

MTA EMPLOYMENT RELATIONS FACT SHEET



Avoiding Unfair Dismissal Claims – Discipline and Warning Procedures

Updated October 2013

In approaching a termination in a fair, reasonable and rational manner it is necessary to analyse the decision, prepare for the delivery of the news consider the individual and the company responsibility.

The question of whether a dismissal is “harsh, unjust or unreasonable” has been considered by the Federal Court of Australia on a number of occasions. The Court’s decisions suggest that, to avoid a finding that a dismissal is “harsh, unjust or unreasonable”, the employer should provide the dismissed employee with both substantive and procedural fairness.

Substantive fairness - means that the reason for the dismissal must justify dismissal. Satisfying the requirement of having a valid reason for termination would go a long way to ensuring that substantive fairness is provided to an employee.

Procedural fairness - means that an employee who is to be dismissed must be treated fairly. It includes such matters as providing an employee with written warnings, conducting a proper investigation, giving the employee an opportunity to be heard and providing written notice of termination.

It is important to remember that both substantive and procedural fairness needs to be provided to a dismissed employee when actually terminating an employee and in the method of carrying out the dismissal (e.g. procedures leading up to the dismissal).

Discipline procedure

There are many instances in which a proprietor / manager needs to take disciplinary action. However, it should be emphasised that the whole point of discipline is to have people follow the desired path and avoid having to terminate. Having good people management and policies (such as recruiting the right people, assessing and training them) should help you avoid the discipline process.

- Benefits of having a discipline procedure:
- A defined procedure gives the best chance of solving discipline problems without having to use the termination option.
- Provides employees with the opportunity to improve their conduct.
- Enables employees to improve their standards of performance.
- An effective discipline procedure will save time and provide the necessary records of evidence and reasoning for a termination decision.

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- A formal discipline procedure ensures that an impartial, consistent approach is applied to the counselling and discipline process for ALL employees.

The development and implementation of a disciplinary procedure will not guarantee protection for an employer against allegations of harsh, unjust or unreasonable dismissal, but it more than likely will assist a company to minimise such allegations and to provide a defence against them when they are made.

Employers with fewer than 15 employees

The fewer than 15 employee count is determined by the number of full time equivalent hours of work up until 27 March 2011 when thereafter it then became a simple head count.

The *Fair Work Act 2009* allows an employer with fewer than 15 employees to undertake discipline of employees in accordance with the Small Business Fair Dismissal Code and Checklist. In essence, so long as you comply with this code and provide at least one written warning there is no need to comply with the more detailed warning procedure detailed below.

Small Business Fair Dismissal Code

Summary Dismissal - It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal - In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be valid based on the employee's conduct or capacity to do the job. The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement. The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters - In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity. A small business employer may be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

Small Business Fair Dismissal Code Checklist

It is in the interests of the employer to complete this checklist at the time of dismissal and to keep it in case of a future unfair dismissal claim. However, it is not a requirement of the Fair Dismissal Code that the checklist be completed.

1. How many employees are employed in the business? (Include the dismissed employee and any other employee dismissed at the same time).

- ☐ Under 15 employees
- ☐ 15 employees or more

[If under 15 employees, the Fair Dismissal Code applies.]

2. Has the employee been employed in this business as a full-time, part-time or regular casual employee for 12 months or more?

- ☐ Yes
- ☐ No

[If No, the employee cannot make an unfair dismissal claim.]

3. Did you dismiss the employee because of a genuine redundancy?

- ☐ Yes
- ☐ No

If yes, explain the reason for the redundancy (for example, economic downturn, introduction of new technology therefore requiring less staff, or another such reason) and whether redeployment was considered.

4. Do any of the following statements apply?

I dismissed the employee because I believed on reasonable grounds that:	YES	NO
a. The employee was stealing money or goods from the business	<input type="checkbox"/>	<input type="checkbox"/>
b. The employee defrauded the business	<input type="checkbox"/>	<input type="checkbox"/>
c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace	<input type="checkbox"/>	<input type="checkbox"/>

d. The employee committed a serious breach of occupational health and safety procedures. ☐ ☐

5. Did you dismiss the employee for some other form of serious misconduct?

- ☐ Yes
☐ No

If yes, what was the reason?

If you answered yes to any question in parts 3, 4 or 5, you are not required to answer the following questions.

6. Did you dismiss the employee because of the employee's unsatisfactory conduct, performance or capacity to do the job?

- ☐ Yes
☐ No

If yes:	YES	NO
a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her	<input type="checkbox"/>	<input type="checkbox"/>
b. Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct?	<input type="checkbox"/>	<input type="checkbox"/>

If yes, how much time was given?

c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?	<input type="checkbox"/>	<input type="checkbox"/>
d. Did the employee subsequently improve his or her performance or conduct?	<input type="checkbox"/>	<input type="checkbox"/>
e. Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him/her an opportunity to respond?	<input type="checkbox"/>	<input type="checkbox"/>
f. Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct/performance could be improved?	<input type="checkbox"/>	<input type="checkbox"/>

Please attach supporting documents

g. (MTANSW additional checklist question – please note that it is a requirement to offer the employee a support person for any meeting when a warning is provided) Did you offer the employee a support person for the meeting when a warning was provided?

☐☐

7. Did you dismiss the employee for some other reason?

☐ Yes

☐ No

If yes, what was the reason?

8. Did the employee voluntarily resign or abandon his/her employment?

☐ Yes

☐ No

9. (MTANSW additional checklist question – please note that it is a legal requirement to provide a written notice of the day of termination – see samples at pages 5 and 6 of this checklist). Did you provide the employee with a written notice of the day of termination?

DECLARATION

I declare that I believe every statement or response in this checklist to be true.

Signature: _____

Date: _____

A guide to the disciplinary procedure

Stage one – counselling

The purpose of the counselling session is to advise the employee personally of the conduct that is of concern, and to establish if there are any reasons for the behaviour, and whether the company can provide assistance to avoid further instances of unacceptable behaviour through training or other action. The employee should be given an opportunity to defend himself / herself against the complaint with assistance of another person if requested by the employee. The company must give due consideration to matters raised by the employee. The employee and the employer should attempt to reach agreement on action required to rectify the problem. Conduct will be reviewed on a specified date.

When the performance of a good worker goes into decline, there is a strong chance that the employee has a personal problem which is distracting them from their work. It may be some event occurring in their personal life such as death or illness in the family, divorce or the break-up of a relationship etc.

An employee's private life is of course their own concern, but when it starts to affect their performance on the job, it becomes the manager's concern. Some action is required on the part of the manager, but it needs to be handled carefully and with sensitivity.

- Your aim is to let the person know that he or she can talk to you about problems they may have.
- Be prepared to do more listening than talking.
- Begin by acknowledging their previous good performance. Let them know that you value them as a person and worker.
- Tell them that you have noticed a change in their performance/behaviour. Describe the specific changes and how you see this affecting their work and the work of others.
- Ask them how they feel they are currently handling the job. Reach an agreement on your view and their view of their job performance. Check with them if there are any problems at work which are affecting them.
- Tell them that their private life is their business, but when it starts to affect their work it has to become your business.
- Assure them that anything you discuss will be kept strictly confidential. Any issues from their private affairs will not be put on record. Encourage them to open up and discuss what it is that is distracting them.

The employee is informed that the counselling session will be recorded in his/her personal file by way of a record of interview.

Ideally, the employee will correct their behaviour following this session and further procedures leading to dismissal may not be necessary.

However, if this is not the case then the formal discipline interview and warning procedure should be commenced immediately. If the problem is of a more serious nature then the formal warning procedure should be commenced without conducting the preliminary counselling session.

Unsatisfactory Employee - Counselling Tips:

1. Identify the problem.
2. Find the causes of the problem.
3. Make sure the section is run effectively.
4. Check management attitudes and methods.
5. Discuss the problem with the difficult worker, choose an appropriate time and place.
6. Ask probing questions - for direct and honest communication.
7. Work out a solution with the employee.
8. Summarise to ensure clear communication.
9. Put the solution in place.
10. Follow the solution through.
11. Follow-up discussion.

It is important to establish that a problem really exists. There is a difference between say, the employee whose behaviour is not perfect, but whose actual work is satisfactory, and the employee who is generally causing a problem by poor work performance and/or reducing the productivity of others.

The test of whether an employee is really causing a problem must be assessed on the facts in each case. If you want to be really effective in identifying unsatisfactory performance or behaviour, it is essential for all concerned to understand the expected standards of behaviour and of performance, this is best established in job description or through performance appraisals as discussed.

Performance can be divided into two categories:

1. Work Performance Problems
 - Low performance level in quantity of work.
 - Lack of co-operation with team members.
 - Only does "just enough" work.

- Unexplained absenteeism, lateness or taking long lunch hours and generally not working the required hours.

2. Behavioural Problems:

- An obvious lack of interest in the company and the task.
- Cynical comments made at meetings.
- Criticises management or supervisors unnecessarily.
- Does not wish to change and actually resists change.
- Argumentative and criticises or disrupts authority.
- Constantly refers to the job description when asked to do something different. Seems to always refer to the “rules”.

If the unsatisfactory behaviour or work performance is having an effect on the employee’s work or on the work of others, then you must take action.

Identifying the cause(s) of the Performance Problem

Performance problems are typically caused by:

- An inadequate management system with no clear job descriptions or procedures, no identified performance standards and uncertain goals.
- Inadequate supervision with limited controls and monitoring, employees treated as if they were not capable of being responsible, and a general lack of interest in employees. This may create segregation within the workplace eg. “them” and “us”.
- The employee’s negative attitude to work, despite an effective manager.
- Communication problems between groups of employees and with management.
- The employee is frustrated with working conditions and lack of opportunity to have a say in the work processes.
- Unclear direction.
- A lack of training.
- Lack of information provided to the employee.
- What the employee sees as a lack of “fairness” in the way the management deals with employees.

- A “personality clash” between employees or with supervisors.
- Boredom.
- Overworked and tension.
- The attitude the employee or supervisor brings to work.
- Employees feel their reward is unfair.

Even though dealing with performance problems can be unpleasant, the longer a performance problem is left, the more difficult it will be to solve. Furthermore, by not dealing with a performance problem promptly it may appear that the company condones such behaviour and/or performance.

The most important tip to remember is that your approach to handling what you see as a problem with an employee is the same approach you would take with ALL employees regardless of position, status, union membership - it is your obligation not to unlawfully discriminate.

A counselling session should be documented. Use the following Performance Review Initial Counselling Record form as a guide.

<p style="text-align: center;">Initial Counselling Record Form (To be put on Company Letterhead)</p> <p>Date:</p> <p>Subject: Performance Appraisal of (insert employee's name)</p> <p>Dear (insert employee's name),</p> <p>I write to confirm that on (insert date); you were counselled in relation to various aspects of your employment in the presence of the following witnesses:</p> <p>(x)</p> <p>(x)</p> <p>Specifically, I drew your attention to the need to address the following matters:</p> <p>(1)</p> <p>(2)</p> <p>(3)</p> <p>(4)</p> <p>Having considered the issues raised above, you replied that you would undertake to:</p> <p>(1)</p> <p>(2)</p> <p>(3)</p> <p>(4)</p>
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It was further agreed that a review of your performance would occur on [insert date] at which stage, further decisions by management will be made regarding your performance. I must however advise that this document forms the first stage in the company's disciplinary procedure and that I encourage you to discuss in confidence any aspect of your performance with me, with a view to resolving any difficulties.

Yours sincerely,

Employer

Employee

Employer's Witness

Employee's Witness

TIP: If you are including a date for review of performance you must stick to it!

Stage two - first written warning

At this stage the employee will be advised of the areas of his/her performance or conduct is unsatisfactory and exactly what it is that the company expects. The employee will be given the opportunity to respond (giving his/her side) to what has been said and, where necessary, this will be investigated.

Notes will be taken and the employee can request a copy. A further date will be set when employee improvement or otherwise will be reviewed.

Employee must understand that this warning is the second step in a disciplinary procedure which may lead to the termination of employment. It is critical that the employee has been counselled and must know that failure to improve may lead to dismissal.

1. Make employee clearly aware of company disapproval of his/her conduct.
2. Investigate matter thoroughly and reasonably in presence of witnesses (making notes of conversations). Provide the employee with the opportunity to bring in their own independent witness.
3. Allow employee the opportunity to present their side and if they respond with a case to answer then investigate it.
4. If after assessing the facts and following a thorough investigation a warning is warranted, issue the warning within 24 hours of the disciplinary interview, and advise the employee that the warning is the first step in a disciplinary procedure which may lead to their termination of employment (make it clear that there is a risk of termination).
5. Keep an eye of the employee's progress, encouraging them where signs of improvement are shown, and cautiously identifying any lapses in performance - watch for overkill as this obviously lowers morale and could be viewed as harassment.

Important Note:

The employee should be requested to sign the warning letter, but if they refuse this should simply be marked on the form by an independent witness. A review period should also be established and adhered to as closely as possible by the employer. If unlikely to review performance on a given date, do not specify a review date.

There are probably more benefits to not specifying a 'Review Date' on warning letters, especially the Final Warning.

First Written Warning Form
(Put on company letterhead)

Date:

Subject: First Formal Warning in relation to the employment of (insert employee's name)

Dear (insert employee's name),

I write as a consequence of a performance review held with you on (insert date), following an initial counselling which you attended on (insert date). As discussed with you at the performance review, the company remains dissatisfied with your apparent inability to address the matters raised and discussed with you at the initial counselling.

I therefore now have no alternative but to issue this first formal warning as part of the company's disciplinary procedures. I would ask you again to ensure that you address the following matters, as discussed, in order to resolve the matters entirely:

- 1.
- 2.
- 3.

I am available to assist you in resolution of the above matters, however must advise that unless you satisfy the outstanding matters in a way discussed with you, you leave the company with no alternative but to reconsider your employment.

Your response to the issues raised was as follows:

- 1.
- 2.
- 3.

I intend to review your performance specifically in the areas discussed on (____insert date), at which you are entitled to be represented.

Yours sincerely,

Employer

Employee

Employer's Witness

Employee's Witness

I (employee to insert their name), accept receipt of this first formal warning issued to me on (insert date) and have been made aware of its consequences.

TIP: If you are including a date for review of performance you must stick to it!

Stage three - final written warning

If after a reasonable amount of time performances/behaviour has not improved the employee should be formally interviewed a second time.

The employee is again personally advised of the reason(s) for the disciplinary interview. Offer the employee the opportunity to have someone present as a witness and must be given an opportunity to defend himself/herself against the complaint(s). In a unionised situation it may be advisable to have a union representative present at this stage of the procedure. The employer should also have their own witness present to take notes.

The company must give due consideration to matters raised by the employee which may require further investigation.

If a written warning is to be issued, the employee and employer should attempt to reach agreement on action required to rectify the problem.

The employee should be informed that:

1. A final warning has been issued for unacceptable behaviour following previous counselling and warning and will be recorded on his/her personal file.
2. A continuation of unacceptable performance/behaviour **will result in dismissal**.
3. Conduct will be reviewed on a specified date.
4. Within 24 hours of the disciplinary interview a written warning based on the record of interview will be issued to the employee and a copy placed on the employee's personal file.

Important Note:

The employee should be requested to sign the warning letter, but if they refuse this should simply be marked on the form by an independent witness. A review period should also be established and adhered to as closely as possible by the employer. If unlikely to review performance on a given date, do not specify a review date.

There are probably more benefits to not specifying a 'Review Date' on warning letters, especially the Final Warning.

SAMPLE
Final Written Warning Form

Date:

Subject: Final Formal Warning in relation to the employment of (insert employee's name).

Dear (insert employee's name),

I write as a consequence of a performance review held with you on (insert date), following a first formal warning issued to you on (insert date). As discussed with you, the company continues to remain dissatisfied with your performance in the following areas and urges you to give full consideration to your ability to address the matters previously discussed with you.

Specifically, I ask you to address:

- 1.
- 2.
- 3.

I have asked you to respond to each of the matters raised and your reply was:

- 1.
- 2.
- 3.

Management has given full consideration to your circumstances, however finds your explanation inadequate for the following reason:

.....

Consequently, this advice constitutes a final formal warning in the company's disciplinary procedures. Unless a significant improvement in your performance as discussed is observed by _____(insert date), you will leave this company with no alternative but to terminate your employment. I intend to review your performance with you at _____ (insert time) on _____(insert date). As previously indicated you are entitled to be represented at this review.

Yours sincerely,

Employer

Employee

Employer's Witness

Employee's Witness

Stage 4 - termination of employee's employment

When an employee is terminated, a great deal of sensitivity needs to be applied. The process of terminating an employee can be one of the most painful for an employer. Some managers who are responsible for this have anxiety attacks for days or weeks, before actually performing the task. The best preparation is to be prepared.

MTA Employment Relations has provided this information as a
guide to the operation of the *Fair Work Act*. It is not
intended to be legal advice and must be read in conjunction
with the relevant provisions of the legislation.

The decision

The first actions should be to carefully examine the decision itself.

If the decision is related to performance, is it a reasoned decision, or an overreaction to recent events? Is it really poor performance, or is the individual really performing reasonable well, but is somehow unable to relate to their work-group or your particular work practices?

Such events to occur, and are often labelled as poor performance, yet they are really associated with aspects of temperament and personality.

You need to think carefully and objectively about this situation.

In the case of a poor performer, does that person know that their performance is below standard? Did the employee clearly understand what was required by the employer? When was their performance last reviewed formally?

Was their performance review documented in a comprehensive manner? If the person did not improve their performance (within a given time frame), to meet clearly defined minimum work standards, should they be terminated?

In the absence of documents to support a decision to terminate someone for poor performance (such as completed Performance Review with written, mutually agreed job objectives) it could be judged that you have condoned and indeed accepted such poor performance as “acceptable”. Recollections of conversations and verbal warnings would probably not be substantive in the event that your decision to terminate was to be tested in an Industrial Tribunal/Court.

If a decision to terminate has been forced on you by market forces, are there any signs that things will soon improve or pick up? Are there alternatives to termination?

The business proprietor / manager / supervisor

Having reached a decision that termination is necessary and all required processes have been complied with, the next action should be to consider the proprietor or managers / supervisor role. How a manager or supervisor is perceived by his / her staff, to handle an unpleasant situation, can affect his / her credibility with them.

A manager / supervisor delivering such bad news is invariably stressed him/herself. If this stress or anxiety (which is normal) is not recognised, it will reduce the ability to control the dismissal situation. A poor delivery (of the bad news) will increase the stress in both the manager and individual, whereas a skilful delivery will reduce both the stress component and the probability of a hostile and negative confrontation.

Taking disciplinary action is never a pleasant task for the proprietor / manager or the person on the receiving end. What makes the task even more unpleasant is that the manager may not be very skilful or confident doing it.

Often, less experienced proprietors / managers / supervisors, will avoid the issue which only makes things worse.

Remember, if you are not fully prepared for such an encounter, both factually, procedurally and psychologically, you may well find yourself not controlling the situation but defending your action. From there it is but a short step to complete loss of control (of the situation) through strong emotional and bitter argument.

Do not argue and lose control. Be prepared factually, procedurally and psychologically.

An employee who is to be dismissed must be treated fairly. It includes such matters as providing an employee with written warnings, conducting a proper investigation, giving the employee an opportunity to be heard and providing written notice of termination.

The individual

Before arranging a meeting with an employee to inform them of their termination, there are a number of strategies which need to be considered, these are:

1. Anticipate the individual's reaction to this news.
2. In advising the employee of their termination, get to the point, be clear and unambiguous.
3. Be prepared for a reaction
4. Have ready a plan of action.

The company

How will the employee/s perceive your action? Will it be seen as fair and just, or coldly impersonal and maybe "unfair". Have the Award provisions (where applicable) been satisfied? Do redundancy rules apply?

How the company is perceived by both its employees and the community is a direct result of the actions of its managers. If, for whatever reason, a manager mishandles a termination to the point where industrial action or litigation ensues, it is the Company (not the Manager) which becomes the respondent, and the Company always suffers in some way.

Stage 5 - confirm in writing

It is important that an employer confirm in writing an employee's termination and the reason/s that led to that decision. This is essential so that the employer can clearly demonstrate that:

1. The reason for termination was given.
2. Required notice was given (if applicable).
3. Confirmation of the date termination took place.

See sample "Confirmation of Termination of Employment" form to use as a guide.

- SAMPLE -
CONFIRMATION OF TERMINATION OF EMPLOYMENT

Date:

Subject: Confirmation of Termination of Employment of [employee=s name]

Dear[employee],

I write to confirm that on[date], your employment with this company was terminated for the following reasons, following initial counselling with you on[date], a first formal warning on[date], and a final formal warning issued to you on [date].

The specific reasons for your termination include:

- (1)
- (2)
- (3)

As discussed with you, your employment is terminated:

- by the giving of weeks' notice ending on (insert date), or payment of weeks' pay in lieu of notice, or,
- by summary dismissal.

A breakdown for your final pay is attached. If you have any queries regarding this advice please contact the undersigned.

Yours sincerely,

.....

Employer

Stage 6 - issuing certificates upon termination

Upon termination of employment, for whatever reason, there are two certificates employers may be obligated to provide to departing employees: payment summary and employment separation certificates.

Payment Summary (formerly known as Group Certificates)

With effect from 19 December, 1997, employers must provide a Payment Summary to an employee ceasing service within fourteen (14) days of the employee's final day of employment with the employer, or within fourteen (14) days of the date upon which the employee has formally requested a payment summary (in writing), whichever is the later.

Employment Separation Certificates (ESC's)

Under section 1304 of the *Social Security Act 1991*, Centrelink require employers to provide to terminating employees upon request, an ESC which is used to assist them in claiming Newstart and other allowances.

The ESC's include questions relevant to termination payments, the reasons for termination and whether the employer has paid any monies in respect to unused leave entitlements. The form must be completed by employers and forwarded to either the employee or directly to Centrelink (upon request) within twenty one (21) days of the date of the request.

If you require copies of Employment Separation Certificates they may be obtained by contacting 1800 367 676 or by visiting the Centrelink website and downloading the ESC at <http://www.centrelink.gov.au/internet/internet.nsf/forms/su001.htm>. For any enquires call Centrelink's Employer Contact Unit on 131 158.

Members who require further assistance utilising this information should contact MTA Employment Relations on (02) 9016 9000.