



National
Retail
Association

GENIUSES, JERKS AND JERRYMANDER

Tips and techniques for performance and conduct management

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- 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);*
- h) any other matters that the FWC considers relevant*

Fair Work Act 2009 (Cth) s 387

Conduct and Capacity

What is a *conduct* issue?

What is a *capacity* issue?

Do they ever overlap?

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- Two strands – ‘misconduct’ and ‘serious misconduct’

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- Two strands – ‘misconduct’ and ‘serious misconduct’

What is a *capacity* issue?

- Covers both poor performance and medical incapacity
- A question of ‘can they do the job, properly, and to a standard where they are contributing to the business’

Do they ever overlap? How des this affect your approach?

Conduct or Performance Issue?

James is an employee of some two years' standing, working as a salesperson in a car showroom.

Scenario 1

You have received complaints that James has been making disparaging remarks about his co-workers, and his remarks about some of his female co-workers have taken on a sexual tone.

The employer's Behavioural Guidelines require that all staff treat each other with respect and courtesy while at work.

Conduct or Performance Issue?

Scenario 2

Three months ago, James fell just short of his sales quota. In the months since then, he has fallen short of his sales quota by a larger and larger margin.

Scenario 3

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In observing James at work, his manager has noticed that he is abrasive, sometimes even rude to potential customers.

The employer's Behavioural Guidelines require that customers be treated with respect and courtesy.



Poor performance is *managed*.

Poor conduct (or misconduct) is *investigated*.

The first step

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Whether we are managing performance or investigating misconduct, we must first set the relevant standard.

Setting standards

Performance standards typically feature in an employee's position description.

Standards of conduct are typically set in both the contract of employment and workplace policies.

These standards mean nothing if they are not **enforced**.

“If the reason for dismissal is said to be deficient performance, the Commission must be satisfied that the performance was deficient.”

Etienne v FMG Personnel Services Pty Ltd [2017] FWCFB 3864

Why manage performance?

From an evidentiary perspective, performance management is the process by which we enforce the standards of performance.

From a human perspective, performance management is about making sure that the employee has the best possible opportunity to remain in their employment.

Why manage performance?

Two approaches: commercial and public policy.

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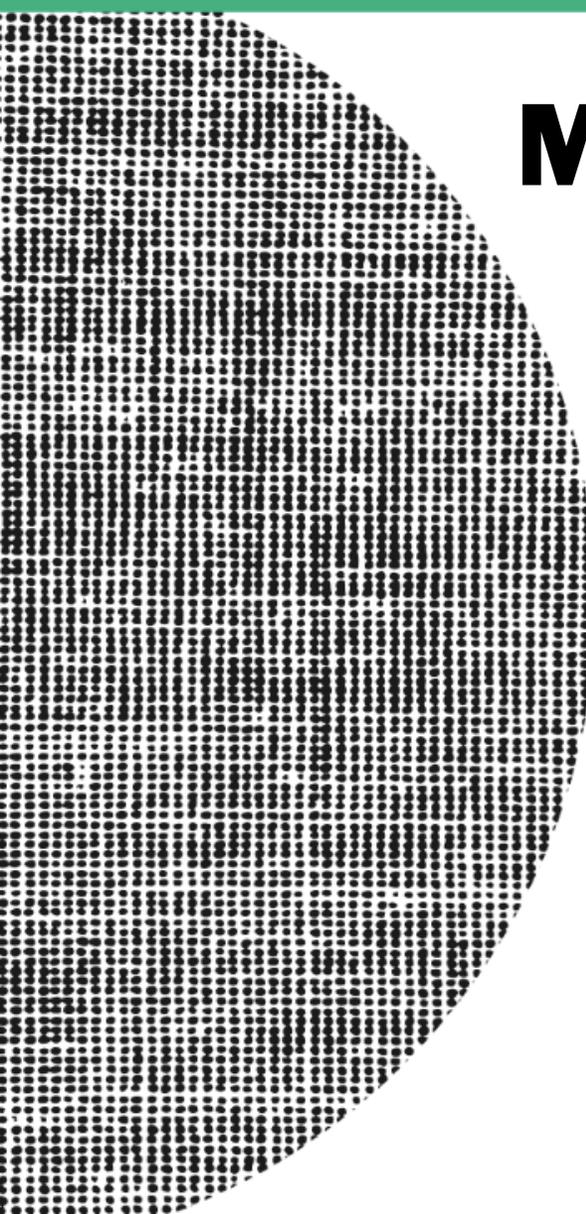
As a matter of **public policy**, encouraging businesses to undertake performance management processes helps keep more people employed and minimises the load on the welfare system.

Fundamental questions

WHAT is the problem?

WHY is the problem happening?

HOW can we address the cause of the problem effectively?

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Methods of performance management

Discrete conversation

Additional training

‘Buddying’

Managerial or specialist coaching

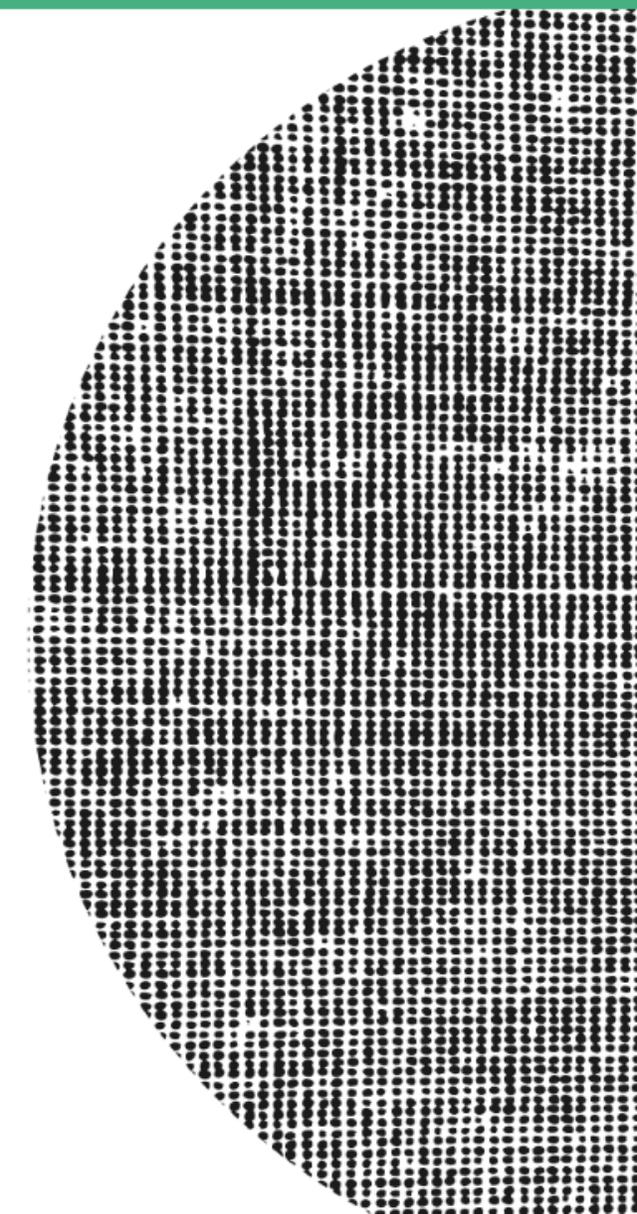
Performance Improvement Plan

Performance Improvement Plans

A short-term plan for a short-term problem – you’re an HR officer, not a miracle worker.

Two reasons for this:

- a PIP done properly is nevertheless a strain on time and resources, so should be very finite
- an employee who fundamentally cannot do their job properly is unlikely to suddenly ‘get it’

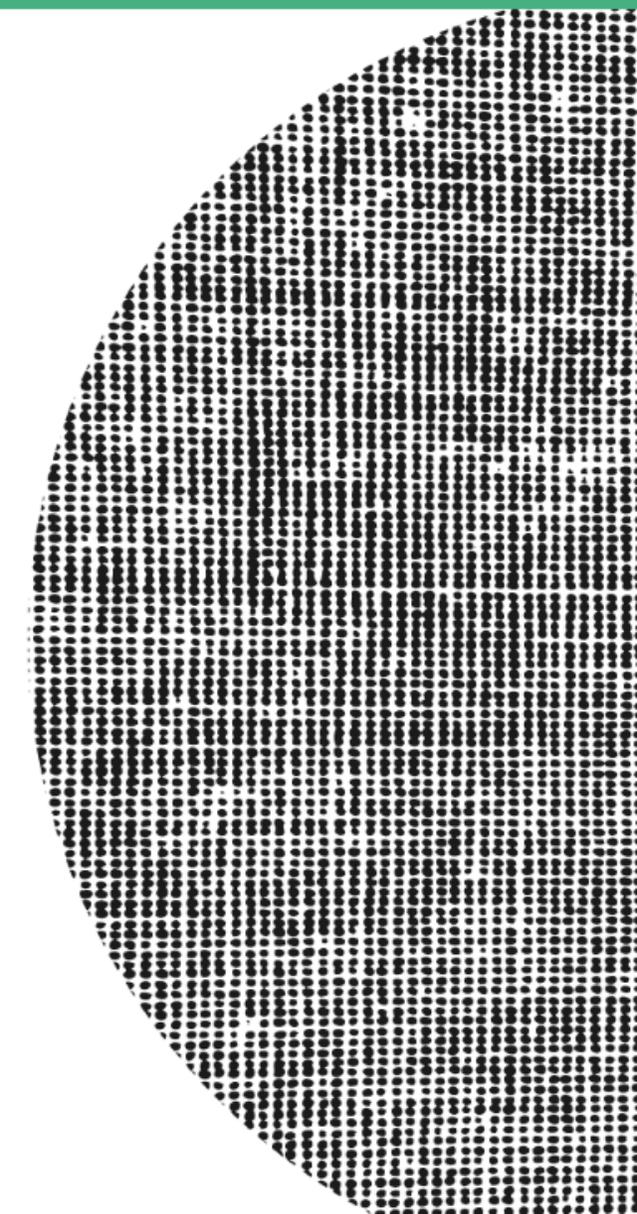


Performance Improvement Plans

Make sure a PIP is a mechanism appropriate for addressing the underlying issue.

Consult with the employee and HR when developing the plan – make sure the goals of the plan are SMART.

PIPs should include support, not just a direction to do better.



SCENARIO

Naomi was one of your best salespeople – so good that she was recently promoted to manager. Despite great expectations, Naomi is struggling to meet the demands of the management role, especially in terms of being responsible for the overall performance of others.

Edward is not your best performer, but he has never been in the list of worst performers – until recently. So far as you can tell, there does not appear to be any reason for his poor performance, and coaching does not seem to have helped.

Standards of behaviour

Standards of behaviour need to be consistent across the business in order to be effectively relied upon.

If these standards are applied inconsistently, or different people are held to different standards, you undermine your ability to rely on a failure to meet these standards as a valid reason for dismissal.

The question is “if this is a valid reason to dismiss Person A, why hasn’t Person B also been dismissed?”

Investigating misconduct

Misconduct should always be investigated – how formal this process is depends on the nature of the misconduct.

The more serious the alleged misconduct, the more formally structured the investigation ought to be.

It is important to make sure the nature of the investigation is appropriate for the nature of the allegation and the people involved.

Investigating misconduct

Consider suspending the accused employee – is there a good reason for it? Or are there other means of managing them?

Be clear about what you are investigating – each allegation should include as many specifics as possible and clearly link to a breach of behavioural standards.

The accused is not entitled to a copy of the complaint against them – just enough information to allow them to meaningfully respond.

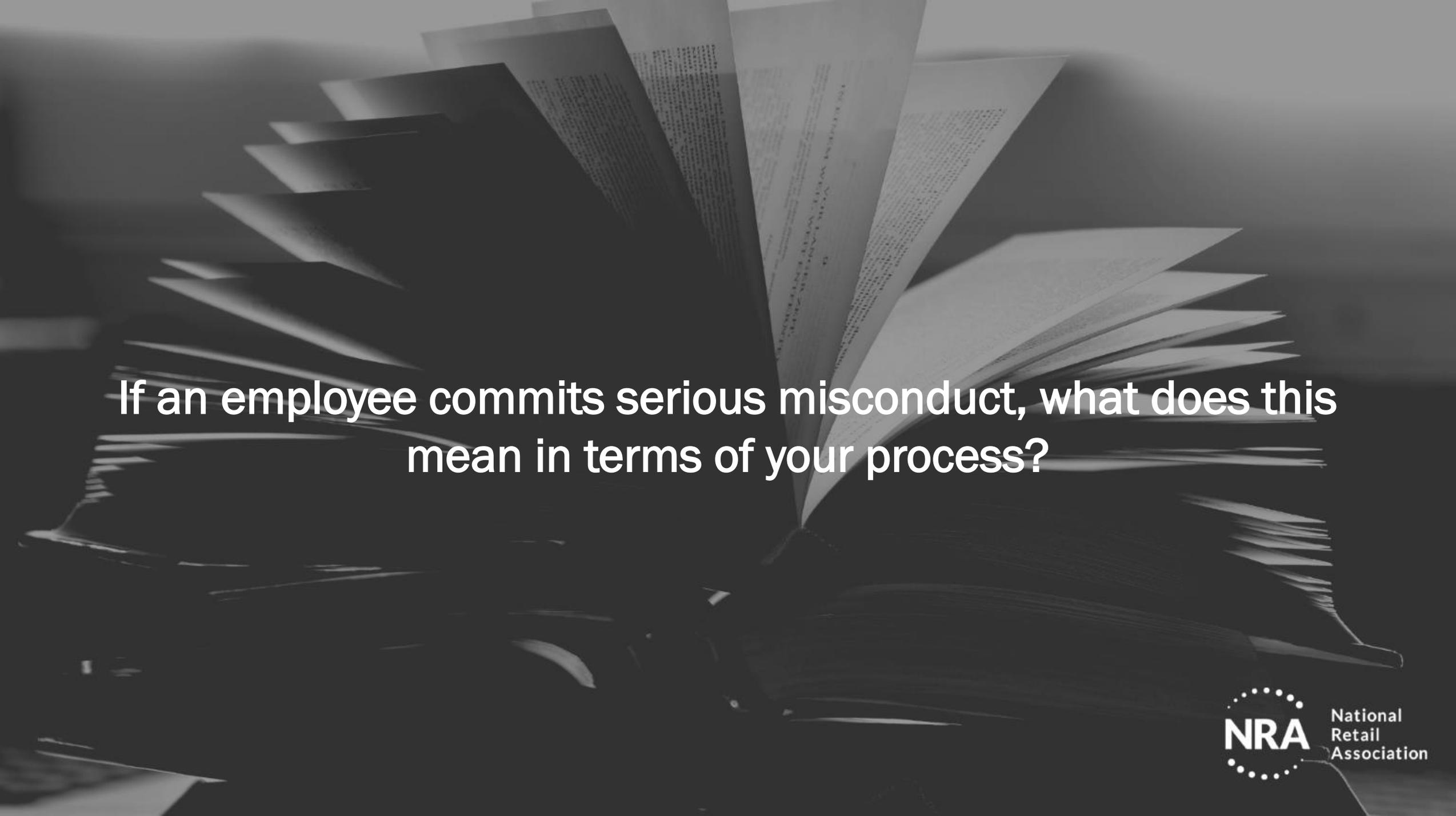
TAKE NOTES OF ALL DISCUSSIONS IN THE INVESTIGATION.

Investigating misconduct

At the end of the investigation, make sure your conclusions link back to the question asked.

If the question asked was “Did Jim do X?” your answer needs to be “Jim did X”, “Jim did not do X”, or “I cannot say whether or not Jim did X”.

Do not answer the question “Did Jim do X?” with “Jim did X, and therefore Y and Z”.



If an employee commits serious misconduct, what does this mean in terms of your process?

The serious misconduct myth

Serious misconduct does not give you a license to ignore proper process.

Serious misconduct is relevant for two issues only:

- which part of the Small Business Fair Dismissal Code (if applicable) needs to be complied with; and
- whether the employee is entitled to notice or pay in lieu of notice.

SCENARIO

Mark has come to you alleging that Peter has been bullying him. He doesn't want you to do anything with this information, he just wants you to be aware of it. What do you do?

QUESTIONS AND DISCUSSION

