

# Performance Management and Terminations



Penny Brooke, Senior Associate

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# Introduction and Agenda

- Generally, the aim of performance management is not to terminate the employee.... sometimes it is the end result.
- Vast difference between dealing with executive and non-executive performance management/termination.
- Focus today on non-executive employees
  - > Managing the legal risk
  - > Common issues and how to handle them

# Managing the legal risk

# Who can make an unfair dismissal claim?

- ❖ A permanent employee who:
  - > has completed the minimum employment period;  
and
  - > earns less than the high income threshold;  
and/or
  - > is covered by an award or enterprise agreement.
- ❖ casual employee employed on a regular and systematic basis with a reasonable expectation of continuing employment

# Is the action harsh, unjust or unreasonable?

- Valid reason for the dismissal
- Notification of reason
- Given an opportunity to respond
- Unreasonable refusal for support person
- Warnings about unsatisfactory performance
- The size of the employer's enterprise
- HR expertise

# Procedural Fairness – the ground rules

- The aim is that performance issues are addressed quickly in the first instance to provide the employee with an opportunity to rectify... and in most cases that will suffice...
- ..... but if dismissal becomes necessary, then the employer is in the best possible position to show that:
  - > The expectations were made clear to the employee
  - > The employee was told how they needed to improve
  - > The employee was given any tools that they needed to improve (within reason)
  - > The employee was given an opportunity to tell their side of story

# Lessons for employers ...

- ❖ Have criteria – don't make them overcomplicated, and police adherence
- ❖ Have a policy – make it scalable and flexible to possible issues, then follow it
- ❖ Train employees – in performance management and expectations
- ❖ Document, document, document ...
- ❖ Not everyone is a star, but everyone has an obligation – call out performance issues

# **Common issues:**

## **How to deal with them**



# Common scenarios and how to respond

1. “GET RID OF THEM!!!”
2. Can’t you just make him/her redundant?
3. I’m too stressed to come to a meeting, my Dr says so!
4. You’re bullying me!
5. Issues with a support person
6. The employee is never here!
7. Do warnings have expiry dates?
8. Should we try to get a deed of release?

The “*Just get rid of them!*” demand



# Case Study

## **Mr Michael Torr v Global Viande Pty Ltd T/A Global Food and Wine** [2015] FWC 4325

*“Unfortunately, we have recently noticed a slackening off in your attitude towards your work.*

*As manager of the meat department, it is your responsibility to lead by example, to ensure co-ordination and correct procedures are adhered to for the smooth running the (sic) department. This has not been occurring.*

*Your blasé attitude to your work has been noted by you working the least amount of hours within the department over the last two weeks. In addition, you have not been adhering to planned start and finish times, on one occasion, you were 25 minutes late for work and offered no explanation or apology.*

*Furthermore, the condition of the meat room, stock and paperwork is not being maintained to an acceptable standard....*

*Following on from these issues, I have been left with little option but to terminate your employment effective Friday 26 September. You will be paid one week’ pay in lieu of notice.”*

## 2. Can't we just make them redundant?

- Yes you can but the unfair dismissal exemption may not be triggered:
  - > No longer require the role to be performed by anyone?
  - > Consultation if award or enterprise agreement covered
  - > Reasonable redeployment options considered

### 3. I'm too stressed..... I have a certificate!

- Being unfit for work does not always equate to being unfit to participate in performance management.
- If it is a serious matter that crosses over with misconduct consider putting allegations in writing to obtain a response in writing.

## 4. You're bullying me!

- Common “defence mechanism”
- Don't stop performance management, place on hold and deal with bullying allegation
- Comply with all policies and procedures and consider an external investigation
- Once bullying issue is resolved recommence performance management process if necessary

## 5. Support person issues

- ❖ Support person isn't available
- ❖ Employee wants a coworker/manager to be their support person
- ❖ Support person is taking over the meeting

## 6. They'd be OK if they were here!!!

- What is the reason for the absences
  - > Is it a matter protected by adverse action/discrimination?
- Focus on the quality of work/behaviour when they are at work rather than the absence
- If the issue is substantiation/proof focus on the process instead of the absence



# 7. Do warnings have expiry dates

- ❑ No!
- ❑ BUT the longer the time between warnings the more caution that needs to be applied
- ❑ Don't write expiry dates into your warnings and review standard forms
- ❑ Don't write expiry dates into your policies and procedures

## 8. Should I get a deed of release

- Catch 22 situation
- Employee cannot be forced to sign – may need added incentive
- How emotional is the employee? Is the employee a conspiracy theorist?
- What is the likelihood that the employee will take further action?

# Questions?

**Penny Brooke**

Senior Associate | Piper Alderman

t +61 8 8205 3441 | f +61 8 8205 3300

[pbrooke@piperalderman.com.au](mailto:pbrooke@piperalderman.com.au)

[www.piperalderman.com.au](http://www.piperalderman.com.au)



**PiperAlderman**