

# 'Back to Basics' Employment Law Guide

## Chapter Four: Dealing with Issues



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This chapter is all about dealing with issues that arise during the employment relationship.

The issues that employers most commonly encounter are related to:

- Employees not performing their role to the standard required (poor performance); and
- Employee's behaviour not meeting the expected standard (misconduct or serious misconduct).

While there can be numerous other issues that may occur during the employment relationship, poor behaviour and performance are the issues that we see most on a day-to-day basis.

While some minor issues may be easily dealt with informally, such as by pulling the employee aside and saying that you don't want to see that sort of behaviour again, in many cases, a more formal process will be necessary. The main difference between an informal and formal process is that disciplinary outcomes can be issued at the end of a formal process, such as a written warning or termination, while informal discussions cannot be used or relied on in the same way.

We generally recommend a formal process where possible. Even if the conduct is relatively minor, a formal process shows that you take the issue seriously, and it means that the conduct can be relied on later if a similar issue arises. For that reason, the focus of this edition will be on conducting a fair and robust process.



# Managing misconduct

There are a range of behaviours that may be considered misconduct; from a breach of policy or procedure, repeated lateness, or behaving unprofessionally, to more serious issues such as workplace assault, harassment, theft or unsafe behaviour. Essentially, if an employer considers that an employee has behaved inappropriately at work, then a disciplinary process for misconduct or serious misconduct may be appropriate.

The difference between misconduct or serious misconduct can be fairly grey. However, serious misconduct is generally recognised as behaviour that is so serious that it destroys the relationship of trust and confidence, which is essential to the continued employment relationship.

However, if the employer is dealing with issues where the employee simply is not meeting the expected standards of their role, then that should be addressed via a process for poor performance (covered further below).

We outline the general steps that you will need to take as an employer to manage misconduct below.

If the nature of the allegations are serious, and you hold ongoing concerns about the employee remaining in the workplace while you investigate, you may want to consider suspending the employee on pay while the formal process is carried out.



## 1. Consider the issue

Think about what the issue is, and whether a formal process is required or whether it is something minor that could be dealt with informally. If you consider that there is good reason to start a formal process, continue to the next step.

## 2. Outline the allegations

This is a very important step of the process. You need to comprehensively outline the allegations in a letter to the employee.

The letter should carefully detail your concerns, and all relevant information to support the concerns should be provided with the letter. For example, if you have been told by someone about an incident, a statement from the person who gave you the information should be provided. Similarly, you should provide any written documentation that you are relying on.

## 3. Give the employee the letter

You should meet privately with the employee to give them the letter. You should make it clear that you do not expect a response to the allegations at this time, but that they will have an opportunity to provide their response to the concerns at the meeting set in the letter.

If you consider it appropriate to suspend, at the same time as giving the employee the letter, it is important that you propose that they be suspended due to the serious nature of the concerns and hear their feedback on that proposal before reaching a final view.

## 4. Formal meeting

At the formal meeting, you should go through each of the allegations set out in the letter and hear the employee's response. It is important that no decisions are made at the meeting.

## 5. Consider the employee's response

You should then go away and consider the employee's response, and the appropriate outcome. If you were satisfied with the employee's explanation to the allegations, it may be that the process is ended with no disciplinary outcome. However, if you do not consider that the employee provided a reasonable explanation, you will need to consider whether the conduct was so serious to warrant termination for serious misconduct, or if a written warning would be appropriate.

If you consider that you need further information, you will need to gather additional information from the relevant sources, and then have a further round of consultation with the employee.

## 6. Decision

Once you have considered the employee's response and the appropriate outcome, you can put your decision in writing and deliver that to the employee. Justification should be provided around how that decision was reached. In some cases, providing the employee with a preliminary decision for comment prior to reaching a final decision will be appropriate.

Deciding whether conduct amounts to misconduct or serious misconduct can be fairly grey. However, serious misconduct is generally recognised as behaviour that is so serious that it destroys the relationship of trust and confidence, which is essential to the continued employment relationship.

# Managing performance

If the employee is not meeting the expected standards of their role, you may need to consider ways to lift their performance.

When it comes to managing poor performance, the process is similar to that for misconduct, but, more involved. As you will see, a common theme with all employment processes is providing employees with relevant information and seeking their feedback before reaching any decisions.

Again, as a first step, you may wish to consider ways to informally lift the employee's performance before commencing a formal process. If a formal process is considered appropriate, we recommend following the below steps.

## 1. Outline your concerns

As with a disciplinary process, the first step is to clearly outline your concerns with the employee's performance, supported by examples where possible.

At the same time, you should prepare a draft Performance Improvement Plan (**PIP**) which clearly outlines the areas where the employee is not meeting expectations, what the expectations are, what they need to do to meet expectations, and the timeframe for improvement.

This first step can require considerable preparation and thought, however, it is important to get this right from the outset.

Beyond outlining the concerns, the letter should also, for example, set a meeting time to hear the employee's feedback, inform the employee of potential consequences, and advise the employee of the entitlement to bring a support person or representative to the meeting and to seek legal advice.

## 2. Give the employee the letter

You should meet privately with the employee to give them the letter. You should make it clear that you do not expect a response at this time, but that they will have the opportunity to provide their response at the meeting set in the letter.

## 3. Meet with the employee

You should meet with the employee to hear their response to the performance issues and proposed PIP. You should also consider and discuss with the employee whether they think any additional support or training could be provided to assist them.

## 4. Decision

If, after meeting with the employee, you still consider it necessary to implement the proposed PIP, this decision should be confirmed in writing and the PIP finalised. It may be that some tweaks need to be made to the proposed PIP in light of the employee's response before finalising.

## 5. Give the employee time to improve

Generally, you should allow the employee a reasonable time to improve after implementing the PIP. During this time, you should set regular meetings (at least weekly) with the employee to discuss their performance. These meetings also allow the employee the opportunity to ask questions or for extra support where necessary.

If any training or additional support was previously identified, then this should also occur during the review period.

## 6. Meet with the employee to review progress

You should meet with the employee at the end of the review period to discuss their performance over the course of the period.

## 7. Consider next steps.

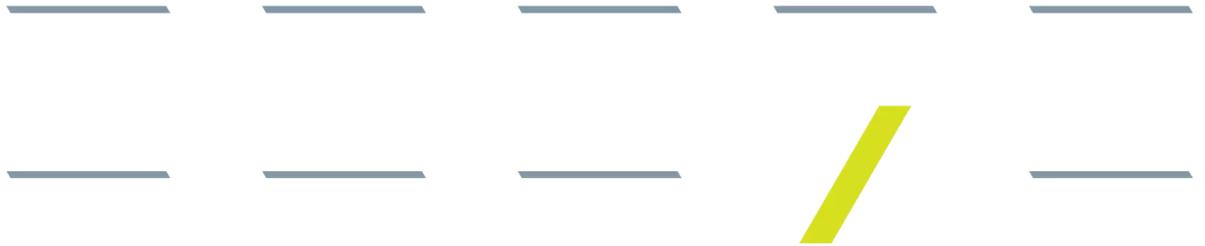
After meeting with the employee, you should consider whether the agreed performance standards have been met. If so, you can bring the process to an end. If not, you can move to issue a first written warning for poor

performance, and then set a further review period to improve. You will then repeat the performance management process until the performance standards are met.

Your decision should be confirmed in writing and discussed with the employee.

## 8. Termination

If you have repeated the PIP process several times, you could look to issue a final written warning, and failing improvement, terminate the employee's employment on notice for poor performance.



# Summary

As you can see, there are multiple steps to follow in a formal process, and it can take some time to complete. However, it is important that the correct process is followed, otherwise you risk a personal grievance being raised on procedural grounds.

For your convenience we have created flowcharts setting out the two processes which can be found over the next two pages.

In any case, as formal processes can have negative impacts on an employee's employment, they come with risks. Therefore, we always recommend seeking legal advice tailored to your situation before embarking on any process.



# Disciplinary process for misconduct



Formally outline the allegations



Provide the letter to the employee



Consider whether suspension is appropriate



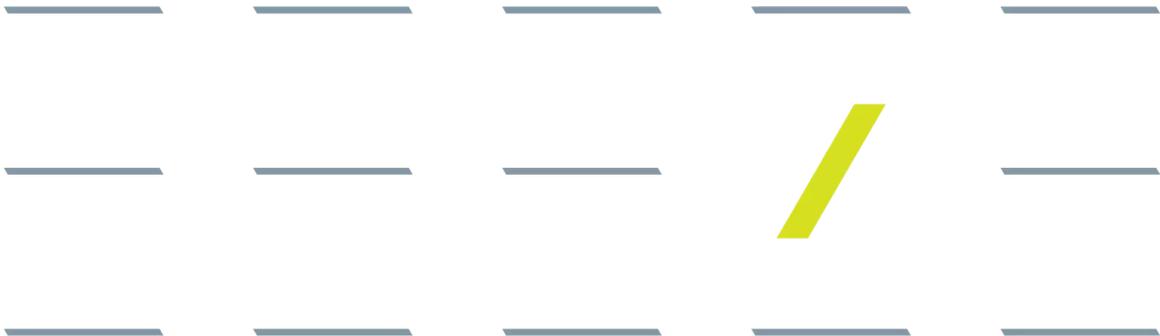
Meet with the employee to hear their response



Consider the employee's response



Issue final decision in writing



# Poor performance process



Formally outline the performance concerns and proposed PIP



Provide the letter and PIP to the employee



Meet with the employee to hear their response



Consider the employee's response



Issue decision in writing



Allow the employee time to improve and provide any additional support



Meet with the employee to hear their response



Consider whether the employee's performance has improved



If improved, discontinue process. If not, issue a warning and set a further review period