sum of unpaid salary and [insert number of hours] hours of unused annual leave.
4. The Employer will provide you with a statement of service and will agree to take best endeavours to ensure that none of its employees, officers or agents disparage you to any employee of the Employer or any third party (it is not the Employer’s policy to provide references, although you are free to approach individual employees for personal references).
5. You agree:

   (a) to hereby release and forever discharge the Employer, or any officer, employee or agent of the Employer, or any controlled entity or related body corporate of the Employer, in respect of any and all present and future claims, actions or liability (including any claim for costs) arising out of or in relation to your employment with the Employer, except for claims, actions or liabilities arising under workers’ compensation legislation, statutory superannuation or to enforce this agreement;
   (b) not to disparage the Employer, or any officer, employee or agent of the Employer, or any controlled entity or related body corporate of the Employer, to any person;
   (c) as a fundamental term of this agreement, not to disclose the terms of this letter, or the circumstances relating to its production, to any person except for the purposes of obtaining confidential legal, tax or accounting advice or except where required by law or to enforce this agreement.

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6. You will return to me prior to the termination date all property and other things in your possession that belong to the Employer or any of its clients, including any document containing or recording information confidential to the Employer and/or its clients.

7. You acknowledge that you understand the terms of this letter and have had the opportunity to seek appropriate independent advice prior to agreeing to the terms.

8. You acknowledge that none of the Employer, its officers, employees or agents has made any representation, promise or inducement or has been party to any conduct material to you entering into this agreement other than those matters set out in this letter.

This letter does not constitute notice of termination of employment. Rather, it is only an offer made on behalf of the Employer to make an agreement with you on the terms contained in this letter.

If you wish to make an agreement with the Employer on the terms contained in this letter, please confirm your acceptance by signing and dating a copy of this letter where shown and returning the signed copy to me by [insert time] on [insert date].

Regardless of whether you agree to these terms, you must keep confidential the contents of this letter and any discussions relating to its production.

Yours sincerely,

……………………………………………………………………………………

[Insert name and title of person signing on behalf of the employer]

I understand and agree to the terms recorded above.

SIGNED............................ DATE .............

[insert employee’s name]
CHAPTER 4

DISMISSING UNDERPERFORMING EMPLOYEES

OVERVIEW

If an employee fails to improve under their performance improvement plan, you may need to consider dismissal. You will need to take certain steps to ensure that you dismiss the employee fairly, including:

- meeting with the employee to discuss the potential dismissal (see below);
- carefully considering the decision to dismiss (see page 29); and
- implementing the dismissal if appropriate (see page 32).

Special rules apply for small businesses with fewer than 15 employees, as per the Small Business Fair Dismissal Code (see page 33).

MEETING WITH THE EMPLOYEE TO DISCUSS A POTENTIAL DISMISSAL

Important: If you are considering dismissing an employee because they have failed to meet the goals of their performance improvement plan, you need to be able to prove they have failed to improve.

You must:

- advise the employee that, due to these circumstances, you are considering dismissal; and
- ask the employee to meet with you to discuss the situation (see page 29).

Remember: Give the employee the option of having a support person present at this meeting.

See page 36 for a template you can use to notify the employee of the meeting.
CHECKLIST: WHAT TO DO IN A MEETING TO DISCUSS A POTENTIAL DISMISSAL

At the meeting, you should:

- Explain why you believe the performance plan’s goals are not being met.
- Refer to evidence to support your assertion.
- Indicate that you believe the failure to meet the goals in the performance improvement plan provides grounds for dismissal.
- Ask the employee to respond.
- Consider the employee’s response.

**Important:** If the employee raises significant mitigating factors, you may need to take time to investigate or consider these matters.

MAKING THE FINAL DECISION TO DISMISS

Following the meeting in which you have discussed the potential dismissal with the employee, you should make a final decision on whether to:

- dismiss the employee for unsatisfactory performance; or
- provide a further warning, counselling, training or other support.

To help minimise your legal risk when making the final decision to dismiss an employee, consider:

- who will make the final decision regarding dismissal (see below);
- whether dismissal is the most appropriate option (see page 30); and
- how you will prove the reason for dismissal (see page 31).

WHO WILL MAKE THE FINAL DECISION REGARDING DISMISSAL?

The person making the final decision to dismiss the employee will need to explain the reasons for dismissal if the dismissal is legally challenged.

The decision-maker needs to be able to prove they:

- have sufficient authority; and
- are impartial.
Important: A decision-maker should be free from bias or perception of bias such as cases involving allegations of bullying or other wrongdoing, or a person involved in investigating those allegations. This will lessen the likelihood of a claim that the dismissal was motivated by the fact of the complaint, which is one of the protections employees have under the general protections provisions in the *Fair Work Act 2009* (Cth) (FW Act) (see page 45).

Tip: The decision-making process should be recorded in an internal document (see page 31 for an example).

IS DISMISSAL APPROPRIATE?

When determining whether dismissal is appropriate, consider:

- the impact a dismissal would have on the employee, e.g. the ability to find alternative work; and
- how you have responded to similar employee underperformance in the past.

Case Law

In *Quinlivan v Norske Skog Paper Mills (Australia) Ltd* (2010), an employee at a paper mill was dismissed for repeatedly removing his safety goggles while cleaning a piece of machinery, in contravention of safe operating procedures. The employee, who had worked at the mill for 20 years, was a middle-aged man with poor job prospects and a young family to support.

Fair Work Australia (FWA) (now the Fair Work Commission (FWC)) reinstated him on the basis that his dismissal was harsh and failed to take his personal circumstances into account.

In *Fagan v Department of Human Services* (2012), a corrections officer dismissed for taking toilet paper to an inmate during lockdown in breach of the employer’s policy claimed that another employee was not dismissed for the same conduct in comparable circumstances. The FWC found that the conduct of the two employees was comparable and the dismissal was unfair.

Remember: Even if you dismiss an employee for a justifiable reason and adopt a fair and reasonable process, the dismissal may still be unfair if the dismissal is harsh.
To prove that there was no option but to dismiss and, as such, the dismissal was not harsh, you should be able to:

- show that you considered alternative options, such as giving a further warning or extending the timeframe of the performance improvement plan; and
- justify why you did not think any action other than dismissal was appropriate.

**Caution:** You will rarely be able to justify summary dismissal for underperformance. Therefore, in nearly all cases you will need to recognise the applicable notice period when you dismiss the employee, e.g. in the FW Act, enterprise agreement or employment contract.

**Definition: Summary Dismissal**

A summary dismissal is an instant or ‘on-the-spot’ dismissal. It is usually only appropriate to dismiss an employee summarily if they have engaged in serious misconduct.

**HOW WILL YOU PROVE THE REASON FOR DISMISSAL?**

Create an internal document recording the factors taken into account in making the decision to dismiss the employee.

**Example**

*From the HR Manager*

*To the CEO*

*Subject: Ongoing employment of Billy Bracks*

I refer to the performance improvement plan implemented in relation to Billy Bracks. Unfortunately, line management and I have concluded that the employee has failed to satisfactorily address the underperformance, despite being afforded a reasonable opportunity to do so.

We met with Billy and indicated that we considered there were grounds for dismissal on notice. Billy was given an opportunity to respond. Nothing in his response caused us to believe we should change our preliminary view that dismissal on notice was warranted.

Accordingly, we recommend you approve the decision that Billy Bracks be dismissed and paid in lieu of his notice entitlement.

I am available to discuss this matter with you should you wish to do so.
Ensure you keep this document with your records from the performance improvement plan.

You may be able to rely on the warning that is part of the performance improvement plan even after the plan has expired. This depends on:

- how long ago the plan expired;
- the seriousness of the performance issue, i.e. the extent to which the employee fails to meet the key job requirements and its adverse impact on the business; and
- the extent to which the warning corresponds with performance issues that were the subject of the plan.

IMPLEMENTING A DISMISSAL

Termination of employment must be brought about by a written notice. The notice can be delivered in person, by email or by post.

Caution: Termination of employment by text message will invariably be found to be unfair.

The date of dismissal must not be earlier than the date the employee receives the notice of the termination of employment.

Remember: In most cases, dismissal for underperformance will involve a payment in lieu of notice. You should check whether the employment contract provides for this.

See page 40 for a template letter of dismissal with payment in lieu of notice.

If you are required to give notice, you can either:

- ask the employee to work during the notice period; or
- place the employee on gardening leave.

Definition: Gardening Leave

Gardening leave occurs when an employee, who has resigned or been given notice of dismissal, is required to serve all or part of their notice period without performing any of their normal duties in the workplace.

Gardening leave allows you time to transition client relationships from the employee or to protect confidential information from being used by the new employer.
**Important:** Check the employment contract to find out if you have the right to place the employee on gardening leave.

See page 35 for a template letter you can use to place an employee on gardening leave.

**Tip:** Use a staff exit form to check that all termination matters are finalised (see page 38 for a template).

You may also wish to issue the employee with a statement of service.

**Definition: Statement of Service**

*A statement of service states the dates of the employee’s employment and the position/s they held.*

See page 37 for a statement of service template.

**THE SMALL BUSINESS FAIR DISMISSAL CODE**

In determining whether a dismissal is unfair, the FWC will take into account the likelihood that either or both of the following factors affected the way you dismissed the employee:

- the size of the business; and
- the absence of dedicated human resources (HR) management specialists or expertise in the business.

For the purposes of the FW Act, you are a small business employer if the total number of your employees and those of associated entities is fewer than 15 (not counting casual employees who are not employed by you or the associated entity on a regular and systematic basis).

**Caution:** Even if you have a small business with no HR expertise, if you dismiss an employee for underperformance without warning, the FWC will rarely find the dismissal to be fair.

A small business employer can defend an unfair dismissal claim by showing that the dismissal was in accordance with the Small Business Fair Dismissal Code.
If you are a small business employer and you are dismissing an employee for underperformance, use this checklist to ensure that you comply with the Small Business Fair Dismissal Code:

- You have clearly warned the employee (either verbally or in writing) that they were not doing the job properly and would have to improve their conduct or performance, or otherwise be dismissed.
- You have provided the employee with a reasonable amount of time to improve their performance or conduct.
- You have offered to provide the employee with any training or opportunity to develop their skills.
- The employee has not subsequently improved their performance.
- Before you dismiss the employee, you have told the employee the reason for the dismissal and have given them an opportunity to respond.

Tip: Download the full Small Business Fair Dismissal Code checklist from the FWO website.
LETTER PLACING AN EMPLOYEE ON GARDENING LEAVE

[Insert date]

Dear [insert name of employee],

I refer to our discussion and confirm that your last day of employment by [insert business name] (the Company) is [insert termination of employment date].

Until then, you are not required to attend the workplace or perform your usual duties.

Please ensure that during your notice period you are available to be contacted during business hours.

You must not have any communication with clients, staff or suppliers of the Company unless you first seek my approval. If you wish to attend the workplace for any matter, please contact me first.

For so long as you remain employed by the Company, you will continue to receive your remuneration and benefits. You will also be bound by your obligations as an employee of the Company, including your obligations not to misuse the Company’s confidential information and to ensure that you faithfully serve the Company’s best interests. Your obligation not to breach the confidentiality of the Company’s confidential information continues after your employment ends.

Prior to your last day of employment, you must return to me all items belonging to the Company, including:

[Insert list of items, e.g. staff uniform].

Yours sincerely,

[Insert name and position title]
LETTER NOTIFYING AN EMPLOYEE OF A MEETING TO DISCUSS POTENTIAL DISMISSAL

[Insert date]

Dear [insert name of employee],

I refer to the performance improvement plan that has been operating since [insert implementation date].

I wish to meet with you to discuss continuing concerns regarding your unsatisfactory performance, which I believe require a review of your ongoing employment.

The meeting will take place at [insert time] on [insert date] at [insert venue].

Attendees at the meeting on behalf of the company will be [insert name/s and title/s of attendees].

You may bring a support person to the meeting. If you wish to do so, please let us know who will be attending.

Yours sincerely,

[Insert name and position title]
STATEMENT OF SERVICE

[Insert date]

To whom it may concern,

[Insert business name and ABN] employed [insert employee’s name] between [insert commencement date of employment] and [insert last day of employment].

During this period of employment, [insert employee’s name] worked as follows:

<table>
<thead>
<tr>
<th>Period of employment</th>
<th>Position</th>
<th>Basis of engagement (full time/part time/casual)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td></td>
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</tbody>
</table>

[Insert employee name]’s employment ceased because of [insert reasons, e.g. resignation/redundancy/dismissal, etc.].

Yours sincerely,

[Insert name and position title]
### STAFF EXIT FORM

Name of employee: ________________________________

Termination of employment date: ________________________________

Division: ________________________________

Position: ________________________________

**NB:** To be completed without exception upon the employee’s services terminating.

#### Part A: Return of company property

<table>
<thead>
<tr>
<th>Item</th>
<th>Details</th>
<th>Cancelled</th>
<th>Destroyed</th>
<th>Signed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Company credit card</td>
<td>Card number:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company fuel card</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Item</th>
<th>Details</th>
<th>Returned</th>
<th>Condition</th>
<th>Signed</th>
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</thead>
<tbody>
<tr>
<td>Company car</td>
<td>Model:</td>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Reg. number:</td>
<td></td>
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<tr>
<td>Laptop</td>
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<tr>
<td>Printer</td>
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<td></td>
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<td></td>
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<tr>
<td>Mobile phone</td>
<td>Phone number:</td>
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<tr>
<td>Charger</td>
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<td>Calculator</td>
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<tr>
<td>Tools</td>
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</tbody>
</table>

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**Part B: Staff exit procedures**

<table>
<thead>
<tr>
<th>Description</th>
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<th>Signed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Computer access withdrawn</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Out-of-office notification set</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loans/advances/other debts repaid</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ongoing obligations confirmed in writing (e.g. confidentiality agreement)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Signature of employee

………………………………………………..

[Insert employee’s name]

Date:………………………………………………

Signature of employer

………………………………………………..

[Insert employer’s name]

Date:………………………………………………

---

This document is a starting point to help you develop a document appropriate to your individual situation. It will need to be tailored to your specific circumstances in light of any applicable laws that apply in your jurisdiction. You should seek your own advice about the necessary amendments. © Portner Press 2019
LETTER NOTIFYING OF DISMISSAL WITH PAYMENT IN LIEU OF NOTICE

[Insert date]

Dear [insert name of employee],

Re: Termination of employment

I refer to our discussion today and confirm that [insert business name] (the Company) is terminating your employment with immediate effect because of your failure to satisfactorily improve your work performance in line with the performance improvement plan implemented.

The Company will make a payment in the sum equivalent to [insert number of weeks] weeks’ pay in lieu of your notice entitlement.

Please return all items belonging to the Company. I remind you of your continuing obligations to the Company, including your obligation not to breach the confidentiality of information imparted to you by the Company on a confidential basis.

Yours sincerely,

[Insert name and position title]
CHAPTER 5
LEGAL RISKS ARISING FROM MANAGING UNDERPERFORMANCE

OVERVIEW
Managing underperformance incorrectly can result in legal action being taken against you, including:

- unfair dismissal claims (see below);
- general protections claims (see page 45);
- claims under anti-discrimination laws (see page 46);
- claims under the *Fair Work Act 2009 (Cth)* (FW Act) anti-bullying scheme (see page 46); and
- workers’ compensation claims (see page 49).

UNFAIR DISMISSAL CLAIMS

**Definition: Unfair Dismissal**

*Unfair dismissal occurs when an employee is dismissed harshly, unjustly or unreasonably.*

If you are a national system employer and you dismiss an employee for underperformance, they may be able to seek a remedy against you for unfair dismissal. This right is provided under Part 3.2 of the FW Act.

**Definition: National System Employer**

*A national system employer is an employer that is:*

- a constitutional corporation;
- the Commonwealth;
- a Commonwealth authority;
- a body corporate incorporated in a territory; or
- a person who carries on an activity (whether of a commercial, governmental or other nature) in a territory in Australia.
Definition: Remedy
A remedy is a rectification of wrongdoing or a form of compensation awarded to a successful claimant. A remedy will be ordered if the Fair Work Commission (FWC) decides, in the particular circumstances, that the dismissal of the employee was harsh, unjust or unreasonable.

CAN YOUR EMPLOYEES MAKE AN UNFAIR DISMISSAL CLAIM?
Use the following flowchart to determine whether the FW Act unfair dismissal laws cover an employee:

1. Are you a national system employer?
   - NO
   - YES

2. Is the employee’s annual remuneration more than $142,000 (2017–2018 figure)?
   - NO
   - YES

3. Does a modern award or enterprise agreement apply to the employment?
   - NO
   - YES

4. Has the employee served more than 6 months at the time of dismissal (or 1 year if a small business)?
   - NO
   - YES

5. Is dismissal on the grounds of genuine redundancy?
   - NO
   - YES
   This requires proof that the employee’s job was no longer required due to operational requirements, that redeployment was not reasonable and consultation obligations were complied with.

6. Was the termination of employment at the employer’s initiative?
   - NO
   - YES

FW Act unfair dismissal laws apply.

FW Act unfair dismissal laws do not apply.
WHEN CAN DISMISSAL FOR UNDERPERFORMANCE BE CHALLENGED?

Dismissal for unsatisfactory performance may be challenged under the FW Act unfair dismissal scheme on the following grounds:

- the reason for dismissal is not valid (see below);
- the employee was not afforded procedural fairness (see below); or
- the dismissal was harsh given the circumstances (see page 44).

Is there a valid reason for dismissal?

Important: If you do not have a valid reason for dismissing an employee, the dismissal will be unfair.

For a reason to be valid it must be:

- sound, e.g. if you dismiss an employee for failing to meet sales targets, the targets themselves must be reasonable;
- defensible, i.e. you must be able to prove the facts and circumstances surrounding the reason; and
- lawful, i.e. the reason must not be in contravention of discrimination or adverse action laws (see page 46).

WAS THE EMPLOYEE AFFORDED PROCEDURAL FAIRNESS?

A dismissal will be unfair if the dismissed employee was not afforded procedural fairness.

Definition: Procedural Fairness

Procedural fairness (sometimes referred to as natural justice) is when an employer gives an employee a fair and reasonable opportunity to respond to matters or evidence that the employer suggests justifies termination.

CHECKLIST: HOW TO ENSURE A PROCEDURALLY FAIR DISMISSAL

A dismissal will be procedurally fair if you do the following:

- Clearly warn the employee (either verbally or in writing) that they are not doing their job properly and will have to either improve their performance or face possible dismissal. (The number of warnings you give an employee before you dismiss them depends on what is reasonable in terms of giving the employee the opportunity to rectify the performance issue.)
Procedural fairness in dismissal processes is essential

- Give the employee the opportunity to develop the skills required to perform their job satisfactorily, e.g. offer them training and provide them with a reasonable amount of time to improve.

- If the employee still fails to improve, explain that you are contemplating dismissal and give them a final opportunity to respond.

- Allow the employee to bring a support person to any discussions concerning their potential dismissal. (However, the employee is not entitled to an advocate, i.e. someone to speak in their defence).

- Ensure that you, and any other decision-maker, are unbiased.

Remember: The old formula of giving three warnings is no longer applicable. If the unsatisfactory performance is sufficiently serious, e.g. consistently failing to meet reasonable deadlines, only one warning may be needed.

Caution: If you raise a performance issue with an employee and issue a warning but do not take reasonable and genuine steps to assist the employee to improve, and you dismiss that employee for underperformance, the dismissal could be challenged on the grounds of fairness.

IS THE DISMISSAL HARSH?

Remember: Even if you dismiss an employee for a valid reason and afford that employee procedural fairness, a dismissal may still be considered harsh, and therefore unfair.

A dismissal may be considered harsh because of:

- the broader context in which the alleged underperformance occurred, e.g. a history of tolerating the behaviour by the employer or inconsistent treatment of other employees guilty of the same behaviour; and

- the personal circumstances of the employee, e.g. length of service, the absence of any disciplinary history, and the harshness of the consequences of dismissal for the employee and their dependants.
Example

Adam is 65 years old and has worked for Prune Insurance for 35 years, beginning at an entry-level position and working his way up to a middle-management position. His senior manager, Eugene, has noticed Adam’s performance standards slipping over the past 6 months. Adam has been late on several occasions, was once caught sleeping at his desk, and made a miscalculation on a claim. Eugene loses patience and dismisses Adam.

Such a dismissal may be held to be unfair due to Adam’s long years of continued, unblemished service, and because this dismissal would place additional hardship on Adam as a worker nearing retirement age. Eugene’s punishment of dismissal could therefore be taken to be disproportionate to Adam’s misconduct.

GENERAL PROTECTIONS CLAIMS

Definition: General Protections

General protections are the legal protections provided under the FW Act for employees, employers and other members of the workforce (such as independent contractors, unions and employer associations). The protections apply to specific characteristics and activities.

A national system employer that warns or dismisses an employee for an underperformance issue that is related to an attribute or activity protected under the FW Act may face proceedings against them for contravention of a civil penalty provision. The employer may also be ordered to compensate or reinstate the employee.

Examples of protected attributes and activities include:

- the entitlement to the benefit of a workplace law or an industrial instrument, e.g. to take personal leave under the FW Act or to file a workers’ compensation claim;
- have an entitlement or exercise an entitlement to the benefit of an FWC order;
- temporary absence from work due to illness or injury;
- making a request for a flexible work arrangement; and
- making a complaint or inquiry in relation to employment.

See the table on page 10 for further examples of protected activities and attributes, and how you should approach them to minimise your legal risk when dealing with underperforming employees.
Caution: The general protections provisions apply to all national system employees and are increasingly being used by employees who cannot access unfair dismissal laws, e.g. casual employees and employees who haven’t served the minimum employment period.

DISCRIMINATION CLAIMS

If you warn or dismiss an employee for an underperformance issue that is related to an attribute or an activity protected under federal, state or territory anti-discrimination legislation, the employee may make a discrimination complaint against you. This can result in a court or tribunal ordering you to compensate the employee.

Attributes protected on a federal level, and in all states and territories, include:

- age;
- impairment;
- marital status;
- pregnancy;
- race; and
- gender.

Tip: Attributes vary depending on which legislation applies. Check the legislation in your state or territory for a full list of protected attributes applicable to your employees.

See the table on page 10 for examples of attributes protected under anti-discrimination legislation, plus information on how you can avoid discrimination complaints by underperforming employees.

BULLYING CLAIMS

If you are undergoing performance management with an employee, the employee may seek a remedy against you for workplace bullying under the FW Act anti-bullying scheme.

Under the anti-bullying scheme, any employee who reasonably believes they have been bullied at work may apply to the FWC for an order to stop the bullying.
The FWC will review the application and give all relevant parties an opportunity to be heard, before a decision is made on whether to assign the matter to a commission member for mediation or determination. The FWC may decide to make any order that it considers appropriate to stop the workplace bullying, including that you:

- review or comply with your anti-bullying policy;
- investigate the matter;
- relocate or transfer the bullied employee;
- provide support to the bullied employee; or
- undertake training in bullying and workplace behavioural standards.

**Tip:** Your capacity to defend an FW Act bullying claim depends on the extent to which you can show the performance management constituted reasonable management action.

**Definition: Reasonable Management Action**

Reasonable management action refers to performance management or a disciplinary process that is carried out fairly, transparently and justly.

Management action will not be bullying if:

- it is based on reasonable grounds; and
- it is carried out in a reasonable manner.

**Example**

Over the past 3 months, Heath has consistently submitted his fortnightly reports late. Heath’s manager discusses the issue with him and writes a plan that will help him improve his performance. The plan includes training in the relevant software and in time management.

Heath’s manager handled the performance issue in a reasonable manner. Had Heath’s manager approached Heath at his desk and loudly criticised his performance, the management action would have been unreasonable.
Tip: A significant proportion of workplace bullying complaints arise when managers or supervisors are dealing with employees about performance issues. To ensure these complaints do not derail reasonable and genuine performance management, you need an effective workplace bullying policy. This will allow bullying complaints to be quickly resolved. See below for a checklist of what to include in your bullying policy.

Establish clear and practical processes for employees to resolve grievances about employment matters and encourage employees who are aggrieved about performance management issues to access these procedures.

Tip: These grievance procedures should supplement policies and complaint resolution mechanisms dealing with workplace bullying, health and safety, and discrimination.

CHECKLIST: WHAT YOUR BULLYING POLICY SHOULD INCLUDE

Your workplace bullying policy should:

- Define bullying and provide examples of bullying behaviour.
- Clearly state, with examples, that reasonable management action is not bullying.
- State your commitment to preventing bullying.
- Set out the standards of appropriate behaviour.
- Describe a process to encourage reporting, including contact points.
- Outline the consequences for not complying with the policy.
- Include a complaints process that:
  - is written in plain English (and any other necessary language);
  - ensures the fair and independent resolution of complaints as quickly as possible;
  - ensures privacy and confidentiality;
  - allows workers to make a formal or informal complaint;

You must have a bullying policy
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- prevents the complainant from being victimised;
- sets out the chain-of-command responsibilities; and
- identifies external avenues if the grievance remains.

Be regularly reviewed and updated as required to ensure that its effectiveness is maintained.

**Important:** For a workplace bullying policy to be effective, all employees should be aware of the policy and the complaints process. This requires proper induction and refresher sessions. It also requires that the policy can be easily accessed by employees, e.g. on the intranet or on noticeboards.

**WORKERS’ COMPENSATION CLAIMS**

Employees are able to make a claim for mental injuries, including stress and anxiety. The claim will be unsuccessful if it was caused by management action taken on reasonable grounds and in a reasonable manner.

Examples of performance management that may be considered unreasonable include:

- poor process in addressing the issue (such as lack of information or failure to provide adequate notice of the issue before engaging in disciplinary action);
- failure to provide a support person; or
- any form of bullying behaviour or conduct that might be considered unreasonable.