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Performance-based terminations.

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Prevalence.

2015 White Paper

A study conducted in 2015 reported that performance-based terminations were the most time intensive for employers.

36% of employers reported that almost half of employees terminated due to performance threatened or commenced litigation.

Further, more than half of employers admitted to considering terminating employees based on redundancy to avoid a potential performance-based termination.

Fair Work Commission 2025 Annual Report

Performance-based terminations account for approximately 25% of involuntary job separations.

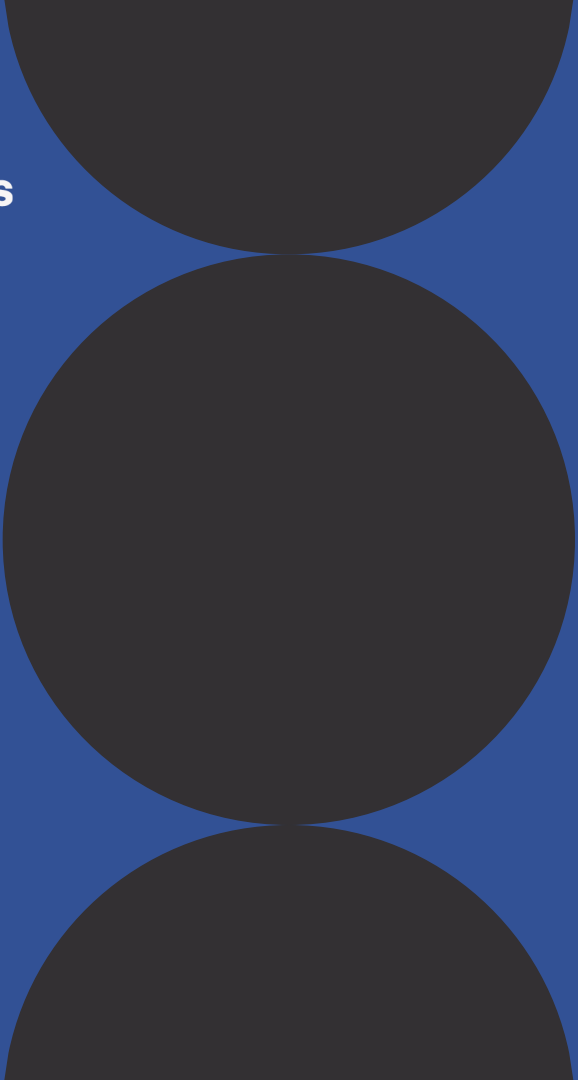
25% of employers carry out five or more performance-based terminations each year.

44,075 lodgements in 2024/2025, which was a 10% increase from the prior year.

37% were unfair dismissal claims, 14% were general protection claims and 13.5% were supported wage system agreements.

Claims expected to increase to over 50,000 in 2025/2026.

Economic uncertainty, the cost of living, increased awareness of legal rights and use of AI are contributing.



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**Performance
management process.**

Performance.

What is performance?

Performance is defined as how effectively an employee performs their job duties.

Performance is critical to an organisation's and an individual's success.

How is performance measured?

- Sales revenue
- Customer satisfaction
- Quality of work
- Efficiency and productivity

Is there a standard protocol to be adhered to or can an individual determine how to achieve outputs?

Performance impacts career advancement, promotions and professional growth.

Performance management.

The goal is to provide support to an employee to assist them reach the employer's performance expectations, not to manage the employee out.

It is important that employees understand what is expected of them in their role and the consequences are if they do not perform as expected.

It is important that the process does not move too quickly to ensure that the process is perceived to be fair.

"Eggshell Skull" rule - you take the employee as you find them; some may react negatively to the process for reasons unrelated to the process.

Termination due to performance.

FW Act does not prescribe how performance-based terminations should be managed.

Guidance is provided in section 387 of the FW Act highlighting the requirement for:

- a "valid reason" for *reason for the dismissal related to the person's **capacity** or conduct (including its effect on the safety and welfare of other employees)*; AND
- for notice of concerns to be provided to an employee along with a reasonable opportunity to respond; AND
- a final warning that employment is at risk prior to termination.

Considerations.

1. Recruitment process - work experience, duration, referees
2. Award coverage - consider duties of classifications
3. Position description - ensure that it is specific, clear and relevant
4. Employment contract - set out the expectations
5. Policies and procedures - are there protocols to be adhered to
6. Training - systems training, protocols
7. Regular meetings - concerns raised immediately
8. Opportunity to improve and support - check in on progress
9. Performance review meetings - quarterly?
10. Performance improvement plan(s) - when concerns continue
11. Policy regarding the disciplinary process & consequences
12. Alternatives to termination and notice of potential termination



FWO sample position description.

JOB TYPE: <Type of employment> For example, Full-time; Part-time; Casual

LOCATION: <Physical address the employee will work at. If the job requires travel, list the primary location> For example, Smithton office

SUPERVISOR/MANAGER: <Who the employee will report to> For example, Office Manager; Shift Supervisor

MAIN DUTIES/RESPONSIBILITIES: <What are the duties and responsibilities of the position?>

For example,

- Coordinate and carry out all office administration including reception, mail, couriers, greeting clients and filing
- Maintain a clean and safe workspace, and abide by workplace health and safety policies and procedures
- Other tasks as directed

SKILLS & EXPERIENCE

Qualifications: <What qualifications, licenses or education level does the employee need?>

For example,

- Diploma or Certificate IV in Business Administration or relevant experience
- First aid certificate

Experience: <What type and how much experience is needed?>

For example, 3 years experience in a similar role or industry

Skills: <What skills are needed for the job, including any technical or interpersonal skills?>

For example,

- Intermediate to advanced Microsoft Office skills (Word, Excel, PowerPoint and Outlook)
- Excellent verbal and written communication
- Organised and able to meet deadlines

PERFORMANCE GOALS: <What level of performance do you expect from the employee?>

For example,

- Complete administration tasks on time
- Ensure office is clean and presentable at all times
- Deal with clients, suppliers and other employees professionally at all times

Case Study.

Facts

Employee does not undertake work as required and is showing signs of apathy.

The Employee does not appear to understand the job duties.

Possible issues

Job content and design.

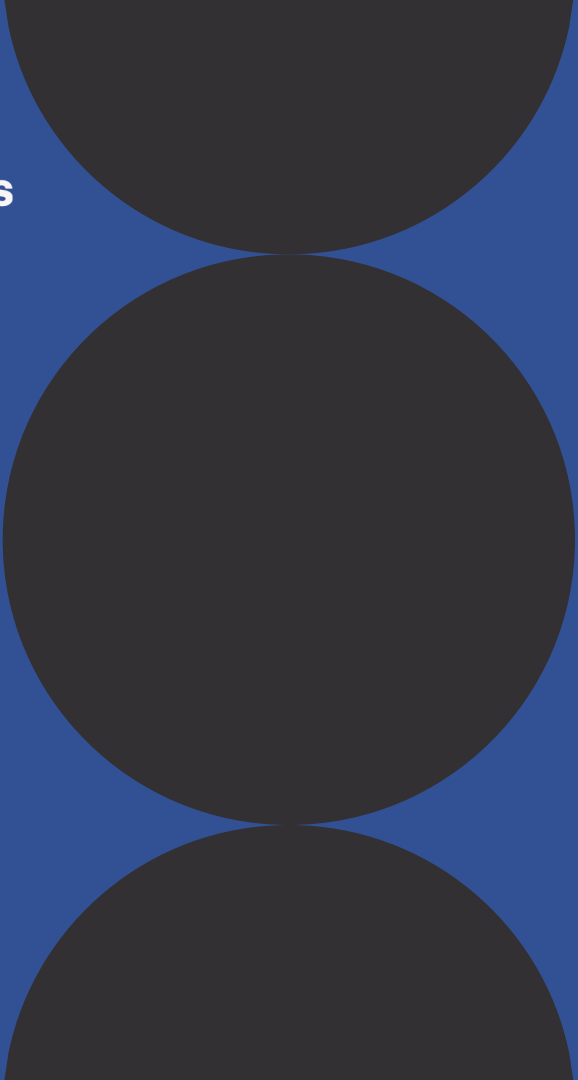
Inappropriate job fit.

Personal or external factors.

Strategy

Meet with the employee to discuss what is required in the position.

Discuss performance expectations and options for training and/or support.



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**What is the minimum
standard for performance
- recent cases.**

What is the minimum standard for performance?

Crozier v Palazzo Corporation Pty Ltd (2000) 98 IR 137

Background

Applicant had successfully applied for a sales executive role with a storage company.

Primary objective of role was to win new business - in the job description and discussions with the employer.

During probationary period, applicant only won one small new deal.

Applicant was dismissed shortly after the probationary period given that he had not achieved any sales.

Unfair dismissal

Applicant argued no valid reason given his limited success was caused, in part, by the employer's failure to provide support and assistance, including not setting sales targets and providing inadequate training.

What is the minimum standard for performance?

Crozier continued ...

The Commissioner observed:

The evidence of Mr Crozier, which was not seriously challenged by the company, is that he was well organised and hard working. He brought a professional approach to his job.

Within the constraints imposed by his employer regarding pricing structures and available facilities he did his best, and his best could not be faulted.

It may be that the product he was to sell and the price at which he was to sell it made his task impossible. ...

I think the situation is best described, again by [counsel for the respondent] as follows:

'In my respectful submission, sir, this episode was an unhappy one for all concerned. The company thought they were getting a person who could sell and Mr Crozier thought he could do it. Through no fault of his own, he was not able to. It was just a disastrous error of judgment by all.'

Applicant's appeal

The applicant argued for a subjective test:

'Simply put it was argued that Mr Crozier did the best he could with the constraints imposed on him.'

The full bench rejected the appeal, finding that performance is an 'incident' of an employee's 'capacity' within the statutory meaning section 387 stating:

'A consequence of the adoption of the test posited by the appellant would be that an employer would never have a valid reason to terminate an employee based on his or her capacity if the employee was doing his or her best, '... despite the fact that the employee may be entirely unsuited for their position or they do not fulfil a key requirement of their position which was reasonable in the circumstances.'

The full bench found that the appellant's role was to bring in new business and he had failed to do that and, therefore, there was a valid reason for dismissal.

What is the minimum standard for performance?

Crozier continued ...

Applicant's judicial review

The applicant sought judicial review before a full bench of the Federal Court.

The applicant was unsuccessful and the Court held that:

"Capacity, means the employee's ability to do the work he or she is employed to do."

The court went on to reject the contention that an employee trying their best will always satisfy the capacity requirement:

"Plainly, there can be a valid reason for the termination of an employee's employment where he or she simply does not have the capacity (or ability) to do the job."



What is the minimum standard for performance?

Carmody v Bureau Veritas Minerals Pty Ltd, [2025] FWC 259 (29 January 2025)

DP Anderson accepts that:

'It is well established that the standard of conduct or performance reasonably required of an employee, including a qualified, experienced and professional employee such as Mr Carmody, is one of competence not perfection'

Background

Mr Carmody was an experienced quality control officer who performed a complex and technical role.

In January 2024, BHP raised concerns about the data quality in a particular report.

An investigation determined that a laboratory technician had not followed the appropriate protocols, and that this had not been identified by Mr Carmody as he was required to do.

Rather, he merely copied inaccurate data. He was counselled informally.

In August 2024 further concerns were raised with Mr Carmody about inaccurately entering data without checking it.

Mr Carmody was suspended for allegedly knowingly and intentionally manipulating false data.

Mr Carmody denied wrongdoing and blamed human error, stating that the approach that he had taken was consistent with his training.

Mr Carmody was terminated for summary dismissal.

Unfair dismissal

DP Anderson stated:

"Error alone is not wrongdoing. ... Mr Carmody's conduct was a serious lapse of professional judgement occasioned by a failure to take due care and resolve anomalies by reference to the available raw data".

Relying upon the test of competence established in *Crozier*, the Commission found that the conduct was sufficient to justify dismissal due to capacity as set out in section 387(a).

What is the minimum standard for performance?

Carmody continued ...

Findings

First, it was held that the error was not 'singular' but followed a pattern behaviour over which Mr Carmody had been counselled earlier in the year.

Second, 'each of these errors were avoidable had due care and attention been exercised.' [106]

Third, Mr Carmody could have taken reasonable steps to resolve the errors, but failed to do so.

'These were material failures by Mr Carmody in the performance of the primary responsibilities of his quality control function,' the DP held.

The nature of the role was also a relevant factor.

'His very job existed as a check and balance to identify errors or anomalies in the testing process, in data entered by the technicians, and to resolve these before certifying results to clients'

Carmody continued ...

Ruling

The DP considered:

- (i) the seriousness of the failures in the context of the role;
- (ii) the multiple, compounding failures;
- (iii) the failure was similar to the issue Carmody had been counselled on;
- (iv) the failures were avoidable, had Carmody followed counselling; and
- (v) Carmody was an experienced professional

It was found that the dismissal was not disproportionate and was a course reasonably available to the employer noting,

'it is well established that the Commission does not stand in the shoes of an employer and decide what they could or should have done.'

The dismissal was found to be harsh and one month's wages was awarded.

What is the minimum standard for performance?

Guy Gooneardena v Komeyui Management Pty Ltd [2024] FWC 1445 (appeal dismissed)

Background

The Applicant was employed as a floor manager at a Japanese restaurant.

The reason for termination was:

"The decision to terminate your employment is based on several issues that have been consistently raised and observed during your tenure, specifically in the areas of Booking Schedule and System, Information Sharing, Professional Communication, Independence as a Manager, Leadership and Trust, and Resolving Late Service Issues."

Unfair dismissal

Commissioner Crawford held that dismissal relates to unsatisfactory performance where it refers to:

"the level at which the employee renders performance, including factors such as diligence, quality, care taken and so on."

The Commission held that the employer did not provide sufficient evidence to establish that the Applicant's performance was unsatisfactory, either at the time of dismissal or during the unfair dismissal proceedings. The six alleged performance issues identified did not provide a valid reason for dismissal either individually or collectively.

Recommendations.

An employee must be capable of performing their duties but need not perform them to a standard of perfection. Rather a standard of competence is required.

Ensure that the position description accurately sets out the duties of the role.

Performance expectations should be:

- clearly communicated prior to the commencement of employment
- measurable
- consistently applied for the same role

Where performance requires protocols to be followed, staff should be trained on the protocols that are documented

Ensure that adequate notice is provided before performance expectations or protocols are changed

Investigate alleged failure to comply with a protocol.

Performance concerns must be clearly articulated in the termination letter.

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**Can an employer
impose a PIP?**

Can an employer impose a PIP?

Vuong An v Glass Expansion Limited [2020] FWC 1771

Background

The employment was subject to a 6 month probationary period.

The employer met with the employee to discuss performance issues during the probationary period several times

The employee was provided with a PIP near the end of his probationary period.

The employee enquired about whether, in accordance with his employment contract, he would receive a salary increase.

The employer informed the employee he would not receive a pay increase unless his performance improved.

Over the next two weeks, the employer spoke to the employee about the expectations in the PIP.

The employee alleged that the PIP was fabricated to deny him a pay increase.

The employee's refusal to comply with the PIP; his employment was terminated on the basis that the relationship untenable.

Unfair dismissal

DP Hamilton agreed that there was a valid reason for termination and in determining whether the dismissal was harsh or unreasonable, found that:

- the employer had put the employee on notice of its performance concerns by:
 - holding performance meetings with employees on a regular basis;
 - communicating in plain and clear terms the performance issues and the standards of performance required;
- offered assistance available to meet those standards, and
- affording opportunity for the employee to address the concerns and improve their performance.

Recommendations.

Ensure that staff are informed of how performance issues will be managed.

Communicate the purpose of a PIP to staff during induction training.

Implement a performance management policy setting out the purpose of a PIP.

Communicate performance concerns clearly when they arise and what is required.

Inform staff of the purpose of a PIP and work with them to create a PIP.

When to use a PIP.

A PIP is appropriate when an employee is not meeting expectations but has a realistic opportunity for improvement

A PIP helps clarify performance gaps, sets out clear expectations and provides a pathway forward with defined goals, timelines and support.

A PIP should include:

- Employee name, job title
- Manager's name
- The specific performance concerns
- The expected standard of performance
- Clear objectives and action steps for improvement
- Support, training, or resources to be provided
- Review dates and check-in dates
- How progress will be measured
- Possible outcomes if the required improvement is achieved or not.

Sample PIP.

Performance Improvement Plan

Employee name		Manager name	
Job title		Start date	
Department		Agreed end date	

Role expectations

What is the acceptable performance expected of the employee in this role?

Areas of concern

In what areas of performance has the employee not met expectations, and what are the root causes of the issues?

Improvement goals

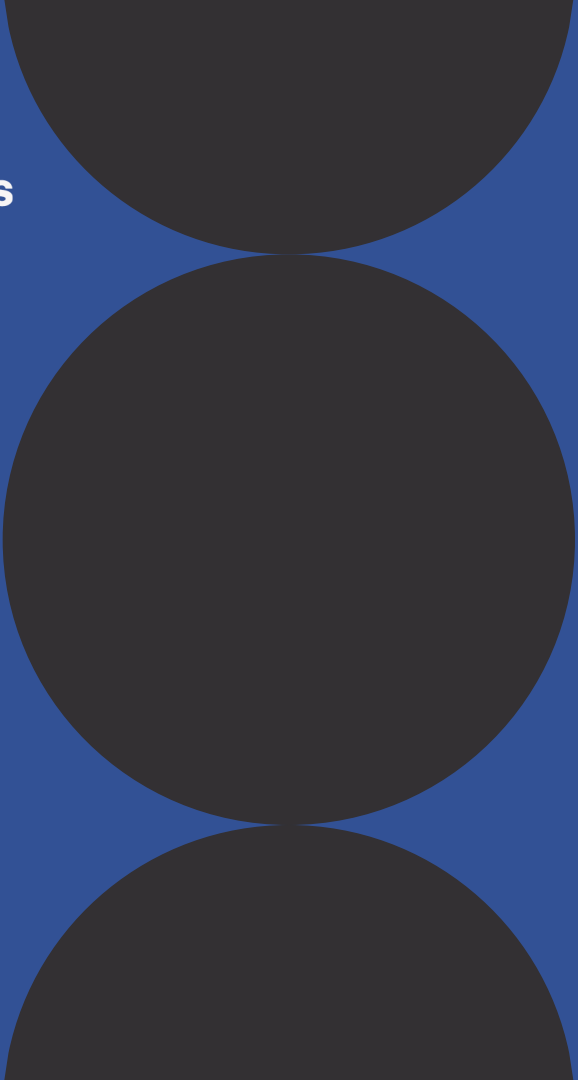
Define concrete goals that address the areas of concern and agree on milestones to meet the goals.

Goal and description	Milestone

Recent decision.

Robert McLean v Reserve Bank of Australia [2024] FWC 2269

Application for an unfair dismissal remedy – performance improvement plan – unsatisfactory performance – valid reason for dismissal – a number of PIP requirements not expressed clearly enough to know what was required or whether they had been met – feedback after mid-point review did not make clear that the Applicant was ‘off-track’ – second PIP meeting cancelled – show cause letter did not particularise ongoing deficiencies in performance – dismissal harsh – compensation ordered.



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**Performance
management and
mental health.**

Performance management and mental health.

Overview

Mental health issues impact 1 in 5 working age adults in any given year.

42.9 % of adult Australians will experience a mental health disorder in their lifetime.

Managing underperformance becomes more complex when mental health issues are involved.

Being diagnosed with a mental health condition does not remove an employee's obligation to meet role requirements.

However, they do require an employer to approach performance concerns with greater care in discharging their duty of care and WHS obligations.

Employers should consider whether there are stressors or psychological hazards in the workplace which could be causing the performance issues.

Reasonable Adjustments

An employer to consider whether reasonable adjustments could assist an employee perform their role effectively where issues have been raised.

Examples include:

- Temporary reduced hours
- Flexible work arrangements
- Working from home
- Additional support or supervision

If an employee's mental health condition impacts performance and the employer fails to consider reasonable adjustments, the termination could potentially be deemed to be discriminatory.

Terminations.

Robinson v Western Union Business Solutions (Australia) Pty Ltd [2018] FCA 1913

Mr Robinson was employed as an account executive and had been absent from work for almost 8 months at the time of termination due to work-related stress, anxiety and depression.

Western Union sent Mr Robinson correspondence inquiring about his return-to-work and directing him to attend at an IME which he refused to do.

Mr Robinson was directed to attend at the IME and was informed that he his failure to do so may result in termination.

Mr Robinson agreed to attend at an IME but as not provided with an appointment.

Mr Robinson's employment was terminated.

The court found that Mr Robinson's employment was terminated because of his mental disability and found that Western Union could not rely on the "inherent requirements" exception in section 351(2)(b) of the FW Act given the lack of evidence regarding Mr Robinson's inability to perform the inherent requirements of the role.

Mr Robinson was awarded \$140,000 in compensation and \$20,000 in penalties because it was found that he was terminated because of his work-related depression and anxiety.



Tips.

Employers should take an empathetic approach and should:



**Ensure clear
communication of
concerns**



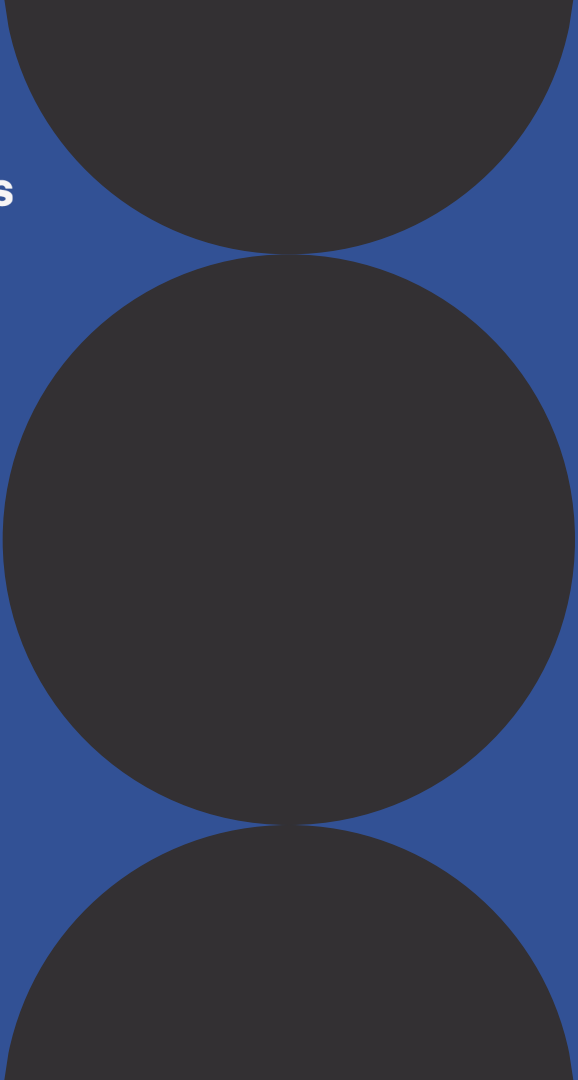
**Adequate opportunity
to respond**



**Reasonable time and
support to improve**



EAP should be offered



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**Risk of
mischaracterizing
performance-based
termination.**

Risk of mischaracterising performance-based termination.

Brendan Paramore v Knight Watch Security Pty Ltd T/A Bluestar Security Services [2020] FWC 4423

Background

The applicant was hired as state manager NSW on 6 August 2018.

Shortly after commencing employment, the company director formed the view that he was a poor fit for the role, as he was not meeting KPIs for budget sales growth and was not bringing in new business opportunities.

In November 2019, the company director decided to eliminate the NSW state manager role along with a business development role in Melbourne.

The company director assumed these while he recruited a national business development manager.

The applicant's employment was terminated on 17 December 2019 due to the restructure.

Unfair dismissal

The applicant alleged that the redundancy was not genuine.

The company director gave evidence stating that he said to the NSW state manager:

"I made your position redundant. I wasn't getting... a return on my investment. ... the relationship was coming to that breaking point between us. You were turning up to meetings in shorts where you should have been working... – I had a manager tell me that you were actually going to the beach ... and the gym and when I did make the position redundant, I took over your telephone, guess what? The evidence was sitting in the phone, you should have been working."

Risk of mischaracterising performance-based termination.

Bluestar Security Services continued...

Unfair dismissal cont.

DP Dean accepted that Bluestar had restructured its operations and made the NSW state manager position redundant as the duties that he had performed were not required to be performed as part of one role anymore.

However, it was also found that the reason for the restructure was the company director's dissatisfaction with the applicant's performance. This supported a finding that the redundancy was not genuine.

Applicant argued that he ought to have been redeployed into the new national business development manager role.

Company director gave evidence that he didn't consider the applicant for redeployment into that role because of his underperformance.

Company director conceded that he did not explore whether he might have had the skills, experience or qualifications to perform the new role.

Ruling

The FWC found that:

- there was no evidence that supported a finding that the NSW state manager's performance was sufficiently poor to constitute a valid reason for dismissal; and
- he was not told in clear terms that his employment was at risk if he did not rectify the concerns raised by the company director, and
- he was not given warnings or a chance to respond to the performance concerns as a result of his termination being characterised as a redundancy.

The dismissal was found to be unfair and the applicant was awarded 16 weeks' pay on the basis that he would not have been employed for a longer period due to the performance concerns.

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Tips and takeaways.

Performance management process.

1. Ensure position descriptions are current and relevant.
2. Establish clear performance expectations.
3. When concerns arise, investigate and collect examples.
4. Meet with the employee and offer a support person. Explain the concerns and provide an opportunity to respond.
5. Agree on actions to address the concerns.
6. Meet to follow up to review progress and record outcomes and feedback. If improvement is not on track, adjust the actions if appropriate.
7. Implement a PIP if necessary setting out specific improvements required, how performance will be measured and a timeframe e.g. 4 to 8 weeks.
8. Issue formal warnings if performance remains unsatisfactory and identify the gap in performance and consequences if performance does not improve.
9. Make a decision and confirm it in writing - termination due to inability to meet reasonable performance standards.

Tips.



Review documentation

- Recruitment file - job ad, reference checks
- Position description - up to date, specific requirements
- Employment contract - hours, performance standards
- Workplace policies - performance management, discipline



Performance objectives

- What are the performance objectives for the role?
- Are they linked to the organisational objectives?
- Are they reviewed and updated?
- Are they measurable and achievable?



Communication

- Regular meetings to provide feedback
- Formal performance reviews

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Thank you.

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