Managing Performance

eBook

Commercial-in-confidence. This publication is the copyright of Liquid HR. No part of this publication may be copied, reproduced or communicated to the public by any process, electronic or otherwise, without the express written permission of Liquid HR.

LiquidHR

Raising the standard

Contents

Overview

This eBook contains an in-depth overview of how to address performance and/or conduct issues that have arisen with an employee.

Should you have any questions in relation to the information below, please reach out to one of our Employment Relations experts on:

Tel: 1300 887 458

Email: enquiries@liquidhr.com.au

Managing Performance

From time to time you may have an employee that is not meeting the performance expectations of their role. This may be for a variety of reasons. It is critical that all leaders in the business have a thorough understanding of the performance management process and the risks associated with non-compliance. This eBook provides a detailed overview of the process, with resources to support.

On the job coaching

It is important before the formal performance management process commences that you have taken the time to provide the employee with timely feedback regarding the performance concerns.

You should ensure you have had an open discussion with them to identify any underlying issues, where they may need further support/training and clearly set expectations.

It is good practice to ensure that you document any informal conversations you have with an employee detailing the date and time of discussion, notes regarding what was discussed and any agreed actions. You will find a file note at the end of this document to support with this.

The probationary period

All full time and part time employees are subject to a probationary period. For organisations with 15 or more employees this period is 6 months. For organisations with less than 15 employees, this period is 12 months.

When calculating the total number of employees:

- Include all full time and part time employees
- Include all regular casual employees
- Include employees who are employed by an associated entity

A probationary period is an opportunity for you to assess the performance and suitability of the individual for the role. It is important that you are having regular catch ups with a new employee throughout their probationary period. We recommend at a minimum this is conducted at the employees 1 month, 3 month and prior to the end of their 6-month anniversary.

If you terminate an employee during their probationary period on performance or conduct grounds, then they will be unable to access the unfair dismissal provisions of the Fair Work Act 2009. It is important to be aware that the probationary period will not exclude an employee from making a General Protections (also referred to as adverse action) claim. This is when an employee claims they were terminated due to a workplace right they held. For further information on this, please refer to our termination of employment eBook.

Once an employee has completed their probationary period, they will be able to access the unfair dismissal provisions of the Fair Work Act 2009, if you terminate their performance on the grounds of performance/conduct and they believe the termination was unfair. In the subsequent sections of this eBook we will discuss in detail the steps you should follow to ensure that if the performance process leads to termination, that you have followed all of the necessary steps.

The main objective of performance management

You should always keep in mind that the purpose of performance management is to get the employees performance back on track and provide them with the necessary support, training and skills to succeed in their role. If you approach it with the mentality that you are 'following the process so that you can terminate' you will greatly diminish the possibility of getting the employee back on track and meeting the performance expectations.

The cost of losing an employee is significant, particularly if you factor in the lost time associated with the recruitment process and training a new employee.

Understanding the risk – unfair dismissal claims

Employees must lodge an application for Unfair Dismissal to the Fair Work Commission (FWC). An unfair dismissal claim must be made within 21 days after the dismissal took effect (extensions may be granted in certain circumstances). A lodgement fee is required with each application.

Prior to considering the merits of an application, the FWC must decide the following matters in relation to an application for unfair dismissal

a) whether the application was made within the required period (21 days after the dismissal took effect)

b) whether the person was protected from unfair dismissal

c) whether the dismissal was consistent with the small business fair dismissal code

d) whether the dismissal was a case of genuine redundancy

In determining a claim of unfair dismissal, the FWC must consider factors including:

a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

b) whether the person was notified of that reason; and

c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal;

e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about the unsatisfactory performance before the dismissal; and

f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

g) any other matters that the FWC considers relevant.

If satisfied that the employee was unfairly dismissed, the FWC may order reinstatement to the employee's former position, or if that is impracticable, re-employment in a position that the employer has available and that the FWC considers suitable. If reinstatement or re-employment would be impracticable, the FWC may order compensation.

Compensation for unfair dismissal has been set at a maximum of 26 weeks wages for award covered employees or half the amount of the high-income threshold immediately before the dismissal (whichever is the lesser). The high-income threshold as of 1 July 2021 is $158,500.

The FWC can reduce the amount of compensation if it is satisfied that the person's misconduct contributed to the employer's decision to dismiss the person. Any compensation ordered by The FWC will not include compensation for shock, distress or humiliation caused by the manner of the person's dismissal.

The performance management process

Step one: Clearly document the concerns you have regarding the employee's performance and/or conduct.

It is important that this is specific and factual. You should also provide examples.

For example:

Lateness to work on 10 occasions, without notifying manager (list dates and times).

We recommend this is documented in the performance discussion template found at the end of this eBook.

Step two: Verbally invite the employee to a performance meeting to discuss the concerns.

You should provide at least 24 hours' notice of this meeting and the opportunity for the employee to have a support person present. You must not unreasonably refuse an employee's request to have a support person. The role of the support person isn't to speak on behalf of the employee.

You should send a follow up written invite which outlines the date and time of the meeting and a general overview of what will be discussed. A template can be found at the end of this eBook.

Step three: Hold the meeting with the employee.

Open the meeting by advising that the purpose of the meeting today is to discuss concerns regarding the employee's performance/conduct. Explain that you will be going through each of the concerns and the employee will be provided with an opportunity to respond and discuss their perspective regarding each of the matters. Advise that you will then close the meeting to consider the employees response and determine the appropriate outcome.

Ensure you document the employee's response in the performance discussion template.

Step four: Consider the employees response and determine the appropriate outcome.

Contrary to popular belief, there is no 'three warning' process. It is important that you take into consideration the employees' length of service with the business, any prior warnings/performance conversations that are related and the employee's response to the concerns. Once you have considered these factors you can determine the appropriate outcome. This may include:

- A coaching discussion
- A verbal warning
- A first written warning
- A first and final written warning
- Termination (for incidents of serious misconduct). Please refer to our termination e-Book for further information.

You should complete the performance discussion record:

- Statement of business expectations: clearly articulate the specific standards expected in relation to the issue being discussed. Reference applicable policies/procedures that must be followed.
- Discussion outcome: select the appropriate outcome
- Action plan: document the action plan. These are the specific actions that need to be completed by the employee to improve their performance or conduct. You may also

include any actions that a manager will take to support the employee in addressing the concerns e.g. facilitate training on the XYZ system.

- Outline the consequences of not meeting the required standards. This may be “further disciplinary action may be taken, up to and including termination of employment”.

Step Five: Hold a follow-up meeting with the employee to deliver the outcome

This meeting should be held as soon as possible after the initial meeting (provided you have had adequate time to consider any of the points raised by the employee).

At this meeting you should advise the employee on the outcome (e.g. coaching discussion, written warning etc). You should go through the performance discussion record and confirm what was discussed, the employee’s response, the expectations, the consequences should there not be the required improvement and the action plan.

You should also issue an employee with a letter advising of the outcome. A template can be found at the back of this e-Book.

Have the employee sign the discussion record and acknowledge trhe receipt of the outcome letter.

Step six: Schedule a follow up meeting in 4-8 weeks to assess the employee’s progress.

Follow the steps outlined above again prior to this meeting. You should also coordinate a weekly check in with the employee to discuss progress informally. You can track this in the file note.

When to consider termination

Prior to terminating an employee on performance grounds, you must ensure you have a valid reason for the termination and that the termination would not be considered harsh, unjust or unreasonable.

Section 387 of the Fair Work Act 2009 sets out the factors the Fair Work Commission (FWC) must take into consideration when determining whether a dismissal was harsh, unjust or unreasonable.

This includes:

- Whether there was a valid reason or the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees)
- Whether the person was notified of that reason
- Whether the person was given an opportunity to respond to any reason related to the capacity or conduct

- Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal
- If the dismissal related to unsatisfactory performance by the person, whether the person had been warned about that unsatisfactory performance before the dismissal
- The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal
- The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal
- Any other matters the FWC considers relevant

Please refer to our termination eBook for further information related to termination of employment. We recommend you seek advice before terminating any employees. You can contact one of our Employment Relations experts on 1300 887 458 or email enquiries@liquidhr.com.au.

Keeping records

One of the critical components of performance management is ensuring you have adequate records of all conversations and actions taken with the employee. The templates below can assist with this process.

You will find a case summary overview below which you may wish to complete for any employees going through the performance management process. If in the unfortunate event the matter leads to termination and an unfair dismissal claim is made, you will have documented evidence showing the steps you have taken.

Resources

Performance Management Case Summary

Employee name:

Position:

Commencement date:

Date	Action	Supporting evidence

File Note

Employee name:

Position:

Date:

Subject:

☐ Phone call

☐ Observation

☐ Meeting/discussion

Performance Meeting Invite Template

Private and confidential

Name
Email or Address

Date

Dear NAME,

Re: Invitation to attend a performance meeting

Further to our conversation on DATE this letter is to confirm the details of a meeting that we have scheduled on DATE at TIME at ADDRESS to discuss your performance and conduct in your role as POSITION with COMPANY NAME. NAME will also be present at this meeting.

The purpose of this meeting is to discuss with you the following concerns:

- INSERT DETAILS

We want to hear your views in relation to these matters and give you an opportunity to respond. In the meeting you will be able to give us any additional or clarifying information that you believe is relevant to the consideration of the above matters.

We will consider your response and undertake any further required investigation before a decision is made. The outcome of this meeting and any further investigation that follows may result in disciplinary action, up to and including termination of employment.

You are entitled to bring a support person with you to the meeting.

Please confirm that you can attend the meeting at the organised time.

We ask that you keep this matter confidential and not discuss with any other employees. If you have any questions about this matter please contact me directly.

MANAGERS NAME

POSITION

Performance Discussion Record

Section 1 – Personal Details

Name	
Position and Department	
Commencement date	
Date and time of discussion	
Manager/interviewer's name	
Company witness' name	
Team member's witness' name (please note if team member declines offer of a witness)	

Section 2 – Setting up the meeting

☐ Ask the team member to attend a performance discussion and advise the general nature of the discussion.

☐ Give the team member the option of having a support person present. If they are under 18, please appoint a support person.

☐ Organise another manager as a company witness to be present and take notes of the discussion.

Section 3 – Reason for the discussion

Complete this section prior to conducting the discussion with the team member. Use notes to clearly describe the reason for the discussion including specific details of the performance or behaviour that does not meet business expectations.

Record known facts in order of occurrence. Record specific details of policy and/or procedure breaches Record results of investigations Show specific dates and times Provide details of specific examples of unsatisfactory performance or unacceptable behaviour	

Refer to any previous discussions Outline allegations Attach relevant documents to support	

Section 4 – Team members response

Ask the team member for his/her response to the issues including what he/she considers to be the appropriate policy or procedure.

Any reasons the team member has provided as to why the performance or behaviour has not met business expectations Details of the explanation provided by the team member, noting the words used (as much as possible) Details of the team member's understanding of the relevant policy or procedure	

Section 5 – Statement of business expectations

Clearly articulate the specific standards expected in relation to the issue being discussed, OR re-iterate the business expectations from any previous discussions. Company policies and procedures Code of Conduct or values and behaviours Safety routines Behavioural competencies Business standards or work processes	

Section 6 – discussion outcome

The outcome of this discussion is:

- ☐ Coaching discussion
- ☐ No warning warranted – file note only
- ☐ First written warning
- ☐ Second written warning
- ☐ Third/final written warning
- ☐ First and final written warning
- ☐ Termination of employment
- ☐ Other action, please specify:

Section 7 – Action plan

Record specific actions that will be taken by the team member and the Company in improving the performance or behaviour. Ask the team member for his/her input.
It is not necessary to complete this section if you are considering termination of employment.

Specific Action	Person Responsible	By When	Completed on

Section 8 – Consequences of not achieving standards or action plan/outcomes

Clearly detail the next action the Company will take on the issue being addressed if there is no improvement or there is a repeat incident.	

Section 9 – Declaration by team member

The details shown above have been explained to me and I understand that a copy of this document will be retained in my personal file. I also understand the consequences of not correcting the performance or behaviour discussed with me.

Name:

Signature:

Date:

Section 10 – Signatures of other people present in the discussion

Managers name:

Signature:

Date:

Support person name:

Signature:

Date:

Company witness name:

Signature:

Date:

Template Warning Letter

DATE

NAME

ADDRESS

Dear NAME,

This letter is the confirmation of our performance discussion on DATE.

As a result of your performance and as discussed on DATE the following measures will be taken:

[Insert – applicable disciplinary action, delete remaining points]

Corrective Coaching Discussion

Verbal Warning

First Written Warning

Second Written Warning

First and Final Written Warning

During that discussion, the following concerns were outlined to you:

[INSERT SPECIFIC EXAMPLES]

As discussed with you, the expectations are:

[INSERT EXPECTATIONS/STANDARD]

You are required to comply with the following actions to improve the abovementioned performance:

[INSERT ACTIONS & TIME FRAMES]

The purpose of this process is to provide you with reasonable opportunity to improve your performance however in the future if these expectations are still not being met, further disciplinary action may be taken which could include the termination of your employment.

NAME, should you require any further information or clarification regarding anything contained within this letter, please do not hesitate to contact me at any time on [PHONE NO] or via email at [EMAIL].

Yours Sincerely,

MANAGER NAME

POSITION

Employee Acknowledgement:

I [insert employee name] acknowledge receipt of this letter

Sign:_____ Date:_____

LiquidHR

Raising the standard

HR Consulting • HR Outsourcing • Payroll

Call 1300 887 458

Email enquiries@liquidhr.com.au

Visit www.liquidhr.com.au

Level 32, 101 Miller Street,
North Sydney, NSW, 2060

enquiries@liquidhr.com.au