

Performance management checklist for Local Aboriginal Land Councils

Legal information for Local Aboriginal Land Councils

This fact sheet covers:

- ▶ steps involved in the performance management process
- ▶ what procedural fairness is
- ▶ the difference between poor performance and serious misconduct

If you are concerned about a worker's poor performance in their role, unless serious misconduct has occurred, you are required to manage their performance before considering terminating their employment.



Disclaimer

The information in this checklist is designed to give you an overview of the recommended steps to take when managing a worker's performance. This information is a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.

Concerns and feedback regarding a worker's performance should be raised in regular supervision meetings or one-one catchups to avoid delays in addressing the concerns and to attempt to resolve the worker's poor performance in an informal manner. It is recommended that any discussion, informal or otherwise, should be documented. For example, a file note of the discussion which outlines the performance issues identified and the steps the worker should take to rectify the issues.

If the worker's performance doesn't improve, consider undertaking a formal performance management process. Use this checklist to guide you through the process.



Note

When managing a worker's performance, make sure this is done in accordance with your LALC's performance management procedures and policies.



What steps are involved in the performance management process?

Performance management is a formal process that allows an employer to address a worker's poor performance.

If less formal steps to resolving the worker's poor performance are unsuccessful, you should undertake the performance management process as soon as possible. Performance issues can become more serious over time and impact workplace behaviours and culture.



Remember – throughout the process:

- the performance concerns raised by your LALC should always be about the worker's performance in their role and in the workplace (they should not relate to any personal issues or conflicts), and
- the aim of the process is to help the worker improve their performance

Step 1: Identifying and assessing the performance concerns

- **Have you clearly identified what the performance concerns are?**

Clearly and precisely identify what the performance concerns are, including identifying specific examples or occurrences in relation to each of the concerns.



Example

The worker has:

- repeatedly failed to complete tasks correctly or to the required standard
- failed to follow directions from a manager, or
- been absent from work on a number of occasions without explanation

- **Have you assessed the performance concerns and possible reasons for the worker's poor performance?**

In assessing the performance concerns, consider:

- how serious is the worker's underperformance?
- how long has their underperformance gone on for?
- what is the difference between the level of performance you expect in the worker's role and what the worker delivers?

Don't approach the situation with assumptions about why the worker is underperforming.

Consider whether there are any organisational or other factors at play that may be contributing to or causing poor performance.

**For example:**

- is the worker clear on what their role is?
- is it a case of inadequate training or supervision?
- does the worker have access to the right tools?
- are there any workplace-related issues (such as interpersonal conflict) that may be contributing to the poor performance?
- are there any medical, personal or family factors that might lead to poor performance?

- **Have you considered what steps could be taken by you or the worker to address the performance concerns?**

You should consider the ways in which the worker's poor performance could be improved. For example, you should consider whether additional support such as training, access to additional tools and resources, reallocation of tasks and duties or flexible working arrangements would enable the worker to improve their performance.

Step 2: Preparing for a performance management meeting

- **Have you gathered and reviewed all relevant paperwork and information before the meeting?**

This could include:

- reviewing the relevant modern award (if one applies) and workplace policies and procedures
- reviewing the worker's employment agreement (including the position description)
- collecting documents and information that demonstrate poor performance, and
- preparing a performance improvement plan

- **Have you notified the worker of the reason for the meeting?**

When notifying the worker about the meeting (preferably in writing), make sure you tell them what the meeting is about and that they are allowed to bring a support person. The worker should also be given a reasonable amount of time to prepare for the meeting.

- **Have you planned what you will say at the meeting?**

Preparing a script or plan for the performance management meeting can help you keep on track and make sure you cover off on all the key discussion points. A meeting plan should set out:

- the reasons for the meeting
- details of the worker's underperformance (including specific examples)
- details of previous steps taken to attempt to resolve the worker's underperformance (including the reasons why the steps have been unsuccessful)
- any response provided by the worker
- any agreed actions by the worker or the employer that is required to improve performance
- details of any future meetings to monitor progress, and



- consequences for the worker if they fail to improve their performance (for example, extending performance improvement plan, counselling, training, written warning or termination of employment)

Make sure you:

- have arranged a suitable venue for the meeting where you will not be interrupted or overheard, and
- are able to take notes to record details of the meeting in writing



Case example – reasonable performance management

After Ms Khan's return to work following an ankle injury, her employer (the Townsville Hospital) initiated a performance management plan. Ms Khan's employment was managed under this plan for four months until she left the workplace.

The hospital's performance management policy expressly required the employer to consider direct reasons and influences for concerns about the performance of employees. The possible reasons and influences for performance concerns under the policy included insufficient employee competencies, ill health, and problems with co-workers.

Ms Kahn argued that the hospital failed to consider the adverse effect on performance that may have been caused by staff shortages, and that the initiation and implementation of the performance management plan was not reasonable management action taken in a reasonable way.

The Court disagreed with Ms Khan and held that the employer:

- reasonably instigated a performance management plan and process
- had a valid reason to do so, and
- followed a reasonable process in the implementation of this plan

This case demonstrates the importance of following the rules under an award or registered agreement, contract of employment, or workplace policy before taking steps to manage underperformance through the initiation of the performance management process.

Khan v Workers' Compensation Regulator [2023] ICQ 002



See the [Fair Work Ombudsman's webpage on performance management and warnings](#) for useful templates and resources to assist with performance management meetings and planning.

Step 3: Holding the performance management meeting

- **Have you clearly explained the performance concerns to the worker?**

At the meeting you should explain:

- what the performance concerns are and provide specific examples
- why their underperformance is an issue and how it impacts the workplace
- what outcomes or change in performance you are seeking
- how you will support the worker to improve or what support is available to them, and



- consequences for the worker if they fail to improve their performance (for example, extending a performance improvement plan, counselling, training, written warning or termination of employment)

- **Have you invited the worker to respond to what you have said and to explain their performance?**

You must provide the worker with 'procedural fairness' (ie. a fair process – see below for further information), which includes giving them an opportunity to respond to the performance concerns you have set out.

You should genuinely consider the worker's response and take their feedback into consideration when discussing what the next steps will be.

- **Have you discussed what the next steps will be and decided on a performance improvement plan?**

When deciding on what the next steps will be, remember that the aim of this process is to help the worker improve their performance.

Consider whether there are any steps that your LALC can take to support the worker to improve their performance (such as providing training or access to additional tools and resources).

Collaborating with the worker to decide on a performance improvement plan with clear actions, goals and reasonable timelines will help the worker understand what areas of their performance need improvement and the level of performance that is expected in their role.

You should also decide on how the worker's performance will be monitored (for example, weekly catchups to discuss their progress, provide feedback and review the performance improvement plan) and schedule dates for follow-up meetings.

Remember to remind the worker what steps will be taken if their performance doesn't improve (for example, they will be given a warning).

- **Have you arranged for the meeting record and performance improvement plan to be signed by the worker and to provide them with copies?**

Make sure you keep accurate and full written records throughout the performance improvement process.

Problems can arise later if the worker makes a legal claim against your LALC, and you are unable to rely on accurate records of the performance improvement process that has been undertaken.

The performance improvement plan should clearly set out the actions, goals and timelines to assist the worker to improve their performance.

The performance plan should be signed by the worker and the LALC and the worker should keep copies of the plan of the performance improvement plan.



Case example – unreasonable performance management

At a mid-year performance assessment, Comcare issued its employee, Mr Chambers, with an 'improvement required' rating.

Comcare did not identify what the issues were with Mr Chambers' performance before, during or following the assessment. Mr Chambers was not provided with an opportunity to improve his performance and was transferred to a non-existent position while management dealt with the performance issues.

Under worker's compensation legislation, the Court found that Comcare's conduct, in managing Mr Chambers' performance, constituted unreasonable management action carried out in an unreasonable manner.

Comcare v Chambers [2017] FCA 1014

Step 4: Monitoring and reviewing performance

- **Have you arranged for follow up meetings to monitor the worker's performance?**

It's unlikely that a performance improvement process will be effective if you don't monitor the worker's performance on a regular basis and provide feedback.

As above, you should document the outcome of any review, including any changes to the original performance improvement plan.

Even if the worker's performance has improved and there are no longer any issues or concerns, a meeting to review the worker's performance should still be held to acknowledge that the issues or concerns have been resolved.

Remember to notify the worker in advance of any follow up meetings and tell them they are allowed to bring a support person.

Step 5: Taking further action if performance does not improve

- **Have you considered what further action should be taken if the worker's performance has not improved after a reasonable period?**

Appropriate action will depend on the circumstances of each individual situation, and options might include:

- Extension of a performance management plan
- counselling and training
- a written warning, or
- termination

Remember to keep accurate and full written records of any further action taken and provide the worker with procedural fairness (see below for further information).



Case example – inconsistent performance management

Mr Anderson was dismissed by Acquista Investments, the employer, for late attendance, as well as other matters including a failure to comply with a no smoking directive.

Acquista Investments contended that Anderson was regularly and persistently late for work, that punctuality was a key element of Anderson's role, and that Andersen was warned on numerous occasions about the issue. In the absence of improvement following a written warning, Acquista Investments argues it was reasonable and fair to dismiss Andersen.

The Fair Work Commission considered evidence that:

- the warnings given to Andersen for poor performance were not consistent, and
- management and other employees also smoked in the office in breach of the no smoking directive

The Commission held that, while the warnings in relation to late attendance were a valid concern, they were undermined by the inconsistency in the employer's attitude regarding late attendance and smoking. There was no valid reason for dismissal and the termination was unfair.

Andersen v Acquista Investments P/L and Veolia Environmental Services (Australia) Pty Ltd T/A Integrated Waste Services [2011] FWA 4560



Caution

Your LALC may be exposed to legal action for unfair dismissal if you take steps to terminate a worker due to performance concerns without first going through a performance management process. For this reason, you should **always** seek legal advice before terminating a worker for performance reasons.



For information on terminating a worker's employment see our [termination checklist](#) and [our fact sheet 'What are our legal obligations if we want to terminate a worker's employment?'](#)

What is procedural fairness?

It's very important that you provide the worker with procedural fairness during the performance management process. Procedural fairness is a term that means that the decision-making process, or procedure used to reach an outcome, needs to be fair to all parties involved.

When providing for procedural fairness in a performance management situation, the employer must:

- notify the worker of the specific concerns and examples of poor performance
- give the worker a full opportunity to respond to any issues or concerns about their performance that you raise with them
- give the worker all the relevant information and documents about your concerns
- give the worker a reasonable amount of time to respond and improve their performance
- allow the worker to have a support person present for any meetings
- not let personal issues or conflicts affect decisions, and
- ensure that the performance management process is kept private and confidential



Case example – lack of procedural fairness

Vondoo Hair (the employer) accused Samantha Crockett (the employee) of witnessing another employee stealing clients for her own personal business and of supplying client details to that other employee.

Because Vondoo Hair failed to properly investigate the matter and give Crockett an opportunity to respond to the allegations against her, the Fair Work Commission found that Crockett:

- was denied procedural fairness, and
- there was no valid reason for her dismissal

Crockett's dismissal was, therefore, unfair.

Crockett v Vondoo Hair t/a Vondoo Hair [2012] FWA 8300

What is the difference between poor performance and serious misconduct?

Poor performance occurs when a worker is not performing their role and duties to the required standard or is behaving inappropriately in the workplace. Examples of underperformance include:

- not carrying out work to the required standard
- not following workplace policies and procedures, or
- engaging in negative or disruptive behaviour at work.

Serious misconduct, on the other hand, is defined under the [Fair Work Regulations \(2009\) \(Cth\)](#) and includes:

- wilful or deliberate behaviour by a worker that is inconsistent with the continuation of their employment, or
- conduct that causes serious and imminent risk to the health or safety of a person or the reputation, viability or profitability of the employer's business

Examples of serious misconduct include being intoxicated at work, theft, fraud, assault, and refusing to follow lawful and reasonable instructions from an employer.

An employer is not required to manage the performance of a worker who has engaged in serious misconduct and may terminate the worker's employment without notice.



Case example – serious misconduct or misconduct

Dr Asher, employed by the Royal Melbourne Institute of Technology (**RMIT**), was dismissed for serious misconduct. RMIT's reasons for Dr Asher's employment termination were a combination of performance and conduct issues, which included the misappropriation of funds.

The Fair Work Commission considered that Dr Asher's conduct amounted to misconduct rather than serious misconduct – while Dr Asher's conduct was ill judged and inappropriate and not condoned, it was not of such a serious nature to warrant the termination of his employment.

Because RMIT failed to provide a fair process of counselling and warnings in relation to the elements of poor performance and the standards expected of Dr Asher, the Fair Work Commission determined that Dr Asher's dismissal was harsh, unjust or unreasonable.

Royal Melbourne Institute of Technology v Asher (2010) 194 IR 1; [2010] FWAFB 1200



See our [Termination Checklist](#) for important information you should consider before terminating a worker's employment.



Caution

Your LALC should consider seeking legal advice on the process for terminating a worker due to serious misconduct to ensure that the LALC is not exposed to legal action.



More information

See our [Legal resources for LALCs webpage](#) to find resources specifically targeted to LALCs. In particular, see:

- [Hiring Checklist for LALCs](#)
- [Termination Checklist for LALCs](#)

Our [website](#) also has resources for not-for-profit community organisations on a range of related topics which may be useful to your LALC:

- Our [managing people webpage](#) – This part of our website covers the relationships your organisation will have with clients, employees, members and volunteers, including recruitment, resignations and disputes. In particular, see:
 - [What are our legal obligations when recruiting an employee?](#)
 - [Discrimination in recruitment](#)
 - [Screening Checks Guide for NSW community organisations](#)

Justice Connect's LALC Service provides free legal information, training and advice to LALCs. To find out more visit [our website](#) or [contact the LALC Service](#).