



EARLY
LEARNING
ASSOCIATION
AUSTRALIA

Managing Performance Related Concerns (MPRC)

RESOURCE



Education
and Training

Contents

Introduction	4	Step 4: Hold your review meeting and provide an outcome	18
The importance of managing underperformance and misconduct.....	5	Continued unsatisfactory performance	18
Who is responsible for managing staffing concerns in an early childhood service?.....	5	Step 5: Commence a subsequent formal support period.....	18
Performance evaluations vs performance counselling	5	Step 6: Issue a determination of unsatisfactory work performance.....	18
What is underperformance?	6	Final unsatisfactory work performance outcome	19
Possible reasons for underperformance.....	6	Approaches to manage misconduct.....	20
What is misconduct?	7	Informal discussions	20
Misconduct	7	Disciplinary action	20
Serious misconduct	7	Suspension during an investigation	20
Workplace bullying.....	8	Demotion	21
Discrimination and harassment in the workplace	9	Procedural fairness.....	21
Sexual harassment in the workplace	9	Summary of the disciplinary procedure for misconduct	23
Child safety.....	9	Disciplinary procedure	24
Reportable Conduct Scheme	9	Step 1: Determine the nature of the conduct and investigate	24
Notifying your Regulatory Authority	10	Receiving a complaint	24
VIT investigations	11	Investigating a complaint	24
Next steps:.....	11	Conflict of interest	24
Determining the most suitable approach.....	11	Use of an independent workplace investigator	24
Approaches to managing underperformance.....	13	Step 2: Outline the allegations of misconduct to the employee in writing.....	25
Informal discussions	13	Inviting your employee to attend the disciplinary meeting.....	25
Performance counselling.....	13	Who should be involved in the meeting?	25
Performance counselling process.....	15	Providing an opportunity to respond in writing.....	26
Beginning your formal performance counselling process.....	16	Step 3: Provide the employee with an opportunity to respond.....	26
Step 1: Write to the employee to advise of performance concerns.....	16	Holding your disciplinary meeting.....	26
Step 2: Conduct your initial work performance counselling meeting and issue your improvement plan.....	16	Role of the support person during disciplinary meetings	27
Structuring your work performance counselling meeting	17	Step 4: Consider the employee's response	27
Step 3: Commence your initial formal support period and monitor performance.....	17	Step 5: Provide an outcome to your employee.....	28
		Issuing a formal written warning	28
		Monitor and review	29
		Dispute resolution procedure	29

Understanding termination of employment.....	30	Tool 3. File note - List of issues and outcomes from your informal counselling meeting.....	35
Escalation or continuation of misconduct by the employee.....	30	Tool 4. Template invitation letter for a performance counselling meeting.....	36
Best practice approach	30	Tool 5. Template invitation letter for a disciplinary meeting	37
Termination without notice (summary dismissal)	30	Tool 6. Template written warning (work performance counselling)	38
Claims associated with the termination of employment.....	30	Tool 7. Template written warning (disciplinary procedure)	39
Unfair dismissal.....	30	Tool 8. Template to guide and record disciplinary meeting	40
General protections (adverse action)	31	Glossary of terms.....	43
Unlawful termination.....	32	References	47
Appendix	33		
Tool 1. Performance Improvement Plan (PIP) template.....	33		
Tool 2. Sample Performance Improvement Plans	34		

Early Learning Association Australia (ELAA) acknowledges the Australian Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the land on which we work and pay our respects to ancestors and Elders, past, present, and emerging.

This resource was prepared by ELAA in partnership with the Department of Education and Training (DET).

Published by Early Learning Association Australia Level 3, 145 Smith Street, Fitzroy, Victoria 3065.

© Early Learning Association Australia 2022

Introduction

The Managing Performance Related Concerns Resource (MPRC) is a comprehensive resource to guide employers in managing issues of underperformance and misconduct in the workplace and understanding their industrial relations obligations.

This resource was first developed by the Early Learning Association Australia (ELAA) in 2019, in partnership with the Department of Education and Training (DET), to assist the early childhood sector in building its capacity to manage employee issues and concerns. This resource has now been expanded and revised in 2022.

The MPRC Resource is a partner resource to the Employee Management and Development Kit (EM&D), which focuses on establishing a positive performance evaluation and development system at the first instance.

Through an appropriate EM&D system of providing timely and ongoing feedback, annual performance evaluation, and mid-year reviews, most concerns with an employee's performance can be identified early and managed. Nonetheless, in some circumstances, an employee's conduct or performance may require an individualised management response by the employer which is encompassed in this guide.

This updated MPRC resource aims to enable employers to effectively manage situations in which the underperformance is of a serious nature or there is evidence of misconduct. Note that issues discussed in this guide relate to non-probationary employees. A best practice approach to managing employee probationary periods is outlined in Section 2 of the EM&D Kit.

Each section of this resource provides a comprehensive guide and relevant tip-sheets, guides, and tools to assist Committees of Management and employers in the early childhood education and care sector. Employers are strongly encouraged to seek professional and/or legal advice where appropriate, including in situations that may warrant termination of employment.

In this updated resource, specific references to requirements and procedures in the *Victorian Early Childhood Teachers and Educators Agreement 2020* (VECTEA) have also been incorporated.

This resource is intended as a best practice guide and can also be utilised by employers under alternative industrial instruments or organisational policies. Employers with detailed policies are encouraged to utilise their policies and procedures in conjunction with this resource.

The importance of managing underperformance and misconduct

It is in both the employer and employee's interests to address issues of underperformance/misconduct promptly and appropriately. If not addressed promptly, these issues can become more serious over time, more difficult to resolve and can impact negatively on the service and other employees.

Who is responsible for managing staffing concerns in an early childhood service?

Informal counselling or discussions

Informal performance or conduct counselling related to minor concerns should take place between the employee and their direct manager. It is responsibility of the Approved Provider to assign or elect appropriate persons to undertake the role of the direct manager/s. This could be the Director, Educational Leader, Nominated Supervisor or the Early Childhood Teacher (if applicable).

Formal performance counselling or disciplinary proceedings

In an independent service, this responsibility may be delegated to a sub-committee of the Committee of Management (CoM), or to the Director of the service who will report back to the CoM.

For standalone services, at the first full committee meeting of the year, the Committee of Management, as the Approved Provider should appoint a staffing sub-committee to deal with staff management concerns. In any formal performance counselling or disciplinary meetings, two members of the staffing sub-committee or executive should be appointed for this purpose.

For services that have a Kindergarten or Centre Director, the responsibility of address staff management can be delegated to the Director, while reporting appropriate outcomes to the Committee of Management.

Performance evaluations vs performance counselling

While mid-year and annual performance evaluation meetings (also known as performance appraisals) provide an ideal opportunity to review and confirm work expectations with each employee, serious or ongoing performance or conduct related concerns should be dealt with as a separate process, known as performance counselling.

It is not appropriate for the employer to wait for the mid-year review or annual performance evaluation, as performance concerns should be dealt with as soon as they arise.

Dealing with underperformance or misconduct can be challenging for both the employer and employee. Having clear processes and procedures, appropriate support, and a willingness to manage the issue is essential in reaching a resolution. Not every issue related to underperformance requires a structured process.

Options for improving performance such as discussing performance issues in an open and supportive environment may help resolve the issue in many instances. Providing timely feedback to employees as set out in the Employee Management and Development Resource (EM&D) will also serve to address areas of concern before they become persistent issues.

The various options available to employers are described in detail later in this resource material. As a general rule, the employer should adopt the lowest level of intervention needed to resolve underperformance issues.

Setting expectations

Every organisation has a set of expectations and standards regarding the performance and conduct required of employees. Expected standards of conduct and performance, in line with the requirements of the job and the culture of the organisation, must be articulated to all employees upfront and at the time of recruitment.

Conducting difficult conversations with employees to address underperformance becomes easier and more objective if contextualised around these articulated standards and expectations.

Record expectations and provide copies to the employee

There are various ways in which employers can record expectations of an employee. This includes setting out expectations in the position description, the employment contract, workplace policies, relevant enterprise agreements (also known as an enterprise bargaining agreement - EBA) and the organisation's operations manual.

Ensure standards and expectations are understood

It is important for the employer to ensure that employees not only have a copy of the documents setting out expectations, but that they have also read and understood them. Setting aside a time to discuss these documents in detail with employees (individually or as a group) and clarifying understanding during these conversations will ensure that there is no ambiguity.

Reviewing policies and manuals

It is also good practice for the employer to review policies and manuals setting out performance standards and expectations regularly to ensure that they are current and relevant. The frequency of these reviews will depend on the size of the organisation and the availability of resources to undertake this review. ELAA recommends a review at least once in three years or earlier if there are

legislative changes that may impact these documents. Consultation with employees in the review process will ensure that employee's views are considered and reflected in the changes.

What is underperformance?

Underperformance is evidenced when the employee persistently performs work or duties below the standard expected of the role. This may include demonstrating behaviour that:

- affects their productivity e.g. excessive absenteeism, lateness or excessive work breaks, poor work planning or time management, poor work quality
- affects other employees' productivity or is disruptive e.g. continually being interrupted by non-work-related matters (non-work emails, social media, socialising).

Possible reasons for underperformance

There are many reasons that lead employees to exhibit poor performance/conduct. While some reasons may be related to work, others may not be work-related.

The following are some common reasons for underperformance:

- job expectations, goals, service policies or standards are unclear
- inadequate resources and equipment, poor working conditions, occupational health and safety issues
- organisational culture e.g., restrictive rules and procedures, intimidating/authoritarian management and supervision styles, low morale
- employment conditions e.g., excessive workloads, bottlenecks, long working hours, no work/life balance

- mismatch of job and employee e.g., employee overqualified or underqualified for the role, boredom, alienation or frustration
- unsuccessful promotion e.g., employee promoted to a position beyond their ability levels or promoted too soon
- job role unclear or communication issues e.g., staff member not communicating information or meeting responsibilities.
- workplace bullying, job-related stress etc.
- work group or peer group problems e.g., personality clashes, failure to speak out in the group for fear of offending when conduct is out of order (groupthink), harassment, conflict between job requirements and cultural values, poor management
- personal issues that impact on the work of the employee.
- parent complaint/s about an employee's inappropriate behaviour
- wilful and deliberate behaviour in the workplace that is an unacceptable breach of policy (i.e., the Code of Conduct)
- performance that breaches the policies/procedures of the service, including policies relating to occupational health and safety, program delivery and supervision of children.

Serious misconduct

Serious misconduct is defined under Regulation 1.07 of the *Fair Work Regulations 2009* (Cth) and is the most severe form of misconduct in the performance of an employee's duties. If investigated and substantiated, serious misconduct may warrant summary dismissal (termination) without notice.

Serious misconduct as defined in the Fair Work Regulations includes both of the following:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment; and
- conduct that causes or has the potential to cause a serious and imminent risk to:
 - the health or safety of a person; or
 - the reputation, viability, or profitability of the employer's business.

Serious misconduct may include:

- any act or omission constituting serious or wilful misconduct in respect of their duties
- breaches the confidentiality of the service and/or children in their care
- is convicted of a criminal offence that has significance with respect to the nature and operation of the workplace

What is misconduct?

Misconduct is different from underperformance and is of a more significant or severe nature.

Misconduct can be defined as either *misconduct* or *serious misconduct* depending on its severity.

Misconduct

Where an employee's conduct results in a breach of established or expected standard, procedure, or policy; then an employee's conduct, if substantiated (proven on the balance of probabilities) may warrant *misconduct*. Minor issues of misconduct may instead constitute underperformance, as the employee is not meeting the standards and expectations of their role.

Examples of misconduct are usually incident based, and include (not limited to):

- is at work under the influence of illicit drugs, alcohol or any other substances that may impair their performance
- refuses or wilfully neglects to comply with any lawful and reasonable order given to them by the employer
- acts in a manner that brings the employer into disrepute
- acts in a manner that is a serious breach of the Education and Care Services Law Act 2010 and/or the Education and Care Services National Regulations, or other regulation/legislation applicable to the service.

Workplace bullying

Workplace bullying is a form of misconduct and/or serious misconduct as it poses a serious and imminent risk to a worker's health or wellbeing.

Workplace bullying is defined as:

Repeated behaviour by an individual or group of individuals that is unreasonable towards a worker or a group of workers at work, and the behaviour creates a risk to health and safety. Reasonable management action conducted in a reasonable manner does not constitute workplace bullying.

The following behaviours could also be considered as bullying:

- aggressive and intimidating conduct
- belittling or humiliating comments
- victimisation
- spreading malicious rumours
- practical jokes or initiation
- exclusion from work-related events; and
- unreasonable work expectations.

Reasonable management action

The behaviour will not be considered bullying if it is reasonable management action carried out in a

reasonable manner. The following are examples of what may constitute management action by an employer:

- performance evaluations
- ongoing meetings to address underperformance
- investigating alleged misconduct and taking disciplinary action
- modifying a worker's duties including by transferring or re-deploying the worker
- refusing an employee permission to return to work on medical advice.

Workplace bullying often results in significant negative consequences for an individual's health and wellbeing and should be acted on immediately. Complaints related to allegations of workplace bullying require an independent and impartial workplace investigation.

Stop bullying orders

The Fair Work Commission (the Commission) can make any order it considers appropriate to prevent an employee from being bullied at work by an individual or a group of individuals.

Before an order can be made, an employee must have first made an *application for an order to stop bullying* to the Commission on account that the conduct has not ceased and there is a future risk that it will continue. Employees should attempt to follow their internal grievance and dispute resolution procedures at the workplace level at the first instance prior to making an application to the Commission.

WorkSafe investigations

Employers have a duty under the *Occupational Health and Safety Act 2004* (OHS Act) to provide and maintain for their employees, so far as is reasonably practicable, a working environment that is safe and without risks to health, which includes providing psychological safety, free from bullying.

An employer who does not take all reasonably practicable steps to provide and maintain a working environment that is safe and without risks to health associated with bullying or as a result of failing to respond to bullying behaviour can be investigated by WorkSafe.



Complaints related to allegations of workplace bullying, harassment and or/sexual harassment require an independent and impartial workplace investigation and should be acted upon

Discrimination and harassment in the workplace

Discrimination occurs when a person, or a group of people, is treated less favourably than another person or group because of their background or certain personal characteristics.

Under federal and state discrimination laws, it is unlawful to treat a person less favourably on the basis of particular protected attributes such as a person's sex, race, disability, or age. Treating a person less favourably on the basis of a specific attribute can constitute harassment. Harassment can include behaviour such as:

- telling insulting jokes about particular racial groups
- making derogatory comments or taunts about a person's disability, or
- asking intrusive questions about someone's personal life.

Sexual harassment in the workplace

Under the Fair Work Act, sexual harassment is:

- an unwelcome sexual advance
- an unwelcome request for sexual favours
- other unwelcome conduct of a sexual nature in relation to another person.

To be sexual harassment, it has to be reasonable to expect that there is a possibility that the person

being harassed would be offended, humiliated, or intimidated by the behaviour. Sexual harassment in connection to employment can be considered serious misconduct and can be a valid reason for dismissal. Some forms of sexual harassment can also constitute *criminal* offences and should be reported to Victoria Police.

The Fair Work Commission can now also make any order it considers appropriate to prevent an employee from being sexually harassed at work by an individual or a group of individuals.

CHILD SAFETY

Reportable Conduct Scheme

The Victorian Reportable Conduct Scheme seeks to improve organisations' responses to allegations of child abuse and neglect by their workers and volunteers. In Victoria, it is an offence to engage in certain sexual behaviours against, with or in front of, a child. Many of these behaviours are reportable conduct under the Reportable Conduct Scheme.

There are five types of 'reportable conduct':

- sexual offences committed against, with or in the presence of a child
- sexual misconduct committed against, with or in the presence of a child
- physical violence against, with or in the presence of a child
- any behaviour that causes significant emotional or psychological harm to a child
- significant neglect of a child.

Conduct that is reportable must be made to the Commission for Children and Young People (CCYP) within three calendar days of the incident or allegation.

Further information is available at:

<https://ccyp.vic.gov.au/reportable-conduct-scheme/>

What is a reasonable belief?

A reportable allegation is made where a person makes an allegation, based on a reasonable belief, that a worker or volunteer has committed reportable conduct or misconduct that may involve reportable conduct. This includes where a reportable allegation is made against the head of the organisation.

A reasonable belief is more than suspicion. There must be some objective basis for the belief. However, it is not the same as having proof and does not require certainty. For example, a person is likely to have a reasonable belief if they:

- observed the conduct themselves
- heard directly from a child that the conduct occurred
- received information from another credible source (including another witness).

Notifying your Regulatory Authority

Approved providers in Victoria must notify the Department of Education as Training (DET) as the Regulatory Authority, of:

- serious incidents (regulation 12)
- any circumstance arising at the service that poses a risk to the health, safety or wellbeing of a child or children attending the service.
- any incident where the approved provider reasonably believes that physical and/or sexual abuse of a child has occurred or is occurring while the child is being educated and cared for by the service.
- any allegation that sexual or physical abuse of a child has occurred or is occurring while the child is being educated and cared for by the service.
- complaints that allege a serious incident has occurred or is occurring while a child was or is being educated and cared for by

the approved education and care service or alleging the National Law or National Regulations have been contravened.

In addition, approved providers must take reasonable steps to ensure that these incidents and complaints are adequately addressed.

DET notification requirements:

The notification requirements are outlined in the *Education and Care Services National Law Act 2010* (National Law) and the *Education and Care Services National Regulations 2011* (National Regulations).

Notification of incidents and complaints should be submitted online by the approved provider via the National Quality Agenda IT System (NQA ITS) and will be investigated by the Quality Assessment and Regulation Division (QARD). Further information can be found at:

<https://www.education.vic.gov.au/>

References	Type of notification	Timeframe
Section 174(2)(a)	Serious incident	In writing within 24 hours of the incident or the time the person becomes aware of the incident Regulation 176(2)(a)
Section 174(2)(c) Regulation 175(2)(c)	Circumstance at the service that poses a risk to the health, safety or wellbeing of a child or children attending the service	Within 7 days of the relevant event or within 7 days of the approved provider becoming aware of the relevant

References	Type of notification	Timeframe
		information Regulation 176(2)(c)
Section 174(2)(b)	Complaints alleging that a serious incident has occurred or is occurring while a child was or is being educated and cared for by the approved education and care service, or that the National Law has been contravened	In writing within 24 hours of the complaint Regulation 176(2)(a)

VIT investigations

The Victorian Institute of Teaching (VIT) may investigate a teacher's registration in any circumstances where it reasonably believes that the registered teacher has engaged in misconduct or serious misconduct.

There may be some circumstances in which VIT will suspend a teacher's registration on an interim basis. This is in cases where VIT has formed a reasonable belief that:

- the teacher poses an unacceptable risk of harm to children; and
- the suspension of the teacher's registration is necessary to protect children.

VIT will then publish the interim suspension on its [Register of Disciplinary Action \(RODA\)](#).

Refer to <https://www.vit.vic.edu.au/> for further information.

Next steps:

Determining the most suitable approach

Each section of this resource has been designed to guide employers with the most appropriate method of action to manage underperformance or misconduct.

When considering an approach, it is best practice to consider the following general guidelines:

Is there a skill-based issue (underperformance)?

- Can the employee continue to perform the duties of their role to a satisfactory level?
- Has the underperformance been observed consistently with little to no improvement over a period of time or is it a recent change?

Is there a conduct-based issue (misconduct)?

Is the employee aware of the impact that their behaviour has on others (i.e., alleged workplace bullying)?

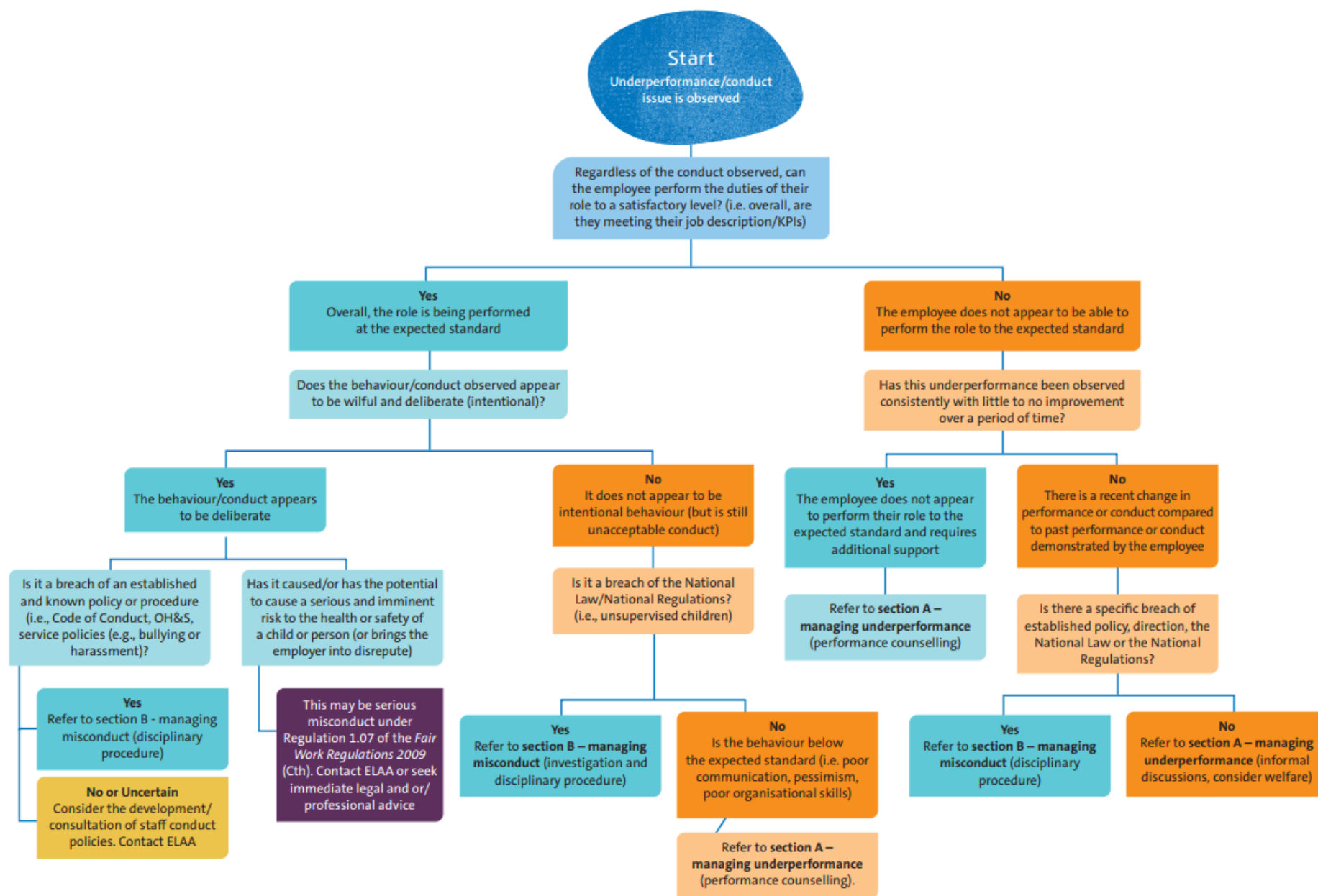
- Has there been a parent or staff complaint that requires investigation?
- Do you have specific or recent recorded instances where the conduct has occurred?

What is the degree of harm or potential harm?

- Has it caused or has the potential to cause a serious and imminent risk to the safety of a child or person, or in a manner that brings the employer into disrepute? I.e. the National Law or National Regulations.
- Does the alleged conduct result in a breach of an established procedure or policy?

Next steps: Refer to the tip sheet (page 12) Determining your approach - employee management strategies

TIP SHEET - DETERMINING YOUR APPROACH - EMPLOYEE MANAGEMENT STRATEGIES



Approaches to managing underperformance

Informal discussions

For perceived minor problems with performance/conduct that persist despite feedback provided by the employer (refer to Employee Management & Development Resource), early intervention through an informal process is more likely to be successful in reaching resolution.

Examples of minor issues where this approach may be appropriate include the following:

- a change in performance or conduct compared to past conduct demonstrated by the employee
- low motivation for no obvious reason
- recent examples that suggest a lack of skills or expertise to perform the job.

If underperformance relates to issues such as those identified above, the process may involve a discussion with the employee concerned, outlining:

- the performance/conduct that is being observed or reported and which is not in line with standards and expectations
- its impact on the service or other employees
- the employer's expectation and time frame with regard to improvements in performance and conduct; and
- the support that may be made available to the employee to help make improvements.

Informal discussions ensure that expectations are understood

Informal discussions enable the employee to participate fully in the discussion and, as an outcome of this meeting, the employee can clearly understand the employer's position in relation to

performance concerns, the impact on service quality and delivery, the employer's expectations, and any potential consequence for repetition of the misconduct/underperformance.

Pre-counselling steps for VECTEA employers

Prior to commencing any formal unsatisfactory work performance process, VECTEA employers should have under clause 12.3:

- explained the standards of performance required of the employee;
- provided informal support to the employee to meet the standards;
- considered the organisational or personal factors that play a role in the employee's unsatisfactory work performance; and
- considered alternatives to the formal support process to address the problems.

Performance counselling

Performance counselling (also referred to as performance management) is another process available to an employer to address issues of underperformance.

Counselling alone should not be used where the actual or the potential consequences of underperformance or misconduct are serious, such as a threat to safety or health of the children and other employees at the service, financial repercussions, damage to property or a threat to the employer's viability or reputation. These are better dealt with as misconduct issues and an employer should follow a formal disciplinary process, as outlined later in this resource.

Performance counselling involves a discussion between an employer and an employee that sets out and reinforces the standard or level of performance/conduct that is required, but which also explores causes of the problem in a constructive manner and identifies possible remedial action.

SECTION A - APPROACHES TO MANAGING UNDERPERFORMANCE

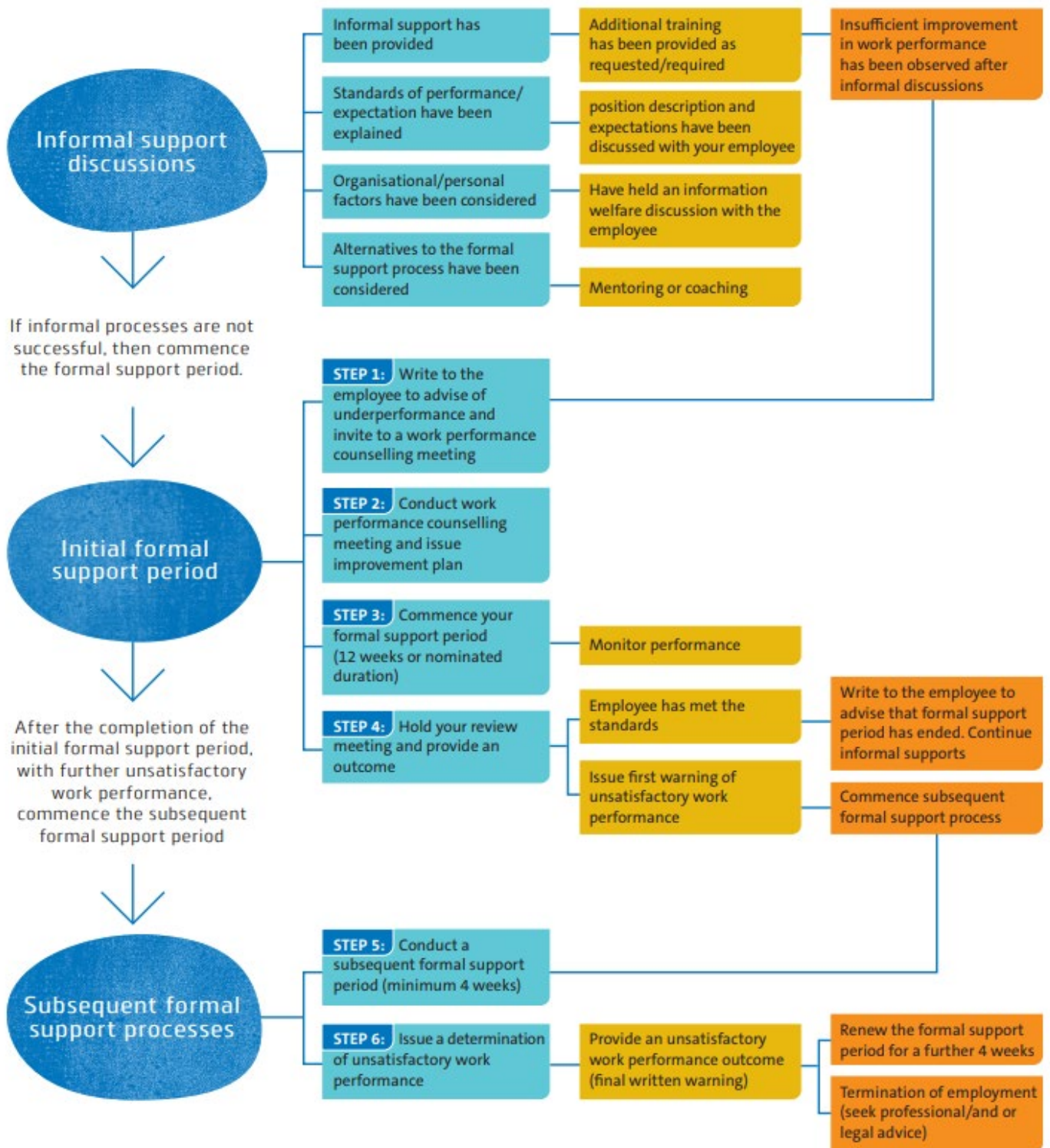
A performance counselling discussion should be at the first instance, an opportunity for the employee to respond to the concerns raised by the employer. The employee should be provided with reasonable notice and an opportunity to bring a support person or representative to the meeting.

Refer to pages 15 - 17 for a best practice performance counselling procedure

Performance counselling process

VECTEA 2020 or applicable industrial agreements

This tip sheet provides a summary of the performance counselling process and can be printed or saved separately for ease of use.



Beginning your formal performance counselling process



Important: VECTEA employers

Employers under the Victorian Early Childhood Teachers and Educators Agreement 2020 (VECTEA) must follow **clause 12** (managing unsatisfactory work performance).

STEP 1: WRITE TO THE EMPLOYEE TO ADVISE OF PERFORMANCE CONCERNS

The first step is to write to the employee to formally address areas of underperformance prior to holding your meeting.

Your letter or email must include the following:

- a date and time for the work performance counselling meeting, where the employee can respond to the alleged unsatisfactory performance; and
- that the employee can bring a support person/representative to this meeting or can elect to respond in writing.
- the areas of unsatisfactory work performance, including a description and examples
- the required standards of performance and/or expectations of the employee's role
- the proposed training/counselling, coaching, feedback, professional development or other support proposed to be provided by the employer to assist the employee to meet the standards
- a copy of the clause (if relevant - clause 12 of the VECTEA)

STEP 2: CONDUCT YOUR INITIAL WORK PERFORMANCE COUNSELLING MEETING AND ISSUE YOUR IMPROVEMENT PLAN

The discussion should focus on the perceived underperformance as well as its impact on the service and other employees (if applicable). It is also an opportunity to provide the employee with a performance improvement plan which will form the basis of their formal support period.

The employer's concerns must be discussed openly and frankly, and the employee should be afforded the opportunity to put their views forward and explain their conduct/actions. Specific examples of the underperformance should be provided and, where possible, supported by objective facts and documented evidence.

In addition to clarifying the standard of work or conduct that is expected, counselling aims to assist the employee to understand the adverse effects of the current performance/conduct on the service, other employees, and the workgroup, as well as the implications it may have for the employee's career.

The following are important considerations:

- care must be taken to involve only those who need to be involved in the discussion
- procedural fairness must be ensured by providing the employee with adequate notice of the meeting and details about the matters to be discussed at the meeting to allow the employee time to prepare. The employee should be offered the opportunity to have a support person at this meeting
- the meeting should be confined to discussing only matters related to the underperformance
- the proposed performance improvement plan can be discussed with the employee

during the meeting, with a final version being provided to the employee

- providing reasonable notice prior to convening a work performance counselling meeting.

Refer to Tool 4: Template invitation letter for work performance counselling meeting

Develop a performance improvement plan

For employers utilising a performance improvement plan (PIP), this involves providing a formal copy to the employee within a reasonable time period after the meeting.



For VECTEA employers, the formal support period cannot commence until the employee has been provided with a copy of their agreed improvement plan.

The improvement plan must detail:

- the required standards of performance and/or expectations of the employee's role not being met
- the training, counselling, coaching, feedback, professional development or other support, proposed to be provided to help the employee to meet the standards
- how the employee's work performance will be monitored and measured; and
- the schedule of meetings to provide the opportunity to discuss progress, and receive advice, support and feedback.

Refer to Tools 1 and 2: Template performance improvement plans

Structuring your work performance counselling meeting

As general guidelines:

- adequate time must be allowed for the meeting to ensure that all matters are thoroughly canvassed. As an approximate

guide, ELAA recommends a minimum of one hour of undisturbed time for the discussion.

- the meeting is best conducted in a quiet location without interruptions, and preferably in a location and at a time that will ensure the privacy of the employee
- clear and concise language should be used to ensure misunderstandings are avoided and that the focus is on the matter being discussed
- the discussion should be depersonalised and kept factual. Details in relation to the underperformance, including dates, times and specific situations in which the underperformance occurred must be provided to ensure that the discussion is objective and not emotional
- the employer should actively listen to the employee's perspective to ensure a balanced decision is made.

Matters to explore during the conversation include but are not limited to:

- any changes to the scope of the job performed or roles and responsibilities
- circumstances beyond the employee's control that may have impacted on performance-specific improvement sought
- Employers must ensure that the improvements sought are realistic and achievable and that the timeframes agreed for improvements are compliant with any industrial agreement.

STEP 3: COMMENCE YOUR INITIAL FORMAL SUPPORT PERIOD AND MONITOR PERFORMANCE

At the conclusion of your work performance counselling meeting, your employee will begin their formal support period. VECTEA employers should note that the initial formal support

period must be no less than 12 weeks in duration.

A formal support period is an opportunity for the employer to both monitor the employee's performance against objectives established in your performance improvement plan (as provided to the employee).

The employer must also implement any agreed mentoring, training, or professional development to ensure the employee's improvement is actively supported. This may include regularly scheduled meetings with their direct manager (i.e. their Educational Leader/Director) to provide feedback about progress and address any other issues that have arisen.

STEP 4: HOLD YOUR REVIEW MEETING AND PROVIDE AN OUTCOME

At the conclusion of the formal support period, it is recommended to meet with the employee to review and provide a formal outcome (with their support person or representative). The purpose of this review is to formally advise the employee that:

that they meet the standards and the formal support period has ended; or

- no sufficient progress has been made.
- Issue a warning of unsatisfactory work performance
- After meeting with your employee, and should sufficient progress not be made, the employee is issued a written warning.
- Your written warning letter will:
- outline the standard expected
- where and how the employee is not meeting this standard
- provide the employee with an opportunity to respond within a reasonable timeframe; and

- outline the consequences if the employee fails to improve their performance including that continued unsatisfactory work performance may result in termination of employment.

Refer to Tool 6: Template written warning of unsatisfactory work performance.

Continued unsatisfactory performance

STEP 5: COMMENCE A SUBSEQUENT FORMAL SUPPORT PERIOD

Should the employee's performance not improve following the initial formal support period, a further support period of no less than four weeks will commence. Given the nature of the employee's underperformance, you may elect to provide one or more additional formal support periods.

STEP 6: ISSUE A DETERMINATION OF UNSATISFACTORY WORK PERFORMANCE

Following this second formal support period, and with continued unsatisfactory work performance, you write to the employee to advise a formal *Determination of Unsatisfactory Work Performance*. (clause 12.7 of the VECTEA 2020). In this letter, you will write to the employee to outline:

- where and how the employee is not meeting this standard.
- that the employer is proposing to terminate the employee's employment for unsatisfactory work performance, and
- that the employer will provide a further opportunity to respond in person or in writing.

Final unsatisfactory work performance outcome

After considering the employee's performance and response, the employer will determine the final unsatisfactory work performance outcome (*clause 12.8 of the VECTEA 2020*). The possible outcomes are:

- extending the formal support period for a further period; or
- termination of the employee's employment.

Refer to Section C: Termination of employment

Approaches to manage misconduct

Informal discussions

For perceived minor problems with behavioural conduct that persist despite feedback provided by the employer (refer to Employee Management & Development Resource), early intervention through an informal process is more likely to be successful.

Informal counselling related to minor conduct or behavioural concerns should take place between the employee and their direct manager. It is responsibility of the Approved Provider to assign or elect appropriate persons to undertake the role of the direct manager/s. This could be the Director, Educational Leader, Nominated Supervisor or the Early Childhood Teacher (if applicable).

The manager should express their concern before the employee is given the chance to respond, talk about any issues they are having, and a plan should be established with the manager to seek improvement in conduct or behaviour.

It is not appropriate or procedurally fair to issue a formal written warning after informal counselling alone as this should be reserved for a formal disciplinary procedure. In some circumstances, a verbal warning may be provided within the context of an informal discussion, but this is not disciplinary action and should not be recorded on the employee's file. It is recommended that a file note of informal discussions is retained.

Refer to Section A - Approaches to managing underperformance.

Refer to Tool 3: Template file note - to be used for informal performance or conduct

Disciplinary action

Disciplinary proceedings are taken where informal discussions and counselling, as described above, have been unsuccessful and/or where the situation is more serious, such as in the instance of misconduct, breach of regulations or incidents that must be reported to DET, police or other authorities etc. Disciplinary action as a consequence of misconduct must only be considered after an employee has been provided with an opportunity to respond either verbally or in writing.

Considerations before initiating disciplinary proceedings

A decision on whether to initiate disciplinary action should be based on the following considerations:

- the seriousness of the impact of the employee's action on the organisation, fellow employees, children and parents attending the service
- the impact on the reputation of the service
- the intent of the employee, i.e. whether the employee's actions were malicious, intentional, negligent or accidental
- the employee's prior conduct
- whether opportunities to improve performance, such as training or counselling, have been provided and if there was sufficient time for these measures to have an impact.

Disciplinary action can take various forms. The most common forms include formal written warnings with consequences and actions or written reprimands.

Suspension during an investigation

Where serious misconduct by an employee is being investigated, and the continued presence of the employee at the workplace is likely to interfere

with the investigation, or if the conduct is of a nature likely to pose a threat to children, other employees and/or parents etc., the employer may choose to suspend the employee with pay for the duration of the investigation and disciplinary proceedings.

A suspension should be notified in writing, paid at the employee's ordinary rate, and must not disadvantage or prejudge the employee. The employer must also ensure that the investigation and the disciplinary process are completed without undue delay. Complaints and allegations of inappropriate workplace behaviour must be taken seriously, and demonstrating this seriousness means giving immediate attention to the matter.

In the event of a suspension, you will need to be able to show you acted reasonably in the circumstances and that the suspension was necessary. For instance, your decision to suspend may allow for a fair investigation or protect others on the premises while the disciplinary process is pending.

A decision to suspend an employee should not be taken lightly, and should be reserved for cases of alleged serious misconduct. It should also be made clear to the employee that this is not a punitive measure, and that the investigation process remains fair and open for an informed decision.

Demotion



Important:

Using a demotion as a form of disciplinary action may not be lawful and is not recommended.

A demotion occurs when you offer an employee, and they accept, a new contract of employment with considerable changes to key aspects of their role. These changes might include a decrease in remuneration or a reduction in benefits. The circumstances in which employers consider

demoting an employee are varied, but usually arise in the context of disciplinary proceedings or as an alternative to redundancy.

Consultation and agreement should be sought before implementing a role or job status change. For example, where a demotion amounts to a reduction in responsibilities, duties and as a result, pay to an employee's contract of employment, individual consultation and agreement by the employee must occur before implementing the change.

This remains the case even where an employer has reserved the right under an employee's contract of employment or industrial agreement to change their terms and conditions. The VECTEA does not contain specific provisions which permit a demotion after disciplinary proceedings. An employee demoted without their consent, in a way that will significantly reduce their remuneration or duties, may commence unfair dismissal proceedings at the Fair Work Commission.

Procedural fairness

Given the serious nature of the consequences for an employee in a disciplinary proceeding, the employer must ensure a high level of procedural fairness when initiating and conducting disciplinary proceedings.

If termination of employment or a formal warning is the outcome of the disciplinary action, ensuring procedural fairness is critical to effectively managing and minimising the risk that an employee will lodge a claim for unfair dismissal. The main elements of procedural fairness are as follows:

- the employee is informed of their rights and obligations and all policies are complied with
- witnesses relevant to the performance/conduct being investigated (identified either by the complainant or the employee) are interviewed

SECTION B - APPROACHES TO MANAGING MISCONDUCT

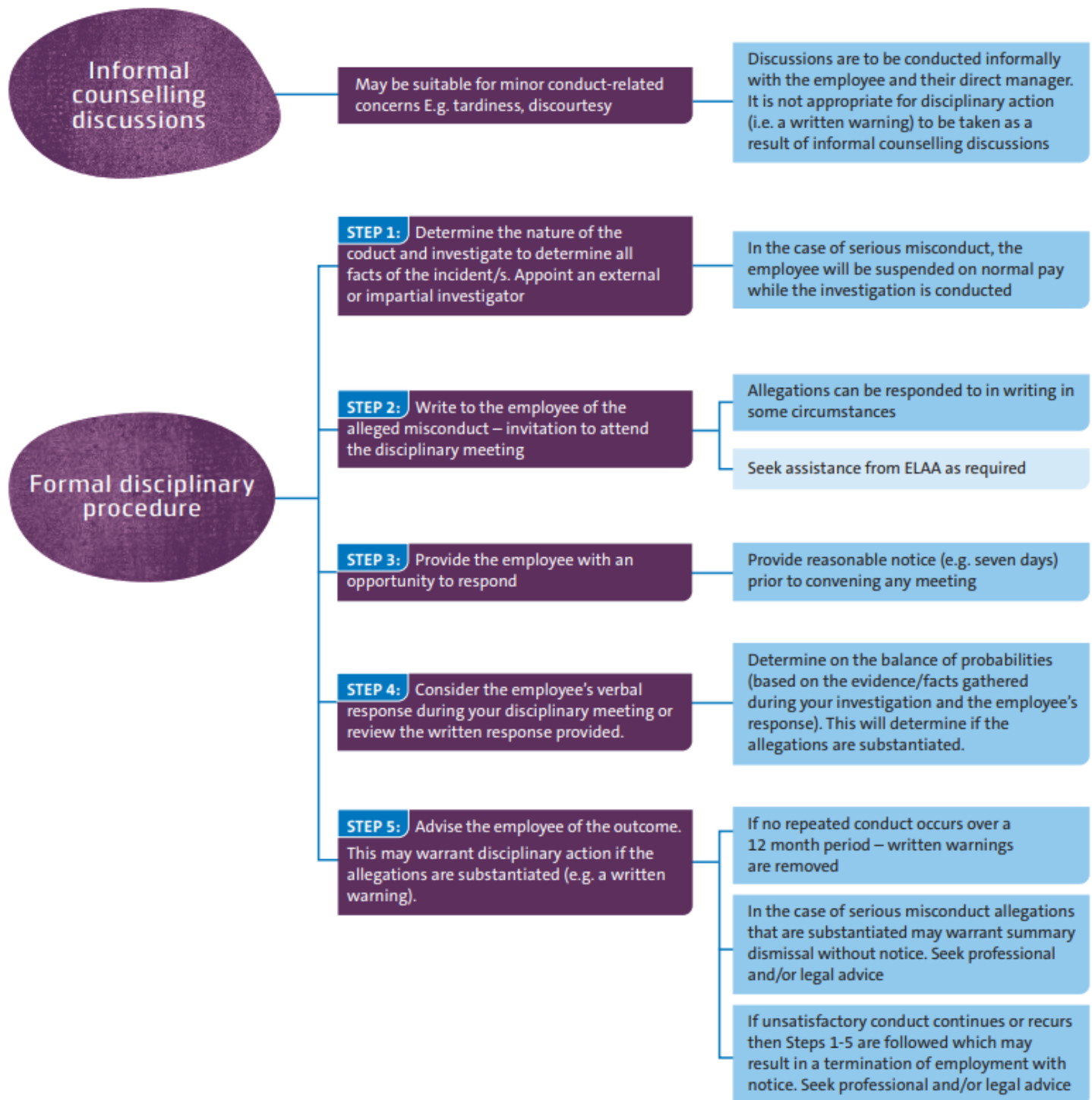
- the employer provides the employee with sufficient resources, including time and access to any relevant documents, to prepare
- action is timely e.g. neither delayed unreasonably nor rushed
- the principles of natural justice confidentiality are observed
- the employee is encouraged to seek independent advice, support and representation. Representation may be in the form of their union or legal representative or support person (i.e. a friend or family member)
- the possible consequences, including termination, of continuing or repeated unsatisfactory performance or conduct have been clearly explained; and
- the allegations are investigated prior to any decision being made, and the final decision is impartial and based on facts and evidence.

Refer to pages 21 -25 for a best practice disciplinary procedure

Summary of the disciplinary procedure for misconduct

VECTEA 2020 or applicable industrial agreements

This tip sheet provides a summary of the performance counselling process and can be printed or saved separately for ease of use.



Disciplinary procedure



VECTEA employers - Disciplinary procedure clause

VECTEA employers are obliged to follow the disciplinary procedure as outlined in clause 11 (disciplinary procedure) or relevant industrial agreement.

STEP 1: DETERMINE THE NATURE OF THE CONDUCT AND INVESTIGATE

Receiving a complaint

The need to deal with issues through a formal disciplinary process is commonly triggered by the receipt of a complaint by the employer on the employee's performance or misconduct, or an event or behaviour witnessed by the employer.

The disciplinary processes that will be followed by an employer may be contained in the policies of the service, or in the relevant award or enterprise agreement. Employers must familiarise themselves with these processes prior to initiating the disciplinary process.

Investigating a complaint

It is important to undertake appropriate investigation into the complaint to establish the facts before initiating the disciplinary meeting. Depending on the seriousness of the issue, ELAA recommends that the investigation is conducted by an independent third party who is experienced in conducting such investigations (see: use of an independent workplace investigator).

Maintaining confidentiality surrounding all disciplinary activities is important for a proper and fair process. A failure to maintain confidentiality by a committee member or staff, may compromise the integrity of your investigation (see: procedural fairness).

If the employer decides to conduct the investigation in-house, care must be taken to ensure that the investigator is thorough and fair, seeks information from all relevant parties and conducts the investigation in a manner that is unbiased and procedurally fair to the employee. Where the investigation is triggered by a complaint, the investigator must not be the person who made the complaint.

Where the matter being investigated indicates a potential threat to the health and safety of children or other employees or poses a serious risk to the employer's business operations, it may be necessary to suspend an employee under investigation (*refer to suspension earlier in this section*).

Conflict of interest

Committee members, employer representatives or employees who are personally affected or involved in the complaint being investigated (or their child/children), are likely to be interviewed as a witness.

Persons with a conflict of interest should refrain from any involvement in the investigation, discussion or decision-making process relating to the complaint, or in implementing required action. Employers should ensure these requirements are communicated to the relevant employees.

Use of an independent workplace investigator

In the case of serious misconduct, employers may also consider appointing an external, independent person/expert for this purpose.

The person who conducts the investigation It is not recommended to be the same person who completes the disciplinary meeting as the outcome shouldn't be pre-determined. An investigator is more likely to have formed an opinion prior to the disciplinary meeting.

An independent investigator is strongly recommended when a complaint has been made in areas of significant concern. This may include complaints or grievances that involve (and are not limited to):

- workplace bullying
- harassment and/or sexual harassment
- conflicts of interest between committee members and the employees (including your Kindergarten Director)
- breaches of the child-safe standards, incidents, or suspected child-harm (including matters referred to the Commission for Children and or Young People (CCYP))
- breaches of the National Law or National Regulations. This includes serious or notifiable incidents which are reported to the Quality and Assessment Division (QARD) of the Victorian Department of Education and Training.

STEP 2: OUTLINE THE ALLEGATIONS OF MISCONDUCT TO THE EMPLOYEE IN WRITING

By the time an employer is ready to initiate the disciplinary meeting, an investigation into the alleged conduct or performance must have been conducted, and the results of the investigation must have indicated the need for a disciplinary meeting and further action.

Once you have conducted your investigation and identified that disciplinary action may be necessary, you must write to the employee to advise:

- the instances of misconduct and/or serious misconduct that is alleged to have occurred.
- that should the alleged misconduct and/or serious misconduct be substantiated (proven); disciplinary action may be taken.

Inviting your employee to attend the disciplinary meeting

The most common method is that the letter that contains the particulars of the allegations will also include a direction for the employee to attend a meeting to provide their response.

The employer must notify the employee in writing of the date, time and venue of the disciplinary meeting, and the matters to be discussed.

Meetings should be scheduled during work hours and paid. The employee should be informed of who will represent the employer at this meeting.

If possible, the employee should be consulted in relation to when the meeting will be held and provided with the opportunity to bring a support person to the meeting. The role of the support person is to listen and provide support, but not to participate in the discussion (*refer to the role of the support person during disciplinary meetings*).

The employer must advise the employee of the matters that will be addressed at the meeting, clearly outlining the conduct that is in question and why the meeting is necessary.

Refer to Tool 5: Template invitation to attend a disciplinary meeting letter.

Who should be involved in the meeting?

Disciplinary meetings are normally best conducted by the employer (approved provider) and should be treated with the utmost confidence. In larger services and Early Years Managed (EYM) services, this may be the Human Resources manager of the service along with the line manager of the employee.

In an independent service, this responsibility may be delegated to a sub-committee of the Committee of Management (CoM), or to the Director of the service who will report back to the CoM.

If the responsibility is delegated to a sub-committee, it is important to clearly define the terms of reference for this sub-committee, and the final decision in relation to an appropriate disciplinary action must be made at a properly convened meeting of the CoM.

To ensure procedural fairness, formal disciplinary meetings are best conducted by no more than two authorised representatives of the employer.

Providing an opportunity to respond in writing

In some circumstances, or due to the nature of the allegations, it may be more appropriate to require the employee to respond in writing instead of attending a disciplinary meeting. If this is the option provided to the employee, the employee must be given a reasonable timeframe to formulate and return their response.

STEP 3: PROVIDE THE EMPLOYEE WITH AN OPPORTUNITY TO RESPOND

Holding your disciplinary meeting

The employer must outline the allegations or concerns one-by-one, outlining the employer's understanding of the issues involved, the investigation undertaken, and the facts as demonstrated by evidence gathered during the investigation.

After hearing the employee's response, the employer must consider if there are mitigating circumstances or new information that must be considered or further investigated. If so, it is important for the employer not to form any conclusions at this stage, but to advise the employee that the meeting will be rescheduled to allow for further consideration/investigation of the information presented by the employee.

Unless the employer's evidence is clear-cut and establishes serious misconduct or underperformance clearly, it is not advisable for an

employer to decide on the action to be taken at the disciplinary meeting. To do so will expose the employer to a claim that procedural fairness was denied to the employee and that the outcome was predetermined and formed without proper consideration of the employee's explanation and perspective.

Ensuring a procedurally fair disciplinary meeting:

It is important to maintain objectivity throughout the meeting, concentrate on the issues being addressed and keep discussions solutions focused.

The employer must provide the employee with an opportunity to present their views and perspectives and must treat the employee fairly. If required, clarification should be sought to understand the employee's perspective.

If the employee requires or requests access to records to prepare a case, the employer must provide the employee with access to such records and time for review, which may mean rescheduling the meeting.

Documents that infringe on the right to privacy of other persons should not be provided to the employee. Similarly, a letter of complaint should not be provided to the employee without the consent of the author of the letter. However, if the matter relates to the employer's duty of care, there is no right to autonomy, except in exceptional circumstances.

If the employee chooses not to answer any questions during the interview or refuses to provide information/comment, the employer may proceed with the disciplinary process in the absence of any response from the employee. It is recommended that the employer seeks to understand why the employee is non-responsive and ensures that the matter is approached sensitively prior to any action being decided upon.

Refer to Tool 8: Template to record disciplinary meeting

Role of the support person during disciplinary meetings

An employee who is the subject of workplace counselling or a disciplinary process has the right to have a support person of their choice present at the meeting. The employee should be notified of the right to have a support person at the time they are notified of the disciplinary proceeding.

Employers should never refuse the presence of a support person, except in rare circumstances where it would be reasonable to do so, for example, if allowing the support person to attend would mean rescheduling the meeting at the last minute.

The employee may choose not to have a support person during the process. The employer should make a note that the employee has chosen to attend the meeting without a support person and continue with the counselling or disciplinary process.

The role of the support person is to provide professional and moral support to the employee concerned and to act as a witness or observer to the process.

ELAA advises employers to set parameters for the role of the support person at the outset of the meeting. The employer may allow a support person to speak on behalf of the employee if, in the employer's view, the support person's participation will assist in clarifying matters, and/or is likely to lead to a resolution of the matter.

Who can be a support person?

A support person may be a friend, colleague, relative or union/association representative. If the support person is a professional advocate, this person should be advised that their role during the meeting is that of a support person and not an advocate.

While the support person may provide legal or other advice to the employee outside the meeting, it is different to the role of a support person during the meeting.

While every attempt must be made by the employer to ensure meetings are set at a time that suits all parties involved, the unavailability of an employee's support person is not an appropriate reason to unreasonably delay a meeting.

Conduct by a support person

The support person may not disrupt or direct the process, or otherwise interfere in the meeting. If the support person wishes to comment or provide advice to the employee during the meeting, the meeting can be adjourned.

A support person who attempts to intervene directly in the meeting, they should be warned that this contravenes the role of the support person.

If the support person does not comply with the reasonable directions of the employer despite having been warned, the employer may ask the support person to leave the meeting, and the meeting may continue without the support person. The employer may also terminate the meeting and reschedule it for another day.

STEP 4: CONSIDER THE EMPLOYEE'S RESPONSE

At the conclusion of the meeting, depending on the discussion and evidence presented, the following outcomes are possible:

- If the information presented by the employee at the meeting needs further investigation, the employer must schedule a further meeting(s) to discuss the findings and make a decision; or
- If the misconduct is established, the employer should convene a further meeting to provide a formal outcome and

attempt to form an agreement on required improvement and appropriate disciplinary action (*see Step 5 below*); or

- No further action is required, as the allegations have not been substantiated on the balance of probabilities (proven).

STEP 5: PROVIDE AN OUTCOME TO YOUR EMPLOYEE

Based on the above framework, you will provide the employee with an outcome without undue delay after your meeting.

Issuing a formal written warning

Where the misconduct/underperformance has been substantiated, established with evidence at the meeting, a formal written warning may be provided to the employee (clause 11.7).

The warning must be provided verbally and in writing to the employee. Your letter should clearly:

- state that it is a formal warning letter
- set out the misconduct/underperformance being addressed
- summarise the discussions from the disciplinary meeting
- quote the employee's response in the meeting or reference the employee's written response (paraphrases should be avoided as they may increase the risk of misinterpretation of the employee's meaning).
- outline the expectations of the employer with regard to changes to be demonstrated by the employee to address the misconduct.
- state the consequences for lack of improvement of the misconduct/underperformance within a stated timeframe, including informing the employee that their employment may be terminated

- list support/development measures for the employee, as identified at the disciplinary meeting, and the timelines within which the employee should undertake such measures
- indicate any follow-up processes agreed to between the employer and employee or required by the employer.
- the duration that the written warning will remain on the employee's personnel (HR) in accordance with the employer's policies or industrial agreement. See: record keeping and warnings.
- All records relating to the disciplinary meeting and subsequent actions must be signed by the employer, kept confidential and stored at the service in accordance with the legal requirements for the storage of records. Copies should be made available to the employee where appropriate.
- Employers should request employees to sign the records as evidence of participation/attendance at the meeting.

Refer to Tool 7: Template written warning (disciplinary procedure).

Record keeping and warnings

ELAA recommends that employers should maintain a record of the discussion including any outcomes and/or actions agreed to be performed by the employer and the employee, the timeframes by which the employee must demonstrate improvements and any further meetings/follow-ups that may be required. It is also good practice to have both the employer and employee sign this record and to make a copy available to the employee.

All counselling or disciplinary matters must be removed from the employee's file after 12 months if the conduct or underperformance has been addressed and resolved satisfactorily.

Monitor and review

Where an improvement in the employee's performance/ conduct is sought, or a formal warning has been issued, the employer should set in place a monitoring and review process to track the employee's progress.

This process should include setting time for:

- regular progress meetings with the employee to review and provide feedback,
- a formal review to decide on whether progress is satisfactory or, if improvement has not been demonstrated, further action must be taken.

Discussions at these meetings should be recorded and signed by both the employer and employee (refer to the Employee Management and Development Kit for information on providing effective feedback and having ongoing conversations).

Dispute resolution procedure

Employees under the VECTEA, awards and industrial agreements can access their dispute resolution procedure relating to a matter under their industrial agreement (i.e. a disciplinary procedure or grievance).

A dispute resolution procedure involves the following:

- Discussing the matter at the workplace level.
- Requesting the referral of the matter to a nominated representative (for example, union official, legal representative) by either party.
- Attempting to resolve the dispute via mediation at the request of either party.
- Referring the matter to the Fair Work Commission for resolution.

Understanding termination of employment



Note: This resource is provided as a guide and is not intended to represent or replace professional or legal advice that services must seek prior to initiating any formal action.

Escalation or continuation of misconduct by the employee

After conducting a fair process, you may be able to dismiss an employee based on an escalation of warnings ie. for repeated warnings for the same or similar behaviour over a certain timeframe.

The *Fair Work Act 2009 Cth* (Act) does not require a standard three written warnings prior to dismissal. It provides that:

- there must be a valid reason for the dismissal related to the person's capacity or conduct
- the person must have been notified of that reason
- the person must have been given an opportunity to respond and not unreasonably refused a support person; and
- if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal.

Best practice approach

It continues to be a best practice approach to provide a series of warnings to demonstrate a continuation or escalation of the unacceptable conduct or performance. Employers should follow their relevant policy and any disciplinary procedure in their relevant industrial instrument prior to enacting a dismissal.

As with the formal written warning outlined above, the following should be included in a notice of termination:

- a summary of the issues, dates and discussions at each of your disciplinary meetings
- reasons for the decision for dismissal
- the date from which the employment will be terminated
- notice period if any in line with contract or industrial agreement
- arrangements for payment of the employee's entitlements.

Termination without notice (summary dismissal)

At any time, the employer may terminate the employment of the employee without notice for any cause warranting summary dismissal by common law or by statute. Any proposed summary dismissal on the grounds of serious misconduct must be made in accordance with Regulation 1.07 of the *Fair Work Regulations 2009* (Cth) and the employee's relevant Industrial Agreement.

Claims associated with the termination of employment

Unfair dismissal

Employers should be aware that a dismissed employee can make an application for an unfair dismissal remedy under the *Fair Work Act 2009* (Cth) (FW Act) at the Fair Work Commission within 21 days of the date of dismissal.

An unfair dismissal occurs when an employee makes an and the Fair Work Commission finds that:

- the employee was dismissed, and

SECTION C - TERMINATION OF EMPLOYMENT

- the dismissal was harsh, unjust or unreasonable, and
- the dismissal was not a case of genuine redundancy, and
- where the employee was employed by a small business, the dismissal was not consistent with the Small Business Fair Dismissal Code.

The costs for an employer for a successful unfair dismissal claim can include up to a maximum of 26 weeks wages (up to the compensation cap of half the high-income threshold) and/or reinstatement.



An employee is eligible to make an application for an **unfair dismissal remedy** if they have completed the minimum employment period of:

12 months – where the employer employs fewer than 15 employees (a small business employer), or

6 months – where the employer employs 15 or more employees.

General protections (adverse action)

Under the general protections' provisions in the FW Act, it is unlawful for a person or employer to take adverse action against another person or their employees for a proscribed reason.

These protections include:

- protections relating to workplace rights that can be broadly described as exercising their employment entitlements or conditions (such as taking leave or making a complaint).
- engaging in industrial activities (which encompasses the freedom to be or not be a member or officer of an industrial association (e.g. trade union) and to participate in lawful activities, including those of an industrial association)

- protections for a temporary illness or injury for up to three months in any 12 month period (taking paid personal/sick leave)
- protection from sham contracting arrangements
- protection from discrimination on the basis of a protected attribute (race, colour, sex/gender, sexual orientation, age, physical or mental disability, marital status, pregnancy or family or carer's responsibilities, religion, political opinion or national or social origin).

Adverse action is actions taken by an employer which may include:

- termination of employment (dismissal)
- injuring the employee in their employment (for example, not giving an employee their legal entitlements, such as pay or leave)
- changing an employee's job to their disadvantage
- treating an employee differently than others
- not hiring someone
- offering a potential employee different and unfair terms and conditions for the job compared to other employees.

Reverse onus of proof

In the event of a general protections claim made at the Fair Work Commission or courts, employers and other persons who are alleged to have taken adverse action bear the onus of disproving that the action was taken for an unlawful reason.



Employees do not have to complete their minimum employment period (6 or 12 months) to make a claim under general protections at the Fair Work Commission.

Civil remedy provisions

General Protections are civil remedy provisions and as such, the court can award financial penalties and damages (including future economic loss). Compensation can be significant, and it is, therefore, advisable to seek expert legal advice.

Unlawful termination

Unlawful termination provisions protect employees who are not entitled to make a general protections dismissal application (for instance non-national system employees). An employee can make a claim for an unlawful termination if the reason is or includes a reason that is prohibited by the Fair Work Act.

Appendix

Tool 1. Performance Improvement Plan (PIP) template

The following development needs have been discussed and agreed to be undertaken on ____/____/____

Employee's name: _____ Position: _____

Beginning of review period: _____ Review period duration: 12 weeks term-time / 4 weeks term-time or _____ (circle)

Date of end of review period: _____

Areas for development <i>Identify areas needing improvement and group into general categories</i>	Specific concerns <i>List examples for each area of development Detail specific dates and examples of where the standards or competencies have not been met</i>	Desired outcome <i>What needs to change? What outcomes are necessary?</i>	Agreed improvement actions and supports <i>These are activities that will assist in development e.g., attending professional development, undertaking on-the-job training, receiving coaching from someone with the required skill</i>	Date/timeframe to meet expected standard	Review date/s <i>(during formal support period)</i>	Review comments <i>Detail any improvement made and expected and any future/negotiated review dates</i>

Tool 2. Sample Performance Improvement Plans

Areas for development	Specific concerns	Desired outcome	Agreed improvement actions and supports	Date/timeframe	Review date	Review comments
Example 1: Early childhood teacher						
Failure to maintain documentation records	On 25/5/22 management observed: <ul style="list-style-type: none"> No current observations have been made. No curriculum program available 	Regular observations of all children and adherence to the planning cycle. A current curriculum program to be developed and displayed.	Utilise the allocated non-contact planning time and seek support from the Educational Leader/mentor	Immediate commencement Review to be taken in 4 weeks	Reviewed on 22/6/22	Documentation has been met - however, will monitor during support period to ensure continued compliance.
Example 2: Cleaner at an early childhood service						
Failure to carry out cleaning duties in accordance with job description, cleaning schedule and expected standard.	Complaints have been received regarding the poor standard of cleaning. Examples of this were: <ul style="list-style-type: none"> on 30/2/22 and 12/4/22, the floor of the children's toilet/washroom was not washed 	To clean the rooms in accordance with the job description, schedule of cleaning duties and expected standard.	Employee to seek guidance if unsure about the listed duties or expected standard.	Immediate Review to be taken in 4 weeks	Reviewed on 1/5/22	Improvement in cleaning of the children's washroom floor.

Tool 3. File note - List of issues and outcomes from your informal counselling meeting

Name of service: _____

Employee's Name: _____ Date of informal discussion: / /

Position: _____

Attendees:

Name: _____ Position: _____

Name: _____ Position: _____

Name: _____ Position: _____

Meeting Notes

Follow up actions (if required):

-
-
-
-

Employee acknowledgment:

Signed:

Date: / /

Tool 4. Template invitation letter for a performance counselling meeting



Note: This is a template sample letter for notifying employees of a performance counselling meeting. The purpose of this work performance counselling session is to discuss an area(s) of concern regarding the employee's work performance and the resolution of issues. Complete all purple fields prior to issue and remove ELAA headers.

[Insert service letterhead]

[Insert date]

PRIVATE AND CONFIDENTIAL

[Insert employee name and address]

Dear [insert name]

Re: Invitation to attend a work performance counselling meeting

We are writing to you regarding recent concerns raised about your performance in the position of {Insert position} at {Insert service name}. This letter is in accordance with clause 12.4 of the *Victorian Early Childhood Teachers and Educators Agreement 2020* (VECTEA).

Please find attached a copy of clause 12 of the VECTEA to this letter.

The alleged areas of unsatisfactory work performance are as follows:

- [Insert performance concern]. [Insert recent example]
- [Insert performance concern]. [Insert recent example]

We are providing you with an opportunity to respond to these concerns at a meeting to be held at [insert day, time, venue].

You are welcome to bring a support person to this meeting. Should you wish to bring a support person, please advise me of the name of the person at least one day prior to the scheduled meeting time.

The purpose of our meeting will be to address the areas of unsatisfactory work performance, provide you with an understanding of the required expectations, and outline the proposed support measures that will be in place for the duration of your support period.

Following our work performance counselling meeting, you will be provided with an initial [12-week] formal support period. During this meeting we will agree on documented objectives in a performance improvement plan that will be discussed and provided to you.

This letter and meeting regarding the issues raised are to remain confidential and must not be discussed with your colleagues, parents or families. A breach of this confidentiality will be treated as a serious matter.

If you require further information, please contact [insert contact details or name, position title and phone number].

Yours sincerely,

[Insert name of representative]

[Insert position e.g., Committee President, HR Manager]

Tool 5. Template invitation letter for a disciplinary meeting



Note: This is a sample letter to be used as a guide for notifying employees of a disciplinary investigation meeting. Contact ELAA in cases of misconduct or serious misconduct or seek professional and or/legal advice. Complete all purple fields prior to issue and remove ELAA headers.

[Insert service letterhead]

[Insert date]

PRIVATE AND CONFIDENTIAL

[Insert employee name and address]

Dear [insert name]

Re: Invitation to attend a disciplinary meeting

I am writing to advise you that an allegation [a number of allegations, (delete if not applicable)] of misconduct have been identified in the performance of your duties at [Insert service name].

- On [Insert date], it is alleged that you [insert overview of conduct]. Specifically, it is alleged that you [insert specifics of the incident]. This is in breach of your employment obligations to follow [insert policy/regulations]. [insert specifics of the employee's response to each allegation, avoid paraphrasing].
- On [Insert date], it is alleged that you [insert overview of conduct]. Specifically, it is alleged that you {insert of the incident} This is in breach of your employment obligations to follow [insert policy/regulations].

[add or remove numbered allegations as required]

We are providing you with an opportunity to respond at a meeting to be held [insert day, time, venue, names of employer representative(s) and any external consultant who will be present].

You are welcome to bring a support person to this meeting. Should you wish to bring a support person, please advise me of the name of the person at least one day prior to the scheduled meeting time.

I remind you that matters and information relating to this allegation are confidential and you are directed not to discuss them with any other person without my express prior consent. Any failure by you to maintain confidentiality may lead to disciplinary action.

If you require further information, please contact [insert Committee contact details or name, position title and phone number].

Yours sincerely,

[Insert name of representative]

[Insert position e.g., Committee President, HR Manager]

Tool 6. Template written warning (work performance counselling)



Note: This is a sample written warning letter to your employee after holding your review work performance counselling meeting. This must only be provided after the formal support period has been completed. Complete all purple fields prior to issue and remove

[Insert service letterhead]

[Insert date]

PRIVATE AND CONFIDENTIAL

[Insert employee name and address]

Dear [insert name]

Re: Formal written warning

I refer to our initial meeting on {insert initial meeting date}, which was held to discuss matters relating your unsatisfactory work performance in the following areas:

- [Insert performance concern]. [Insert recent example]
- [Insert performance concern]. [Insert recent example]
- [Insert performance concern]. [Insert recent example]

Following this performance counselling meeting, you were provided with a [12 week or insert applicable duration] formal support period to demonstrate improvements in documented objectives as outlined in your performance improvement plan (attached to this letter).

You were then invited to a further meeting at the conclusion of this support period on [insert date] to provide an opportunity to respond to our concerns. In our meeting you provided the following verbal response:

- [insert employee's reasons/response for underperformance]
- [insert employee's reasons/response for underperformance]

Based on the above, you have not demonstrated sufficient progress to the objectives as outlined in your formal support period. As such, [the Committee of Management/Employer name] has decided to issue a formal warning in relation to your unsatisfactory work performance. This formal warning will be kept on your file for 12 months from today. [In accordance with clause 12.6 of the VECTEA 2020, you are now provided with a further formal support period of 4 term weeks in duration].

During this support period, your performance will be assessed in accordance with your performance improvement plan, and every effort will be provided to support you to improve during this time. You are reminded further unsatisfactory work performance may result in further warnings being issued or the termination of your employment.

I am obliged to inform you that this matter is being treated in strict confidence. We ask that you respect this confidentiality by not conveying any information regarding this matter to any person, including work colleagues, parents, and others, without my prior consent.

Yours sincerely

[Insert name of representative]

[Insert position e.g., Committee President, HR Manager]

Tool 7. Template written warning (disciplinary procedure)



Note: This is a sample written warning letter to your employee after holding your disciplinary meeting. Complete all purple fields prior to issue and remove ELAA headers.

[Insert service letterhead]

[Insert date]

PRIVATE AND CONFIDENTIAL

[Insert employee name and address]

Dear [insert name]

Re: Formal written warning

I refer to our letter concerning an allegation of misconduct, dated [insert date].

A disciplinary meeting was convened on [insert date], for the purposes of allowing you an opportunity to respond to the allegations of misconduct. *[On [insert date] you were invited to provide your response in writing to the allegations below, which is attached to this letter - delete if not applicable].*

Our meeting involved obtaining your verbal response, which is outlined in summary to the allegations as follows:

- On [Insert date], it is alleged that you [insert overview of conduct]. Specifically, it is alleged that you {insert of the incident} This is in breach of your employment obligations to follow [insert policy/regulations]. [insert specifics of the employee's response to each allegation, avoid paraphrasing].
- On [Insert date], it is alleged that you [insert overview of conduct]. Specifically, it is alleged that you {insert of the incident} This is in breach of your employment obligations to follow [insert policy/regulations]. You responded that [insert specifics of the employee's response to each allegation, avoid paraphrasing].

[add or remove numbered allegations as specifically listed on invitation letter].

Having regard to the above, and in the present circumstances you are hereby issued with a formal written warning that your conduct outlined above is unacceptable. Please be advised that any further misconduct may result in more serious disciplinary action, up to and including termination of your employment.

I am obliged to inform you that this matter is being treated in strict confidence. We ask that you respect this confidentiality by not conveying any information regarding this matter to any person, including work colleagues, parents, and others, without my prior consent.

[Insert if applicable - [Name, I understand this can be a difficult time and would like to advise you of the Employee Assistance Program which is a free and confidential counselling service that may be of assistance to you. Benestar can be contacted on [insert details].

Yours sincerely

[Insert name of representative]

[Insert position e.g., Committee President, HR Manager]

Tool 8. Template to guide and record disciplinary meeting

Date of meeting: / /

Time of meeting:

Name of service: _____

Employee's full name: _____

Position: _____

Names of those in attendance:

Name (Chair): _____ CoM role/ Position: _____

Name: _____ CoM role/ Position: _____

Employee name: _____

Support person name (if applicable) _____ Position and organisation: _____

Introductory comments (Chair)

- Introduce each attendee and their role
- If a support person is present, confirm that they are attending to provide support to the employee but are not to answer questions or speak on the employee's behalf.
- Remind all attendees that all matters and information relating to this disciplinary process are confidential, including any related documentation or outcome.
- Explain that the purpose of the meeting is to seek an explanation of the issues raised, including all facts and evidence gathered during the investigation that has taken place (if applicable).
- Confirm that an outcome (i.e. warning) will not be provided during this meeting. You cannot advise what an outcome will be until all evidence and facts have been fully considered.
- Advise that the CoM/management will carefully consider the employee's response and all matters discussed during this meeting and will provide an appropriate outcome as soon as practicable.

Discussion of allegations and particulars

Allegation 1 (as per invitation letter)

Type here

Employee's response (avoid paraphrasing)

Probing questions and employee's response

Allegation 2 (as per invitation letter)

Type here

Employee's response (avoid paraphrasing)

Employee's response (avoid paraphrasing)

Probing questions and employee's response

[add or remove numbered allegations as specifically listed on the invitation letter].

Closing comments

- Advise the employee that you do not have any further questions and ask if they would like to add anything.
- Reiterate that the CoM/management will need to consider all the evidence at hand, including the employee's responses, and wukk provide an outcome as soon as practicable.
- Thank attendees for their time and reiterate their confidentiality obligations.

Additional comments raised:

Meeting closed at: (time).

Employee acknowledgment:

Signed:

Glossary of terms

A

Award (Modern Awards)

Legal documents that outline the minimum pay rates and conditions of employment (i.e., the Educational Services (Teachers) Award 2020).

Affidavit

A sworn statement of fact made under oath before an authorised official. An affidavit is used to provide evidence at the Fair Work Commission (or at court).

Allegation

To declare that something is true without providing proof.

Arbitration

The process by which a member of the Fair Work Commission (tribunal) will hear evidence, consider submissions, and then make a formal decision.

Application

The way of starting a case before the Fair Work Commission.

B

Bullying (workplace bullying)

Repeated behaviour by an individual or group of individuals that is unreasonable towards a worker or a group of workers at work, and the behaviour creates a risk to health and safety. Reasonable management action conducted in a reasonable manner does not constitute workplace bullying.

Balance of probabilities

The comparison of disputed facts to determine what is more likely to have occurred. A fact proved to be true on the balance of probabilities is more probable than not.

C

Complaint

A complaint is an informal accusation, allegation, or charge (oral or written). Employees with complaints should be encouraged to utilise a formal grievance policy or procedure.

Complainant

A person who makes a formal complaint or lodges a grievance.

CCYP

The Commission for Children and Young People. Independent statutory authority regulates organisations that work with children and young people.

D

Decision

A determination made by a single member or the Full Bench of the Fair Work Commission.

Disciplinary procedure

A procedure set out in an enterprise agreement or policy outlines the steps required to deal with an employee's misconduct.

Disciplinary action

Management actions are taken after an employee has been given an opportunity to respond to concerns that are substantiated about their performance or misconduct. May include a verbal warning, formal written warning, or summary dismissal.

Dismissal

Termination of employment at the initiative of the employer due to conduct or performance or misconduct.

Dispute resolution

A procedure set out in an award or agreement that can be used to settle disputes related to that award or agreement, or the National Employment Standards.

E

Enterprise agreement

An enterprise agreement (or enterprise bargaining agreement - EBA) is a legally binding workplace agreement that outlines minimum terms and conditions of employment (similar to an award). It covers employers who are listed as signatories (respondents) to the agreement. An enterprise agreement must meet requirements under the Fair Work Act before it can be approved by the Fair Work Commission.

Employer (within an early childhood service)

Employer means an Approved Provider under the Education and Care Services National Law Act 2010 (i.e. Committee of Management) or persons (e.g. Director) who has been delegated authority to manage staffing matters.

Employee Management and Development Resource (EM&D)

The ELAA companion resource which focuses on implementing an effective performance evaluation system aligned with the National Quality Framework (NQF) and best practices for professional development.

Evidence

Information that tends to prove or disprove the existence of a particular belief, fact, or proposition.

F

Fair Work Commission

The Fair Work Commission is Australia's national workplace relations tribunal (court). It creates and reviews modern awards, approves enterprise agreements and manages workplace disputes.

Fair Work Act

The Fair Work Act 2009 (Cth) is the Commonwealth (federal) legislation that governs workplace (industrial) relations in Australia.

Fair Work Regulations

The Fair Work Regulations 2009 (Cth) contain additional regulations to the Fair Work Act and form part of the national workplace relations framework in Australia.

Fair Work Ombudsman

The Fair Work Ombudsman is an independent statutory office that provides workplace advice and manages compliance of employers who breach the Fair Work Act, awards, or registered agreements (i.e., underpayments).

G

General protections

The Fair Work Act prohibits an employer from taking adverse action against an employee, or prospective employee for discriminatory reasons, including their sex, race, religion, or gender, exercising a workplace right, being a member of an industrial association (e.g., union) or sham contracting arrangements.

Grievance

A workplace grievance is a formal complaint raised towards an employer by an employee due to a violation of their terms or conditions of employment. This may be in relation to policies their employment contract, remuneration, industrial agreement, conduct or practices in the workplace (e.g., bullying or harassment).

H

Harassment

Treating a person less favourably on the basis of particular protected attributes such as a person's sex, race, disability, or age (can include sexual harassment).

I

Industrial agreement

A generic term for a legally binding industrial document that details the rights and obligations of parties bound by the document, such as an enterprise agreement (EBA) or modern award.

J & K

L

Lawful and reasonable direction

Employees have a general common law obligation to comply with a lawful and reasonable direction from their employer. Lawful and reasonable directions can extend to several tasks or activities in an employment contract or position description.

M

Misconduct

Where an employee's conduct results in a breach of the established or expected standard, procedure, or policy; then an employee's conduct, if substantiated may warrant misconduct.

Minimum employment period

An employee can make a claim for unfair dismissal once completing their minimum employment period (6 months or 12 months for a small business employer). The minimum employment period applies to an employee's employment irrespective of any contractual provisions setting out a probationary period.

N

National Law (early childhood)

Th— Regulates Early Childhood and Children's Services in Australia.

National Regulations (early childhood)

The Education and Care Services National Regulations (National Regulations) 2011 support the National Law by providing detail on a range of operational requirements for an education and care service.

National system employer

An employer covered by the National Workplace Relations System in Australia (the Fair Work Act). Includes all employees in Victoria (with the exception of a law enforcement officer or a public sector executive).

Notice period or notice

A notice of termination (notice period) is a duration of time between notifying an employee of their dismissal and the end of employment date. Notice periods may also be required to be provided upon resignation by an employee. Notice periods are outlined in an employee's applicable award, enterprise agreement and/or contract of employment.

O

Order

A formal direction made by the Fair Work Commission which gives effect to a decision and is legally enforceable.

P

Performance evaluation (performance appraisal)

A collaborative approach applying to an organisation or team, whereby a manager and employee agree on set objectives and responsibility areas and meet to review results at regular intervals.

Performance counselling

Also referred to as performance management.

Performance counselling is a specific process, used to address and improve employee unsatisfactory work performance or behaviour.

Performance improvement plan (PIP)

A performance improvement plan is a document that sets out what the problem is with an employee's performance and what they need to do to improve it. Often used in conjunction with formal work performance counselling but can also be used after a disciplinary process.

Procedural fairness

Procedural fairness requires a person whose interests will be affected by the decision to have a fair and reasonable opportunity to be heard before the decision is made. Used interchangeably with the principle of 'natural justice'.

Q

QARD

The Quality Assessment and Regulation Division of the Department of Education and Training (DET).

R

Reasonable management action

A worker may feel bullied when an employer takes performance or disciplinary action. If this action is 'reasonable management action', carried out in a reasonable way, the law does not define it as bullying.

Reportable Conduct Scheme

Victoria has a Reportable Conduct Scheme to oversee allegations of child abuse and misconduct. Conduct that is 'reportable' must be mandatorily reported to CCYP.

Respondent

A person named which is accused of having engaged in the misconduct in the form of a complaint.

Reinstatement

To return an employee to the job that they previously held before they were dismissed.

Remedy

The possible outcomes of a matter heard at the Fair Work Commission. This could include an order for reinstatement or compensation.

S

Small Business Fair Dismissal Code

A code declared by the Minister for Education, Employment and Workplace Relations for small businesses (less than 15 employees) to follow when dismissing an employee to ensure a fair process.

Small business employer (small employer)

A national system employer which employs fewer than 15 employees (inclusive of regular casual employees).

Serious misconduct

The most severe form of misconduct. Wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment; and 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.

Stop-bullying order

An order made by application to the Fair Work Commission to stop bullying for a worker who is a risk of continued bullying by the same individual or groups.

Substantiated

Allegations of workplace conduct that are proven on the balance of probabilities.

Summary dismissal

Termination of employment without notice.

T

Termination of employment

Termination of employment is when an employee's employment ends (also referred to as a dismissal when at the employer's initiative).

U

Underperformance/ unsatisfactory performance

When an employee does not perform work unsatisfactorily or does not perform duties to the standard expected of the role on an ongoing basis.

Unfair dismissal

An unfair dismissal occurs when an employee makes an unfair dismissal remedy application and the Fair Work Commission finds that the employee was dismissed and the dismissal was, harsh, unjust, and unreasonable (and in the case of a small business not consistent with the Small Business Fair Dismissal Code).

An eligible employee who has completed their minimum employment period and is dismissed by their employer may make a claim for unfair dismissal.

Unlawful

Any action that is in violation of a statute or established legal precedent.

Unsubstantiated

A claim that has not been supported or proven by evidence.

V**VECTEA**

The Victorian Early Childhood Teachers and Educators Agreement (VECTEA). An industry-wide enterprise agreement covering employers of early childhood teachers and educators in not-for-profit kindergartens

VIT

Victorian Institute of Teaching

W, X, Y & Z**Witness**

A person who gives evidence in relation to a situation that they had some involvement or saw happening. A witness is usually required to provide a verbal or written witness statement or affidavit.

Workplace investigation

A workplace investigation involves the employer investigating whether an employee has engaged in misconduct, usually upon receiving a complaint.

Workplace right

An employee may exercise a 'workplace right' as protected under legislation when they make a complaint or inquiry in relation to their employment.

WorkSafe Victoria

WorkSafe is Victoria's workplace health and safety regulator and insurer

References

- Australian Children's Education & Care Quality Authority. 2021. *National Law and Regulations*. Accessed April 19, 2022. <https://www.acecqa.gov.au/nqf/national-law-regulations>.
- Australian HR Institute (AHRI). 2022. *Methods of performance appraisal*. February. Accessed April 20, 2022. <https://www.ahri.com.au/ahri-assist/>.
- Australian Human Rights Commission. 2014. "Workplace discrimination, harassment and bullying." *Commonwealth of Australia*. . November. Accessed April 19, 2022.
- Commission for Children and Young People (CCYP). The State of Victoria. 2022. *Reportable Conduct Scheme*. Accessed April 20, 2022. <https://ccyp.vic.gov.au/>.
- Department of Education and Training (Victoria). 2021. *Incidents and complaints*. 30 December. Accessed July 5, 2022. https://www.education.vic.gov.au/childhood/providers/regulation/Pages/incidents_complaints.aspx.
- Fair Work Commission. 2018. *Anti-Bullying Benchbook*. Commonwealth of Australia., 28 March.
- Fair Work Commission. 2018. *General Protections Benchbook*. Commonwealth of Australia, 2 July.
- Fair Work Ombudsman. 2022. "Effective dispute resolution." Accessed April 19, 2022. www.fairwork.gov.au'.
- More, Lisa. LegalVision. 2022. *I have demoted an employee. Is this legal?* 14 April. Accessed May 10, 2022. <https://legalvision.com.au/>.
- Morris, Anne. Davidson Morris. 2019. *Disciplinary hearing (a guide for employers)*. 15 October. Accessed May 10, 2022. <https://www.davidsonmorris.com/>.
- Rozenbergs, Karl & Hallett, Gemma. Australian HR Institute (AHRI). 2019. *Union reps in disciplinary meetings: your practical guide*. 9 October. Accessed May 2022, 10. <https://www.hrmonline.com.au/>.
- Victorian Institute of Teaching (VIT). 2021. *Investigations*. 19 July. Accessed July 5, 2022. <https://www.vit.vic.edu.au/conduct/investigations>.
- WorkSafe Victoria. 2021. *Responding to workplace bullying*. 30 August. Accessed July 5, 2022. <https://www.worksafe.vic.gov.au/responding-workplace-bullying>.