

Sharrock Pitman Legal

# Managing the Dismissal of an Employee

*An employer's best practice handbook*

Deciding to dismiss an employee can be a tough time for everyone involved. Our guide is here to assist employers with a best practice approach.

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A decorative background on the left side of the page consists of several interlocking puzzle pieces. Each piece features a stylized human figure icon in shades of blue and white. The icons represent various professions, including a woman with long hair, a man in a suit, and a man in a uniform. The puzzle pieces are arranged in a grid-like pattern, with some pieces being more prominent than others.

# About this guide

The dismissal of an employee is often not an easy or pleasant experience. However, sometimes it is unavoidable. This guide is intended to assist busy employers to manage the dismissal process well, to ensure that all parties are treated with respect and dignity and to minimise the prospects of any successful claim being brought against you as a result.

**Disclaimer:**

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## Contents

- 1. Seek Legal Advice ..... 3
- 2. Ask yourself the question – Why? ..... 3
- 3. Dealing with the Under-Performer ..... 4
- 4. Dealing with Serious Misconduct ..... 6
- 5. Dealing with Redundancies ..... 7
- 6. A few last pointers... ..... 7

# Best Practice for Managing a Dismissal

## Seek legal advice

It is best to be proactive and to seek legal advice before doing anything. There are many pitfalls and consequential headaches that can be avoided by seeking advice at an early stage. Seeking strategic and practical legal advice can assist you in identifying:

1. whether you have appropriate grounds on which to dismiss your employee;
2. what the risks of dismissal may be to you as the employer;
3. the procedural requirements for managing the dismissal; and
4. an appropriate strategy for handling the matter going forward.

## Ask yourself the question – why?

It is critical, before you take any steps, to ask yourself the question ‘why do I want to dismiss this employee?’

You may at first think you know the answer. However, careful self-awareness of your motives as an employer will be important here for the following reasons:

- > Sometimes employees rely on their rights at the most inconvenient times. But if you are frustrated with the employee because they have exercised a workplace right or entitlement, be very careful!

You cannot dismiss or otherwise take ‘adverse action’ against an employee because they have relied on workplace rights available to them at law.

These rights might include:

- taking annual leave,
- personal leave (whether paid or unpaid),
- maternity leave,
- receiving workers’ compensation payments,
- being involved in a union, or
- participating in industrial activity.

- > You also cannot dismiss or otherwise take ‘adverse action’ against an employee because they have made a complaint or inquiry in relation to their employment.

You should ensure that you are not discriminating against the employee for an unlawful reason by dismissing them. It is unlawful to discriminate against an employee on the basis of attributes such as their race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin. Even if one of these reasons is only one factor in your decision to dismiss the employee, you may still be liable.

You may wish to dismiss the employee because they have under-performed. It may be because they have engaged in serious misconduct. It may be that their position no longer exists and so a redundancy situation arises. Or, it may be a combination of any number of those. Your response and your strategy will need to be tailored accordingly so as to comply with your obligations under the *Fair Work Act 2009* and any other industrial instrument.



## Dealing with the under-performer

If you do have an employee that is underperforming, it is worth understanding what your rights and obligations are with respect to that particular employee. For instance, not all employees are protected from unfair dismissal under the Fair Work Act. These employees employment can generally be brought to an end without the need for you to provide reasons for the dismissal. You will need to comply with any requirement to provide your employee with notice of the end of their employment, or pay them in lieu of notice:

- > Casual employees who do **not** work on a regular and systematic basis are not protected from unfair dismissal.
- > Employees who are within their first six months of employment, or twelve months if you are a small business employer (i.e. you have less than 15 permanent or regular casual employees

working for you, or for any associated entities), are not protected from unfair dismissal

- > High income employees (i.e. they earn a guaranteed \$153,600.00 per annum in the 2020-21 financial year), whose employment is **not** covered by an Award or Enterprise Agreement, are not protected from unfair dismissal.

In each of these cases, you may still decide to implement a performance improvement process. However, you will not be held to the same standard as you would be if the employee was protected from unfair dismissal.

For all other employees, you will need to take considerable care in dealing with their under-performance.

Asking yourself the following questions will assist you in dealing with the under-performing employee:

- > Are your expectations of the employee fair and reasonable having regard to the employee's level of experience and the terms of employment? Convey those expectations to the employee in writing and allow them a reasonable opportunity to respond.
- > With respect to the employee's conduct in the workplace, are your expectations of the employee clear (e.g. by way of a sound policy document that has been well publicised and is readily accessible)? If not, the employee should be cautioned in any event and such policies should be immediately implemented.

### Steps for conducting meeting(s) with the employee

- > If your expectations are reasonable, clear and have not been met, you should first meet with the employee to discuss the under-performance.

At such a meeting, you should:

- Provide the employee with an opportunity to have a support person present.
- Provide the employee with an opportunity to provide an explanation for the under-performance.
- Ascertain whether the under-performance is due to a lack of training or awareness in the relevant area. If so, you may wish to consider any reasonable training that you could provide to the employee.
- Ascertain whether the under-performance is due to the current personal circumstances of the employee. You may wish to consider here how your business could (within reason) provide support to the employee so as best enable them to meet your expectations.
- Discuss how the employee's failure to meet expectations is impacting the business. It is important that the employee is made aware of the impact of their under-performance and why it is necessary that they improve.
- Provide the employee with a reasonable, clearly specified timeframe within which to improve their performance and a date for a review meeting. The reasonableness of the timeframe will depend upon the improvement required. In cases where you may expect fairly prompt improvement, a reasonable timeframe may be four to six weeks. In other cases it may be a number of months.
- We recommend that you implement a formal performance improvement plan, which you have agreed with the employee. Or at least, you and your employee should both sign an agreed set of Minutes following the meeting.

- After the meeting, provide the employee with a letter confirming your concerns regarding performance, reiterating your expectations and warning the employee that they will be observed over the coming review period and that, if there is not a satisfactory improvement in performance, then dismissal may need to be considered.
- We also recommend that you have an independent person present with you in the meeting to act as your witness. This may be another manager in your business who can be present, for example.

### What to do in the event that initial meeting(s) with the employee are unsuccessful

If a first meeting with the employee has taken place and at the subsequent review meeting it becomes clear that the employee's performance has not improved satisfactorily, you may wish to consider the following:

- > Is there a genuine, reasonable and legitimate reason for the employee's failure to improve? If so, it may be worthwhile providing the employee with a further extension of time to improve. Again, a further review date should be set. In certain circumstances it may be prudent to issue a second written warning at this stage.
- > If there appears to be no good reason as to why the employee's performance has not satisfactorily improved, then the employee should be provided with written notice of a 'show cause' meeting to be held within the next three to five business days.

- > The notice of the 'show cause' meeting should state the reasons (individually) as to why it is being held, that the employee will be required to show cause as to why their employment should not be terminated and that they are entitled to have a support person present at the meeting. It is *very* important that the employee is clearly aware of the allegations which they will need to respond to at the meeting.
- > You should have your own witness at the 'show cause' meeting as well. Once the meeting has taken place and you have had the opportunity to consider the employee's response, a decision will need to be made as to whether or not to terminate the employment. If the decision is made to terminate, that should be communicated to the employee in writing with the reasons for the termination made very clear.
- > You should advise the employee as to whether they are required to work out their notice period. Unless the employee is being summarily dismissed for serious misconduct, you will be obliged to either provide the notice period or to pay out the employee in lieu of notice.
- > If you are a small business, prior to any decision to dismiss an employee, you should work through the **Small Business Fair Dismissal Code** <https://www.fairwork.gov.au/ArticleDocuments/715/Small-Business-Fair-Dismissal-Code-2011.pdf.aspx> to ensure that you have complied with all of the necessary steps. Compliance with the Code will assist you as a small business in defending any unfair dismissal claim.

# Dealing with serious misconduct

## What can be classified as 'serious misconduct'?

The *Fair Work Regulations 2009* define serious misconduct as follows:

- > wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
- > conduct that causes serious and imminent risk to:
  - (i) the health or safety of a person; or
  - (ii) the reputation, viability or profitability of the employer's business.

It is generally recognised that conduct which falls within the definition of serious misconduct includes:

- > theft,
- > fraud,
- > assault (or other forms of threatened or actual violence); and
- > serious breaches of Occupational Health and Safety laws and procedures.

The ultimate test for serious misconduct is whether the conduct of the employee was so serious that it would have been unreasonable to expect you, as the employer, to continue to employ them for the remainder of their notice period.

## What steps can be taken to handle a serious misconduct situation?

You should consider the following steps in handling a serious misconduct situation:

- > Once you are aware that the employee has, or may have, engaged in serious misconduct, stand the employee down from their employment while you undertake an investigation. If the employee is a permanent employee, you will need to pay them while they are being stood down.
- > If you do not believe that you are able to handle the investigation yourself, then you may wish to engage an external investigation service.
- > Ordinarily (though there are exceptions) you would provide the employee with an opportunity to participate in the investigation. You could invite the employee to attend a meeting with the investigator, in which case you should set out the nature of the allegations that you are raising against the employee, warn them that their employment is at risk, and provide them with the opportunity to have a support person present.
- > If it has been necessary to report the matter to the police, you should keep a record of all information passed on to the police.
- > Following your investigations, if you have reasonable grounds for believing that the employee has engaged in serious misconduct, then you are entitled to dismiss the employee without notice on the basis that their conduct is sufficiently serious to justify immediate dismissal. You should confirm the dismissal in writing and the reasons for doing so.
- > If you are a small business (i.e. less than 15 employees), make sure you complete the Small Business Fair Dismissal Code.

# Dealing with redundancies

Asking yourself the following questions will assist you in dealing with redundancies:

- > Is the employee's job no longer required to be performed by anyone because of changes in the operational requirements of the business? This does not mean that every aspect of the employee's position must no longer exist. Certain elements may still need to be undertaken by the other employees. The question is whether, substantially, the role which the employee was performing no longer exists.
- > Can you objectively prove the changes in the operational requirements of the business (e.g. downturn in business, loss of key clients/contracts, major restructure, substantive change in business direction)?
- > Have you consulted with the employee in accordance with the consultation provisions of any Modern Award or Enterprise Agreement or your own relevant policy and procedure?
- > You will typically need to notify the employee and/or their representative in writing of the likelihood of a redundancy and the reasons why that situation has arisen, and invite their feedback. You should carefully consider any feedback or suggestions provided by your employee or their representative.
- > Have you considered whether the employee could be redeployed into another position within your business (including related entities of your business)? This does not oblige you to create a position. However, if there is an available position within your business which the employee could reasonably occupy, then priority ought to be given to that employee.

# A few last pointers...

- > If you already have policies and procedures in place in your business for handling these types of matters, then you should comply with those documents. Your employees are entitled to assume that they will be dealt with in accordance with the policies and procedures of the business. If you are unsure as to whether they comply with the law, you should seek legal advice.
- > Document everything. Many employers struggle to successfully defend unfair dismissal or general protections claims because they simply have not kept good records.
- > Where you are making a final decision regarding the employee's employment, you should communicate that decision in writing together with the reasons for that decision.
- > When dealing with an employee who is behaving poorly in the workplace, bear in mind your obligations as an employer to your other employees to provide a safe workplace. Being aware of those obligations will assist you in determining how best to deal with the offending employee.
- > You will need to pay your employee all of their accrued entitlements at the end of their employment. Many Awards require employers to pay end of employment entitlements within seven days, and if an employee has accrued long service leave under the *Long Service Leave Act 2018* (Vic), you must pay them their accrued long service leave on the day that their employment ends. Failure to do so could expose you to criminal penalties.

We trust this guide is of valuable assistance to you. While we cannot guarantee that an employee will never attempt a claim against you or your business, compliance with the above recommendations will go a long way to assisting you in defending, and hopefully even defeating, such claims.





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