

Workplace Update

PITFALLS OF PERFORMANCE MANAGEMENT

In November 2015, Mark Cox and Nikita Barsby presented this topic to lawyers and human resources professionals at Legalwise's seminar: *"Workplace Law - A Brave New World for Employers."*

Trends in unfair dismissal cases suggest that a common pitfall for employers is failure to adopt a fair and proper procedure when managing underperforming employees.

Even where an employer has a valid reason to discipline or dismiss an employee, the employee

may still succeed in an unfair dismissal claim if the performance management process is flawed.

Performance management is important to the success



of any enterprise. Yet it can be fraught with risk of claims or complaints by employees, especially if mishandled (See our Employee Handbook and HR Guide products).

What Is Underperformance?

The test is not whether an employee is working at their personal best, but whether the work performed meets the needs of the business and the requirements of their role, considered objectively. A performance issue may also arise where the employee fails to observe an employer's policies, procedures or rules.

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"Even where an employer has a valid reason to discipline or dismiss an employee, the employee may still succeed in an unfair dismissal claim if the performance management process is flawed."

MDC Legal are Employment Law specialists.

MDC Legal is a modern specialist employment law firm. We are unique in Western Australia in that we work for both employees and employers, giving us the benefit of understanding the law from both perspectives. Our lawyers are also unique in that they have experience working in a number of different legal environments including for large multinational law firms, government regulators, not for profit organisations and boutique law practices. We provide a full range of employment services, from setting up employment relationships to managing disputes and everything in between. This means that we can provide our clients with practical, cost effective and tailored advice which will help them get back to work or get back to business sooner.

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Pitfalls of Performance Management

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Communication and documenting are crucial

The employee must be given a reasonable opportunity to understand what the performance issues are *and* a reasonable opportunity to respond to them.

An employee should be warned that they are underperforming in a timely manner. There is no minimum number of warnings that must be given when managing underperformance.

However, warnings are designed to put an employee on notice of their underperformance and to provide them with an opportunity to remedy the underperformance.

The process should be documented, recording:

- the aspects of the employee's performance that are below par;

- the performance improvement plan and means of monitoring it; and
- the warning that the employee's employment is at risk unless they meet requirements of their role.

example, personal illness or injury, lack of understanding of expectations, lack of training, or difficult personal circumstances.

How long should an employee be given to improve their performance?

What is the required level of performance?

Clear, measurable and reasonable performance targets must be set and clearly communicated to the employee. Active steps should be taken to assist the employee to meet the required level of performance, for example, training, counselling, mentoring, and or performance improvement plans.

There is no set timeframe that must be given to an employee to improve their performance. However, the timeframe must be reasonable in the circumstances of the particular case and needs of the business.

What if the employee has not improved?

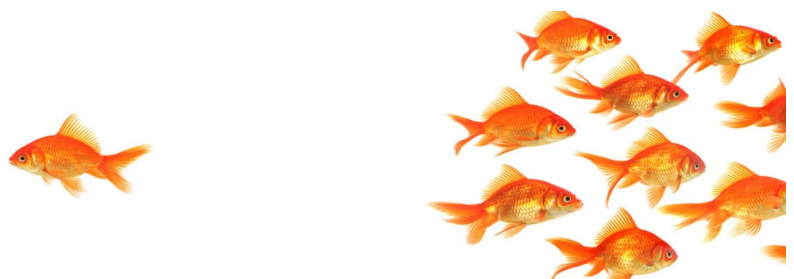
Give the employee a genuine opportunity to "show cause" (ideally by way of a show cause letter) prior to any final decision to terminate their employment.

Is there a reason for the underperformance?

Ask the employee if there is an explanation or reason for their poor performance, for

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"It is important to ask the employee if there is an explanation or reason for their poor performance..."



Pitfalls of Performance Management

“Employers should not avoid performance management of ill or injured workers, but should adopt appropriate, fair and lawful strategies for doing so”

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Policies and procedures

Policies and procedures should be in place to guide the process and ensure compliance with procedural fairness in the performance management process, and if used correctly, will mitigate the employer’s risk of exposure to legal claims.

However, to limit the risk of exposure to breach of contract claims, performance management policies and procedures should not form part of the employment contract. This can be achieved with

statements to that effect and carefully drafted policies, procedures and management guides.

Illness or injury

Where personal illness or injury is a cause of the underperformance, consider what reasonable adjustments can be made to support the employee. Let the employee know that the employer wants to support them to reach the required level of performance while remaining clear, firm and consistent on what the required level of performance is.

Employers do not have to avoid performance

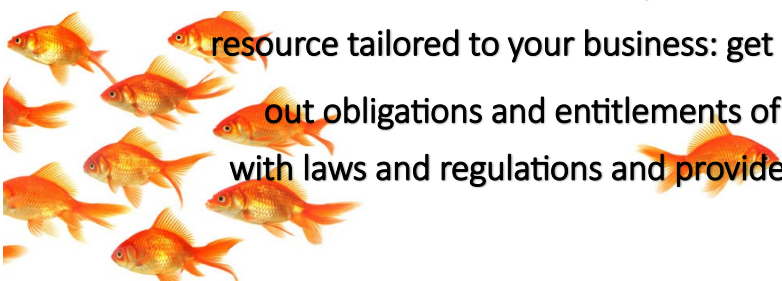
managing ill or injured employees, but should use fair and lawful procedures for doing so. Employers should take care to avoid discriminating against employees by reason of illness or injury. The underperformance and illness or injury should be managed as separate issues.

Conclusion

Approaching performance management in a considered way that is clearly communicated and documented throughout the process will minimise the risk of claims, and if claims are made the employer will be better placed to defend them.

“Approaching performance management in a careful and considered manner will increase the likelihood of a competent and lawful process being adopted..”

HR is usually a key to the success of any business, yet it is often complex and can involve risk. Minimise risk and improve workplace management and culture with a twin HR resource tailored to your business: get an up to date **Employee Handbook** setting out obligations and entitlements of employees, and a **HR Guide** that is compliant with laws and regulations and provides simple to follow guidance on managing a wide range of HR, people and culture issues.



MDC Legal Christmas Tennis Tournament

Party, 11th December 2015

Location: Loton Park Tennis Club, Mt Lawley



MDC 2015 BEST PLAYER AWARD

Paula Parentich



MDC 2015 BEST EFFORT AWARD

Victor Ageev & Gemma Little



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How Your Business Can Deal With “Suspect Sickies”

A recent study¹ of 97 public and private sector employers in Australia found that 40% of all personal leave was taken on Mondays, which is double any other day. 45% of employers surveyed believed that employees were absent on personal leave because they were “chucking a sickie”.

Employers are entitled to monitor and regulate employees’ use of personal leave.

To be entitled to paid personal leave, an employee must:

- Be unfit for work because they are sick or injured, or be required to provide care to an immediate family or household member who is sick or injured or affected by an unexpected emergency;
- notify their employer that they will be taking leave “as soon as practicable”; and
- where the employer asks for evidence, provide evidence that “would satisfy a reasonable person”.

Specific paid personal leave

entitlements or procedures should be observed including in any applicable Modern Award.

Employers should have clear policies around when employees must provide evidence of the reasons for their absences and what evidence they must provide.

You should accept a medical certificate from a qualified

“...employees are twice as likely to be absent on Mondays than any other day of the week...”

medical practitioner unless there are circumstances that reasonably lead you to suspect that an employee was not entitled to take personal leave. If so, you can investigate this as a disciplinary matter by asking the employee to provide a medical report, checking that the medical certificate is authentic, and putting specific allegations to the employee, based on objective evidence that their leave claims are dubious.

Care is needed, because disciplining or dismissing an employee for taking personal leave

may give rise to an unfair dismissal claim, or a general protections or discrimination claim on the basis that you have taken adverse action against them because they exercised workplace rights to leave.

¹ Bianca Hall, “The Great Aussie Sickie Falls Out of Favour, but Entitlement Culture Remains: Bosses”, The Sydney Morning Herald, November 5 2015.



MDC Legal is able to assist you in managing your rights and obligations in relation to personal leave, including by reviewing your business’ existing policies and procedures and providing you with an employee handbook and management guides specifically tailored for your business.



High Court Holds Third-Party Contracting Arrangements Sham

Quest Misrepresents Contract of Employment

Quest South Perth Holdings Pty Ltd (“Quest”) purported to enter into a triangular contracting arrangement with third party labour hire business Contracting Solutions Pty Ltd (“Contracting Solutions”).

Under this arrangement Quest engaged two housekeepers to provide cleaning services. Quest represented to the employees that they were performing housekeeping work as independent contractors of Contracting Solutions, despite the fact that they continued to perform that work for Quest under implied contracts of employment.

HCA Rules on Sham Third-Party Contracting Arrangements

Section 357(1) of the *Fair Work Act 2009* (Cth) prohibits employers from misrepresenting to employees that they are working as an independent contractor under a contract for services.

The Fair Work Ombudsman applied for penalty orders against Quest for allegedly contravening s357(1). It argued that the employees never became independent

contractors as they continued to perform exactly the same work as they had always done.

The Federal Court dismissed the proceeding at first instance. An appeal to the full Federal Court was also dismissed. The full Court construed s357(1) as applicable only where the misrepresentation related to a

The effect is that an employer can no longer avoid penalty under the section by introducing a third party into the contractual arrangement between the employer and the employee. Instead courts will look to the substance of the work being performed where

“...employers should exercise caution to avoid misrepresenting employment as an independent contracting arrangement.”

contract of employment between the employee and the employer.

The High Court unanimously allowed the subsequent appeal, and found that s357(1) applied to the misrepresentation of contracts for services between the employees and third parties. It held the identity of the other contracting party as immaterial to the application of the section.

Going Forward: What Does This Mean For Employers?

In this decision, the High Court effectively dismissed the Federal Court’s narrow interpretation of s357(1).

a conversion to independent contractor status is purported.

As a result, employers should exercise caution to avoid misrepresenting employment as an independent contracting arrangement. In determining whether a person is an employee or an independent contractor, it is important to make an objective assessment that looks to the substance of the employment relationship. If in doubt, employers should seek legal advice to avoid application of penalties under s357(1) of the *Fair Work Act 2009* (Cth).

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] HCA 45.

WELCOME TO MDC LEGAL

MDC Legal is delighted to welcome Sue Nguyen as Office Manager and Jo Knoth as Senior Associate to our Team. Sue brings innovative improvements in efficiency and service delivery to optimise client services, while Jo comes from good pedigree in litigation, employer advice and solutions delivery with previous firms including HLS and Jackson McDonald. Jo has also worked with the ELC where the focus is on employee advice, so she has a well-rounded background.



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Want to have a chat?

If you would like to get to know us better, contact us today for a free no obligation consultation to discuss how we might be able to assist you or your business.



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Nick Parkinson, Law Graduate

Doyle's Law Guide 2014 Edition ranks MDC Legal as a "leading Employment and Workplace Relations law firm", and says: "MDC Legal sits clear as the premier Perth based employee focused employment law firm. Founder and Partner Mark Cox earns the greatest of respect from his adversaries, so much so that he is almost exclusively their sole port of call when referring conflicting matters. Cox is viewed as having 'a cool head on his shoulders' and 'forceful but always reasonable'."