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E M P L O Y E R   G U I D E

# **Disciplinary & Performance Management**

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*A practical framework for managing underperformance, misconduct and serious misconduct with fairness and confidence.*

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## How to Use This Guide

This guide is designed to sit on your desk, not on a shelf. It is a practical, step-by-step framework for managing employee performance and conduct issues in a way that is fair, documented and legally defensible.

Whether you are dealing with an employee who is not meeting the standard of their role, or someone whose behaviour has crossed the line, this guide will help you understand what kind of issue you are facing, what process to follow, and what the Fair Work Commission actually looks at when deciding whether a dismissal was fair.

It is written for business owners and managers who want to get this right. Not because it is complicated, but because the consequences of getting it wrong can be significant.

### Inside this guide you will find:

A clear explanation of procedural fairness and why it matters. | How to identify whether you are dealing with underperformance, misconduct, or serious misconduct. | A step-by-step process for each type of issue. | A decision flowchart to help you choose the right path. | A quick-reference table showing what the FWC actually examines under section 387. | A pre-action checklist you can use before every disciplinary process. | Practical tips and common mistakes to avoid.

## 1. The Golden Rule: Procedural Fairness

Before taking any disciplinary action, every employee must be afforded procedural fairness. This is not optional. It is the foundation of every disciplinary process, and it is the single most important thing the Fair Work Commission considers when reviewing a dismissal.

### What does procedural fairness actually mean?

The employee must know the concerns raised against them, understand the seriousness of the matter, have a genuine opportunity to respond, and have that response properly considered before any decision is made. It does not mean the employer must accept the employee's explanation. It means it must be genuinely heard.

### Procedural Fairness Checklist

Every disciplinary process should satisfy all of the following:

- Concerns are clearly identified and specific
- The employee has enough information to understand the issue
- The employee has a reasonable opportunity to prepare and respond
- The employee is offered the opportunity to bring a support person
- The employer approaches the meeting with an open mind
- The employee's response is genuinely considered before any decision
- The entire process is carefully documented

## 2. The Disciplinary Meeting Invitation Letter

The invitation letter is one of the most critical documents in the process. It sets the tone, establishes fairness, and gives the employee the opportunity to prepare a proper response.

### What Must the Letter Include?

Element	What It Means
<b>Clear Allegations</b>	Specific, factual, and dated. Avoid vague terms like 'poor attitude'. State what happened, when, and why it is a concern.
<b>Background &amp; Context</b>	Prior discussions, warnings, relevant policies, or a pattern of behaviour that gives context to the current concern.
<b>Business Impact</b>	Explain the impact: operational disruption, safety risk, client dissatisfaction, team burden, reputational harm, etc.
<b>Meeting Details</b>	Provide at least 24 hours' notice. Include the date, time, location (or method), and who will attend.
<b>Support Person</b>	Expressly advise the employee they may bring a support person. Clarify their role is to provide support, not to advocate.
<b>Potential Outcomes</b>	Identify the range of possible outcomes from no action through to termination, so the employee understands the stakes.
<b>No Final Decision</b>	State clearly that no decision has been made and the meeting exists to obtain the employee's response.
<b>Non-Attendance</b>	Explain what happens if they do not attend, including that the process may proceed in their absence.
<b>Confidentiality</b>	Direct the employee to maintain confidentiality except to obtain support or advice.

### Example: Specific vs. Vague Allegations

VAGUE: 'You have failed to perform your role adequately.' SPECIFIC: 'It is alleged that on 10 March 2026 and again on 14 March 2026, you failed to complete the required client reports by the deadline, despite prior direction from management that these reports were to be submitted by 3:00 pm each day.' The more specific the allegation, the fairer the process, and the stronger the employer's position.

## 3. The Disciplinary Process: Step by Step

The invitation letter is only the beginning. What follows determines the integrity of the entire process.

1	<p><b>The Disciplinary Meeting</b></p> <p>Go through the concerns clearly. Give the employee a genuine opportunity to explain. Ask reasonable questions. Allow mitigating factors to be raised. Take detailed notes. The tone should be firm but fair.</p>
2	<p><b>Consider the Response</b></p>

After the meeting, genuinely consider the employee's response before deciding any outcome. Assess whether the allegation is substantiated, whether there are mitigating circumstances, whether further investigation is needed, and whether the proposed outcome is proportionate.

3

**Issue the Outcome Letter**

Confirm the findings, the reasons, the disciplinary outcome (if any), the standards expected going forward, the consequences of further issues, and any support, monitoring, or review arrangements.

**Important: Do not decide on the spot**

Unless the matter is very straightforward, it is best practice to adjourn after the meeting, consider the material properly, and then confirm the outcome in writing. This demonstrates genuine consideration and strengthens your position.

## 4. Decision Flowchart: What Kind of Issue Are You Dealing With?

One of the most important steps is correctly identifying the type of issue. Each category calls for a different process and may support different outcomes. Use this flowchart to determine your starting point.

### WHAT IS THE NATURE OF THE ISSUE?

UNDERPERFORMANCE	MISCONDUCT	SERIOUS MISCONDUCT
Employee is not meeting the standard or output expected of the role.	Employee has breached workplace expectations, policies, or behavioural standards.	Conduct is so serious it may justify immediate dismissal without notice.
Usually not intentional. Capability, consistency or skill issue.	Usually involves a conscious act or choice by the employee.	Deliberate, wilful, or reckless. Fundamental breach of trust.
Missing KPIs, repeated errors, poor quality work, slow output, not meeting role requirements.	Lateness, policy breach, offensive language, minor insubordination, inappropriate conduct.	Theft, fraud, assault, serious safety breach, intoxication (with risk), serious harassment.
<b>STAGED PROCESS:</b> Informal discussion → Verbal warning → Written warning → Final warning → Termination	<b>CAN ESCALATE FASTER:</b> May start at written warning level depending on seriousness. Prior history matters.	<b>MAY JUSTIFY TERMINATION:</b> Can support first-instance dismissal. Fair process still required. Consider first and final warning.

#### Remember: Fair process applies in every category

Even where the allegation is very serious, the employer must still investigate, gather evidence, identify the allegations clearly, invite the employee to a meeting, give them an opportunity to respond, and genuinely consider that response before making any final decision. Skipping these steps exposes the employer to legal risk, even where the misconduct is obvious.

## 5. Managing Underperformance

Underperformance should generally be managed as a staged process that gives the employee a clear and fair opportunity to improve.

1	<b>Informal Discussion (Optional but Often Useful)</b> Identify the concern, clarify expectations, offer support or training, and set a timeframe for improvement. Not every issue requires immediate formal action.
2	<b>Formal Verbal Warning</b> If concerns continue. Must still be documented. Record the concerns, standards expected, timeframe, support offered, and consequences if improvement does not occur.
3	<b>First Written Warning</b> Sets out specific performance concerns, prior history, improvement required, the review period, support available, and consequences of failing to improve.

<b>4</b>	<p><b>Final Written Warning</b></p> <p>Makes clear the issue is now at a critical stage. Sustained and immediate improvement is required. Failure to improve may result in termination.</p>
<b>5</b>	<p><b>Termination</b></p> <p>If, after a fair process and genuine opportunity to improve, the employee still fails to meet the inherent requirements of the role.</p>

### When you can escalate faster

A staged process is not always mandatory. You may move more quickly where: the underperformance has serious operational consequences; the employee has already received repeated feedback; the employee is in a senior role where standards are critical; or the underperformance is so significant the business cannot sustain it over an extended period.

## 6. Managing Misconduct

Misconduct is conduct-based. It involves behaviour rather than capability. Because it involves a conscious act, disciplinary responses can often be more immediate. Depending on seriousness, the process may start at a higher step than in underperformance matters.

## 7. Serious Misconduct

Serious misconduct is conduct of such gravity that it may justify immediate dismissal, including dismissal without notice, depending on whether the allegations are established through a fair process. Examples include theft or fraud, physical assault, serious safety breaches causing imminent risk, serious insubordination, intoxication at work where serious risk is involved, serious harassment or bullying, deliberate falsification of records, and serious breach of confidentiality or conflict of interest.

### Suspension during investigation

In serious matters, it may be appropriate to suspend the employee on full pay while the investigation is undertaken. Whether this is available depends on the contract, any applicable policy, and the operational risks involved.

## 8. First and Final Written Warning

A first and final written warning is a powerful and entirely legitimate disciplinary tool, particularly in serious misconduct cases where the employer could justify termination but chooses to extend leniency.

<b>FIRST</b>	This is the first formal warning being issued in relation to this matter.
<b>FINAL</b>	This is also the last chance being afforded. Any further substantiated misconduct may result in termination.

## 9. Notes to File

A note to file is one of the most underused but effective management tools available to employers. It is suitable when a concern is emerging but does not yet justify formal disciplinary action. It creates a contemporaneous record that can be invaluable later if the situation escalates.

What the note should record: the date and attendees, the specific concerns raised, the business impact, the employee’s response, expectations going forward, confirmation the meeting was non-disciplinary, and an escalation warning advising that failure to improve may lead to formal action.

### Why this matters

If a later disciplinary process becomes necessary, a well-kept note to file demonstrates that the employer raised concerns early, the employee was made aware of the issue, the business explained the impact, and the employee was given an earlier opportunity to adjust. This strengthens your position significantly.

## 10. What the Fair Work Commission Actually Looks At

When the Fair Work Commission assesses whether a dismissal was harsh, unjust, or unreasonable, it considers the criteria set out in section 387 of the Fair Work Act. This table shows each factor and what it means in practical terms for employers.

Section 387 Factor	What This Means for You
<b>(a) Valid reason for dismissal</b>	Was there a genuine, defensible reason related to the employee’s capacity or conduct? Vague justifications will not stand up. You need specifics.
<b>(b) Notified of the reason</b>	Was the employee told why their job was at risk before the decision was made? This is where the invitation letter matters.
<b>(c) Opportunity to respond</b>	Did the employee get a genuine, fair chance to give their side of the story? A meeting where the outcome was already decided does not count.
<b>(d) Unreasonable refusal of support person</b>	If the employee asked for a support person and was refused, that weighs heavily against the employer.
<b>(e) Prior warnings for performance</b>	If the dismissal was performance-related, had the employee been warned that their performance was not acceptable? This is where your documented process matters most.
<b>(f) Size of the business</b>	Smaller businesses may not have dedicated HR resources, but this does not excuse skipping a fair process entirely.
<b>(g) HR management resources</b>	Did the business have access to HR expertise or specialist advice? If you did and did not use it, that can count against you.
<b>(h) Any other relevant matters</b>	This is the catch-all. Length of service, personal circumstances, the employee’s record, inconsistency in treatment of other employees, and any other factor the Commission considers relevant.

**The takeaway**

The Commission is not looking for perfection. It is looking for a genuine, fair process. Employers who can demonstrate they identified the issue clearly, gave the employee a fair opportunity to respond, and genuinely considered that response before making a decision are in a far stronger position than those who skip steps, rush to a conclusion, or fail to document what happened.

**11. Key Cautions for Employers**

Mistake	Why It Matters
<b>Pre-judging the outcome</b>	One of the biggest risks is appearing to have made the decision before hearing the employee. Always keep the process genuine and open.
<b>Using vague language</b>	Specificity matters at every stage. The employee must clearly understand the concern being raised.
<b>Skipping documentation</b>	Every stage must be documented. Meetings, warnings, file notes, and outcome letters. If it is not written down, it did not happen.
<b>Treating all issues the same</b>	Underperformance, misconduct, and serious misconduct are different. Match the process and outcome to the nature of the issue.
<b>Delaying unnecessarily</b>	Address concerns promptly. Unexplained delay weakens your position and creates inconsistency.
<b>Over-relying on informality</b>	Repeatedly having informal chats without escalation can undermine your position if the issue persists.

## 12. Pre-Action Checklist

Before taking any disciplinary action, work through the following questions. If you cannot answer yes to each one, stop and address the gap before proceeding.

<input type="checkbox"/>	Have I identified the nature of the issue? (Underperformance, misconduct, or serious misconduct?)
<input type="checkbox"/>	Do I have specific evidence to support the concern?
<input type="checkbox"/>	Has the employee previously been spoken to or formally warned about this or similar issues?
<input type="checkbox"/>	Can I clearly articulate the business impact?
<input type="checkbox"/>	Have I selected the appropriate level of process for this situation?
<input type="checkbox"/>	Has the employee received a proper invitation letter with all required elements?
<input type="checkbox"/>	Has the employee had a genuine and fair opportunity to respond?
<input type="checkbox"/>	Have I genuinely considered the employee's response before making my decision?
<input type="checkbox"/>	Is the proposed outcome proportionate to the issue?
<input type="checkbox"/>	Has the entire process been properly documented at every stage?

***A sound process is not red tape. It is good management.***

*Fairness, clarity, consistency, and documentation protect both the business and the employee.*

### Need Help With a Workplace Issue?

Blackstone Business Group provides specialist Industrial Relations and HR advisory services to Australian employers. We help you navigate performance management, disciplinary processes, termination strategy, and Fair Work compliance with confidence and clarity.



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