

PERFORMANCE PROCESSES AND MANAGEMENT: RISK MITIGATION  
HR MASTERCLASS SEMINAR  
1 OCTOBER 2019

**1. Introduction**

This presentation will consider various inter-work performance management and improvement processes and specifically how to mitigate risks to an organisation. I will discuss what makes a good Performance Improvement Plan that minimises the risk of an employee misinterpreting your management of their performance as an attempt to bully them. This seminar will be presented in a legal context, with reference to the applicable legislative instruments, and some recent cases that have emerged from management gone wrong.

**2. What is “performance management” in the context of this seminar?**

Workplaces generally have their own procedure of managing their employee’s development and performance. This may be done formally, methodically and delivered consistently across the work site for all employees, or it may be informal and on an ad hoc basis.

Today I will be talking primarily about “Performance Improvement Plans” (PIPs), however I will also discuss various informal methods of encouraging and monitoring staff improvement. We will also consider how to introduce and implement these processes in a way that is mutually beneficial for both you as the employer, as well as to the employee as the subject of these plans.

**3. “Performance Improvement Plans” (PIPs)**

Performance Improvement Plans are a common management strategy implemented in workplaces to monitor and encourage employees to be cognizant of their weaknesses at work or areas of concern for their employer, and aim to improve their performance. They are especially useful in situations where an employee is not completing tasks to the standard required of them, but can be utilised in almost any situation where an employee is underperforming.

When correctly prepared, they can also be a useful way to provide constructive feedback to an employee. A well-constructed Performance Improvement Plan identifies the areas where an employee is underperforming and provides them with unambiguous performance indicators or tasks that they should achieve to meet the standard required of them.

There are a multitude of generic Performance Improvement Plan templates available for free online that may be utilised. As is often the case with anything available for free on the internet, the quality of these Performance Improvement Plans are variable therefore I would advise against distributing anything that you haven't carefully considered in the context of your workplace. Having said this, the Fair Work Ombudsman website has one available which is well constructed.

#### **4. Primary legal risks to an employer associated with Performance Improvement Plans**

Performance Improvement Plans and other performance management strategies that are poorly designed or administered pose a risk to the employer. The three primary legal risks associated with Performance Improvement Plans from a legal perspective are:

1. A Stop-Bullying Order issued by the Fair Work Commission;
2. A Work Cover "stress" claim for a psychiatric injury under the *Return to Work Act 2014* (SA); and
3. An unfair dismissal claim under the *Fair Work Act 2009* (Cth).

These are not exclusive from one another. An employee can potentially initiate more than one of these claims against their employer based on the same incident or issue.

#### **5. Stop-Bullying Orders issued by the Fair Work Commission**

Under Section 789FC of the *Fair Work Act 2009* (Cth):

*(1) A worker who **reasonably believes** that he or she has been **bullied at work** may apply to the FWC for an order under section 789FF.*

The *Fair Work Act*<sup>1</sup> says that:

*(1) A worker is **bullied at work** if:*

*a) While the worker is at work in a constitutionally covered business:*

- i. An individual; or*
- ii. A group of individuals*
- iii. **repeatedly behaves unreasonably towards the worker**, or a group of workers of which the worker is a member; and*

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<sup>1</sup> *Fair Work Act 2009* (Cth) s789FD.

b) That **behaviour creates a risk to health and safety.**

At this stage it might be appropriate to discuss the link between Performance Improvement Plans and claims of workplace bullying.

A Performance Improvement Plan generally requires an employer or Human Resources member to meet with an employee and address concerns regarding their performance at work. This can feel uncomfortable, surprising or confronting for the employee for a range of reasons that may be entirely separate from the quality of the Performance Improvement Plan.

The employee may have previously thought that he/she had been performing well in their role and this may be the first time he/she is being told that he/she is not meeting the required standard. Alternatively, the employee may have been feeling overwhelmed at work. This encounter may elicit feelings of stress, anxiety or embarrassment, which can potentially create a risk to their mental health.

Additionally, Performance Improvement Plans often require an employer to follow up with the employee multiple times to discuss their progress, which an employee may misinterpret as repeated bullying. An individual's interpretation and understanding of what constitutes bullying is often dependent on their personality and past experiences. In other words, what you may consider to be performance management, an employee may consider to be bullying.

When implementing the Stop Bullying provisions in the Fair Work Act, Parliament acknowledged that employers must still be able to exercise control of their staff and monitor or discipline poor performance.<sup>2</sup> For this reason, they inserted a provision in section 789FD saying:

(2) To avoid doubt, subsection (1) does not apply to **reasonable management action** carried out in a **reasonable manner**

Therefore, if the alleged bullying was actually **reasonable management action** carried out in a **reasonable manner**, it cannot be classified as bullying and a Stop Bullying Order cannot be issued.<sup>3</sup>

Reasonable management action is not explicitly defined in the legislation so it has been left open for interpretation. In determining whether the action constitutes "reasonable management action" the Fair Work Commission objectively assesses the action subject to a claim of bullying in the

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<sup>2</sup> Application by Poh Keng Chang [2019] FWC 3178; Explanatory Memorandum to the [Fair Work Amendment Bill 2013](#).

<sup>3</sup> Fair Work Act 2009 (Cth) s789FD(2).

context of the circumstances and knowledge of those involved at the time.<sup>4</sup> The Fair Work Commission will not issue a Stop Bullying Order where management processes could have been undertaken in a manner that was ‘**more reasonable**’ or ‘**more acceptable**’. This means that;

- management actions do not need to be **perfect or ideal** to be considered reasonable;
- a course of action may still be ‘reasonable action’ even if **particular steps** are not;
- to be considered reasonable, the action must also be lawful and not be ‘irrational, absurd or ridiculous’;
- any ‘unreasonableness’ must arise from the **actual management action** in question, rather than the **applicant’s perception** of it; and
- consideration may be given as to whether the management action involved a **significant departure from established policies or procedures**, and if so, whether the departure was reasonable in the circumstances.<sup>5</sup>

The expression ‘management action’ encompasses a wide range of conduct that affects an employee, including such things as performance and disciplinary matters, the allocation of work and the way in which work is to be carried out.<sup>6</sup> Placing an employee on a Performance Improvement Plan falls within the scope of ‘management action’.

By virtue of this limitation, employers are able to give constructive feedback to employees and take appropriate corrective action regarding their performance without fear of unjustified claims of workplace bullying.

### **5.1. *Miroslav Blagojevic v AGL Macquarie Pty Ltd; Mitchell Seears* [2018] FWC 2096**

In *Blagojevic v AGL Macquarie*,<sup>7</sup> an engineer applied to the Fair Work Commission for a Stop Bullying Order because his new supervisor Mitchell Seears had placed him on a Performance Improvement Plan. Mr Blagojevic submitted that Mr Seears intentionally presented him with unattainable performance targets and task deadlines so as to set him up for failure and have an excuse to terminate his employment.

Prior to Mr Seears’ employment at AGL, Mr Blagojevic had received feedback that his performance exceeded expectations for a number of years. Unfortunately, due to changes in the workplace

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<sup>4</sup> *Re Ms SB* [2014] FWC 2104 at [49].

<sup>5</sup> *Re Ms SB* [2014] FWC 2104 at [51].

<sup>6</sup> *Blagojevic v AGL Macquarie* [2018] FWC 2906 at [19]-[23].

<sup>7</sup> *Miroslav Blagojevic v AGL Macquarie Pty Ltd; Mitchell Seears* [2018] FWC 2096.

procedures, Mr Blagojevic failed to maintain his performance and Mr Sears' predecessor alerted him to the employee's underperformance.

During the trial it was revealed that prior to placing him on the Performance Improvement Plan, when it was brought to Mr Sears' attention that Mr Blagojevic was underperforming, the new supervisor familiarised himself with the duties and expectations of various engineers on site. He even personally attended the plant Mr Blagojevic was placed at on his own initiative and spoke to employees one-on-one to further inform himself of the conditions and resources available there.

Mr Blagojevic was given the proposed Performance Improvement Plan a week before he was expected to agree to it so he had adequate time to consider it. The PIP was also revised so as to better suit him. Mr Sears met with Mr Blagojevic a total of seven times with a third party present to discuss how he was progressing on the Performance Improvement Plan. He even went so far as to reduce Mr Blagojevic's workload to increase the likelihood of him meeting the objectives in the Performance Improvement Plan.

Although it was evident that there was a degree of repetition to Mr Sears' behaviour regarding the Performance Improvement Plan, the Commissioner found that the Performance Improvement Plan was reasonable management action. This was largely due to the prior notice Mr Sears gave Mr Blagojevic of his impending Performance Improvement Plan, the amendments he made to it so that it was agreed upon between parties and the multiple discussions he had with him to see how he was coping. The Commissioner further found that the Performance Improvement Plan was not put in place to bully Mr Blagojevic or have his employment terminated, but was a genuine attempt to improve his performance.

## **5.2. Susan Purcell v Mercy Education T/A St Aloysius College; Mary Farah [2016] FWC 2308.**

In *Purcell v Mercy Education*<sup>8</sup>, a teacher made an application for a Stop Bullying order against her school principal.

Susan Purcell identified 16 different incidents where Ms Farah was allegedly bullying her. Among them, one incident involved Ms Farah assigning Ms Purcell a "mentor" after she returned from Long Service Leave. When Ms Purcell asked why this was necessary, Ms Farah pretended she wasn't involved in the decision to assign Ms Purcell a mentor, when in fact she had been. Ms Farah later

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<sup>8</sup> *T/A St Aloysius College; Mary Farah* [2016] FWC 2308.

said it was because there had been curriculum changes during the Plaintiff's absence, however during the hearing she conceded that there hadn't been any changes in the six months Ms Purcell was on leave. Ms Purcell claimed that this was unreasonable action as the teacher assigned as her mentor had;

- been teaching for less time than her,
- had less experience in the subject she taught;
- and did not teach the same year level as her.

Ms Purcell said that the mentor was only assigned to her to target, harass, embarrass, humiliate and isolate her.

Ultimately Deputy President Gostencnik agreed with Ms Purcell and found that the assignment of a mentor to her was indeed bullying and did not constitute reasonable management action.

In another of the alleged incidents Ms Farah attempted to have another member of staff conduct Ms Purcell's Annual Review. The person who the Principal attempted to have conduct her meeting was a person whom Ms Purcell had previous unpleasant experiences with, which Ms Farah was aware of. Furthermore this man was not a teacher but the school's business manager and he was only appointed to conduct Ms Purcell's Review and no one else's. Ms Farah eventually agreed to conduct the review herself when Ms Purcell asked her to. Deputy President Gostencnik found that there was no evident or intelligible justification for Ms Farah to attempt to have someone else conduct the Annual Review and this was blatantly unreasonable.<sup>9</sup>

In a separate allegation relating to the same Annual Review Meeting Ms Purcell claimed that during the Meeting the Principal made vague comments about her needing to improve her communication skills, but failed to give any specific examples of ways to improve. She also claimed that the Principal intentionally withheld the page of her Annual Review form where Ms Farah provides written feedback on the staff member's performance to be signed by them. The Deputy President again found that Ms Farah's behaviour in the Meeting was unreasonable and was intended to intimidate and bully Ms Purcell.

In this case we can see how an informal and ad hoc type of performance management, namely the mentoring, was not well received by the employee. In this situation, had the Principal genuinely

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<sup>9</sup> *Susan Purcell v Mercy Education T/A St Aloysius College; Mary Farah* [2016] FWC 2308.

wanted to help her employee improve, a Performance Improvement Plan with clear targets for improvement may have been more appropriate. We can also see how pointing out weaknesses of an employee not offering specific examples of these or how they can improve may also be found as unreasonable. Unlike the previous case, the Respondent here had no genuine desire to see her employee improve and bullied her under the guise of performance management.

## **6. Work Cover claims for psychiatric injuries under the Return to Work Act 2014 (SA)**

The second risk associated with performance management is a stress claim for psychiatric injury under Section 7(2)(b)(i) of the Return to Work Act 2014 (SA) as follows:

*“(2) Subject to this section, an injury arises from employment if—*

*(b) in the case of a psychiatric injury-*

*(i) the psychiatric injury arises out of or in the course of employment and the employment was the significant contributing cause of the injury.”*

It is not uncommon for Performance Improvement Plans to be the catalyst for employee stress claims. As performance management is, in most cases, undertaken in the course of employment, an employee who suffers an adverse reaction to a Performance Improvement Plan may be eligible for a Work Cover claim.

Similar to the Stop Bullying legislation, Parliament limited the circumstances an employee may make a claim for psychiatric injury. Under s7(c) a psychiatric injury that arose due to:

*“reasonable administrative action taken in a reasonable manner by the employer in connection with the worker's employment”*

Is not a compensable injury.

If it was wholly or predominantly as a result of reasonable administrative action taken in a reasonable manner by the employer in connection with the worker's employment.<sup>10</sup> A psychiatric injury will not be compensable if it is found to fall within this provision.

### **6.1. Sellars v Wesfarmers Ltd [2016] SAET 9**

In *Sellars v Wesfarmers* a senior case officer managing compensation claims alleged that she had suffered a psychiatric injury arising predominantly out of her employment. The Respondent argued

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<sup>10</sup> Return to Work Act 2014 (SA) s7(4)(c).

that she had sustained this injury due to reasonable administrative action taken in a reasonable manner.

In 2013 Ms Sellar's employer hired a new State Manager, who immediately scheduled individual meetings with all employees. Ms Sellar felt that during this meeting her new supervisor Ms Paolo was unnecessarily critical of her and she left feeling anxious. A subsequent meeting was scheduled when Ms Paolo became aware of the fact that Ms Sellar had been failing to meet Key Performance Indicators, deadlines and various other standards required of her.

Ms Paolo met with Ms Sellars on various other occasions over a period of 4 months to alert her to the fact deadlines were still not being met before telling the employee she was to be placed on a Performance Improvement Plan and her ongoing employment would be subject to review. Ms Paolo presented her with a draft Performance Improvement Plan which the employee was to consider and include any additions in the plan she desired. Unfortunately, Ms Sellars was deeply distressed by this, however she did sign it four days later. The Performance Improvement Plan asked the worker to identify any areas she required extra support and set out a specific completion date.

The State Manager then sent the worker an email confirming that she had agreed to a Performance Improvement Plan, but went on to say that if she failed to improve by the completion date she may be terminated. Ms Paolo further followed up with the employer by way of emails and letters, stating that she was still not meeting the required standards, but failed to provide her any support. This caused Ms Sellars to feel increasingly anxious and overwhelmed.

Ms Sellars submitted that her workload was too large to allow her to meet the targets in her Performance Improvement Plan. She said Ms Paolo was aware that her workload was excessive as she had tried to recruit more case managers from Melbourne.

The SAET President found that Ms Sellars' injury was predominantly due to Ms Paolo's behaviour and in the circumstances, it was unreasonable to expect so much so soon from the employee.

In this case we can see that although the Manager implemented a methodical performance management system consistent across the workplace, her expectations of the employee were unreasonable. Furthermore, the time period she imposed for Ms Sellars' improvement with a threat of termination if she failed to succeed within this period was unreasonable given that Ms Paolo was fully aware of Ms Sellars' large caseload.

## **7. Unfair dismissal claims under the Fair Work Act 2009 (Cth)**

A person has been unfairly dismissed if the FWC is satisfied that:

- (a) the person has been dismissed; and*
- (b) the dismissal was harsh, unjust or unreasonable; and*
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code;*  
*and*
- (d) the dismissal was not a case of genuine redundancy.<sup>11</sup>*

The relevant considerations for what may be harsh, unjust or unreasonable are:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct(including its effect on the safety and welfare of other employees); and*
- (b) whether the person was notified of that reason; and*
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person [my underlining]; and*
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and*
- (e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal[my underlining];*  
*and*
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
- (h) any other matters that the FWC considers relevant.<sup>12</sup>*

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<sup>11</sup> Fair Work Act 2009 (Cth) s385.

<sup>12</sup> Fair Work Act 2009 (Cth) s387.

A Performance Improvement Plan would be considered as a notification or warning about an employee's underperformance.

**7.1. Peter Sheehan v Federation Training [2017] FWC 5789**

Mr Sheehan was employed as a teacher at a TAFE education centre since 1982. In March 2016 he was involved in an altercation with another teacher. He became aggressive and punched a cupboard. Mr Sheehan was subsequently suspended from work while the site conducted an investigation.

Mr Sheehan received a "first and final" warning regarding his behaviour. He was also asked to develop a "behaviour plan" with the Human Resources Manager and apologise to the other teacher involved.

Mr Sheehan emailed the female teacher saying "Claire I wish to apologise if my breakdown in March of last year caused you any stress." The recipient did not feel that this was an adequate apology or that Mr Sheehan took responsibility for his actions.

Upon receiving the final report of the investigation in May 2017, Federation Training wrote to Mr Sheehan informing him they were terminating his employment as they were concerned of the risk he may pose to young students. Mr Sheehan said he was not given an opportunity to respond to the concerns they raised in his letter of termination because they didn't give him the summary of the investigation findings until afterward.

Deputy President Masson found that although the TAFE had a legitimate reason to terminate Mr Sheehan's employment and notified him in plain and clear terms,<sup>13</sup> Mr Sheehan was unable to properly address their concerns as he wasn't given the report that they relied on until after his employment had ended. They therefore failed to provide him with an opportunity to respond to the reasons for dismissal, and it was held to be an unfair dismissal.

**8. How to implement a reasonable and successful PIP**

It is important that Performance Improvement Plans or other methods of performance management are utilised only when necessary and in a clear, authentic manner so as to help an

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<sup>13</sup> *Peter Sheehan v Federation Training* [2017] FWC 5789 at [169].

employee meet your expectations. Unreasonable or unattainable work expectations also have the potential to be considered as bullying. It must also be delivered in an appropriate, reasonable manner.

In order to successfully implement Performance Improvement Plans, it is crucial to understand what the purpose of an employee's role is, whether they have the resources or capacity to achieve this and any specific barriers they may face.

Ideally, when introducing a Performance Improvement Plans or some other form of performance management scheme, it should include some of these key characteristics:

- Clear identification of areas where the employee is underperforming;
- Concise key objectives they can achieve given their resources and role;
- A degree of flexibility with room for the employee to contribute or negotiate goals;
- A specific time frame for reaching the key objectives;
- Agreement between yourself and the employee on the performance improvement plan discussed;
- A transparent, documented record of the performance improvement plan.

Similarly, when scheduling a meeting with the employee to discuss their performance, it is advisable to;

- Give them prior notice of the meeting;
- Explicitly tell them it is to discuss performance concerns;
- If possible give them an agenda of the concerns, particularly if they ask;
- Allow them to bring a support person if they wish;
- Have at least one other person present to witness the meeting;
- Take notes of what is said in the meeting by both parties;
- Allow the employee opportunity to respond to the issues you raise.

As was discussed earlier, performance management does not need to be perfect. It does however need to be reasonable given all the circumstances and a genuine attempt to see this employee improve at work. It is also advisable that you conduct a follow-up review with the employee to discuss their progress.

## **9. Conclusion**

The key points to remember when managing your employee's performance that you should remember are:

1. Be reasonable;
2. Apply common sense;
3. Put yourself in the position of the employee: is it fair and reasonable?

If you treat your employees how you would like to be treated if you were in their position, you really can't go wrong.