

Practical guide... performance management

The procedural fairness requirements of the Fair Work Act, 2009 (Act) together with decisions of the Fair Work Commission (FWC) impose an obligation on employers to act carefully and consistently as you manage your employees. This fact sheet provides some practical strategies for effective workplace performance management.

Performance management of employees exposes you as an employer to the risk of claims of adverse action or unfair dismissal. Decisions handed down by the FWC demonstrate the breadth of the adverse action provisions under the Act that can be invoked to grant injunctive relief, award for compensation or reinstatement.

Make sure there is a valid reason for the conversation on performance which, if it does not improve, may result in termination. Ensure you have all facts in relation to lack of performance prior to the meeting. The following tips for performance managing your employees may help to minimise your risk of such exposure.

Rigorous performance management

You need to constantly review the performance of your employees to ensure your business is running as effectively as possible with ongoing feedback rather than it being an annual event. This approach to performance management allows you to both recognise employee performance and also counsel or dismiss an employee for non-performance.

Essentially, a performance management process allows you to address and document concerns in the workplace as they occur; set expectations for employees; and minimise risk exposure to claims in the event of dismissal.

Consistency when dealing with analogous circumstances

Consistency in terms of process rather than outcomes is important when dealing with employees. The circumstances of each matter need to be considered based on their own facts. What is important is that you adopt a consistent approach or process in the performance management of your employees. Being able to demonstrate your employees have been consistently performance managed will assist in defending claims of unfairness or unreasonableness.

Don't ambush your employee

Your employee should preferably be invited to a performance management meeting by written invitation stating the matters of concern and inviting them to bring a support person. Make sure the employee is aware of the circumstances that informed your decision to have the performance management meeting.

Affording the right to a support person

The support person who is the choice of the employee provides emotional support at the meeting and act as a witness. Provide adequate notice of each meeting to the employee so they can arrange a support person should they choose to do so. However, if the support person fails to attend, it cannot be then construed you refused the employee's request for a support person.

Role of the support person

You can request only person speak at the meeting rather both employee and support person. The support person is not an advocate for the employee and is there in a support capacity only.

There are very few occasions where refusal would be appropriate – eg: where the support person was involved in an event or witness to an allegation that is the subject of the meeting or possibly when the support person comes from the same work area as the employee.

A support person can suggest a break – however, it is decided between you and the employee whether a break is taken.



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Adopting a suitable forum for discussion

It is almost trite to say, but adopting a suitable and appropriate forum for a performance discussion to take place is important – ie: the meeting should be held in an allocated meeting room or off-site.

Affording the opportunity of a right of reply

In the course of a performance management discussion, it is important an employee is given the opportunity to respond. It is equally important any such response is properly and fairly considered before any decision is made.

Paper trail

If the employee is warned, they should be given a written warning letter stating why they have been warned and detailing a plan for improvement. The warning letter should state that, if the plan is not met, further disciplinary action (including termination) may result.

The warning letter should be created following the meeting and cover off the issues discussed within 24 hours of the performance management meeting.

The paper trail should comprise termination letters, warning letters, invitations to disciplinary meetings, keep minutes of disciplinary meetings, etc.

Conclusion

Performance meetings and having an effective performance management process in place is invariably demanding and it is not uncommon for employers to be concerned about the manner and method of dealing with difficult or non-performing employees.

By keeping in mind the above performance management tips, this will help minimise the risk of exposure to adverse action and unfair dismissal claims as such actions find greater momentum under the protections afforded in the Fair Work Act.

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