

Managing Poor Performance and Misconduct

A guide for employers

What is poor performance?

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

Can you identify specific pieces of work on which employee failed to meet the required standards? Is this failure persistent or repeated? If so, there is a performance issue.

What is misconduct?

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

How should I plan for performance and misconduct issues?

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

There are a number of policies that should be in place as well as a number of things an employer should consider.

Do I have policies in place? Do my employees know about the policies? Do managers know how to implement the policies? Can managers identify disciplinary issues?

A disciplinary policy

A disciplinary policy governs the way in which performance and misconduct issues are handled by the employer. It lets employees know where they stand and provides a valuable guide to human resources managers and team leaders. A draft policy can be found on our website at

www.jfmlaw.com.au.

A workplace investigation policy

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

A grievance policy

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

Dealing with misconduct

How should I deal with minor performance or misconduct issues?

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

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

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

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

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

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

1. That the employee is required to attend a formal counselling meeting;
2. The date and location of the meeting;
3. The names and positions of any people who will be attending the meeting;
4. That the employee is entitled to bring a support person if they wish;
5. A brief outline of the reason for the meeting; and
6. A brief outline of the process that will be adopted at the meeting.

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

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

1. Goals that the employee is required to meet;
2. The time frame in which the goals need to be met;
3. That the employee will be required to report to the manager on their progress towards the goals;
4. The potential consequences of not complying with the plan;
5. The date and time at which those reports are to be made; and
6. The form in which those reports are to be made.

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

What if a performance improvement plan is not complied with?

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

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

How should I deal with serious misconduct?

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

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

If you suspect that an employee has engaged in serious misconduct, you must commence a formal workplace investigation. The employee in question should be stood down with pay while the investigation takes place.

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

The employee should be provided with a written notice specifying:

1. That they are being stood down;
2. That they are being subject to a workplace investigation;
3. The time frame of the investigation and the name and position of the investigator;
4. The alleged conduct which has given rise to the investigation; and
5. The time at which the employee will be given an opportunity to respond.

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

Termination should never occur before an investigation has taken place.

Investigations

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

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

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

The decision maker cannot conduct the investigation

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

Confidentiality must be maintained

Workplace investigations into alleged serious misconduct often require employers to compile confidential information. It is important that this information is not disclosed to other employees or to third parties. Confidentiality can be maintained by requiring employees who are interviewed as part of

the investigation to read and sign a confidentiality agreement, and by ensuring that the investigator is a person who is removed from the day-to-day operations of the employer.

A communications plan must be set up

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

Observe legal standards of proof

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

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

Remember your reporting obligations

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

What should I do when employees are performing well?

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

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

What next?

If you would like to speak to someone about managing an employee's poor performance or misconduct, call us on (02) 9199 8597 or email us at wehelp@jfmlaw.com.au.

Further information can also be found on our website at www.jfmlaw.com.au.