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The road to goodbye: when dismissal is the only solution

BACKGROUND

In all of the previous chapters we have emphasized a coaching approach (and all that entails) for dealing with underperformance and/or poor conduct, with a confident expectation that coaching would fix the problem. Unfortunately, this will not always be the case and you will be forced to move from the coaching mode to your organization's disciplinary procedures, because it would clearly be inappropriate for you to allow things to continue as they are.

Reality strikes

You wake up one morning (or perhaps in the middle of the night) and you realize it is not going to work! Not your car (or your marriage), but a workplace relationship with a team member. You have tried everything but it now seems inevitable – the person has to go in the best interests of the organization (and the quicker the better).

The problem is, you have played this out as though it were always going to be OK. You selected the team member, you inducted and trained the person – you have been the coach. The person seemed pleasant enough and picked up the skills quite quickly by comparison with others you have

recruited. So much so that when their three month probation was coming up and HR asked you to consider whether to offer a permanent position, you hardly gave it a thought. The person seemed fine.

Now we are 18 months down the line and you spend an hour every day trying to manage this person. Mistakes are made and the quality of work is poor. The person doesn't seem to care, comes late, absenteeism has increased and his or her attitude to you and other team members is extraordinarily negative. Everyone wants this person gone, including your boss, and you are not sure what to do or how.

You are not alone! There would be few people reading this book who haven't had the experience and believe us, if you haven't (and you continue to be involved in managing people) you will, because people are human – they change. Things happen at home that impact on the workplace. Not everyone can get promoted, people perceive jealousy and favouritism, and people get 'cliquey' and exclude other people.

Workplace relationships will drive workplace behaviour and performance. If the relationships become strained, performance can fall off or behaviour becomes anti-social – or both.

So far we have talked about coaching – encouraging and recognizing excellent performance/behaviour, and reacting to underperformance and/or unacceptable conduct as close to the event as possible, to help get the employee back on the rails. Now we need to talk about what we do when this is having no impact and poor performance (or behaviour) continues. The coaching is not working. You will note here a subtle change in language. In the coaching mode we talked about underperformance – as we move to the discipline process, we are now dealing with poor (clearly unacceptable) performance. We will talk about one-off incidents of serious misconduct later in this chapter. For the moment we are talking about an employee who, over a period, has not responded to coaching interventions to rectify the problem.

CONDUCT AND CAPACITY TO PERFORM

We need to distinguish quite clearly between cases involving unacceptable conduct/behaviour and those involving an individual's capacity to perform the job to the standard required. Virtually all English-speaking countries (and a large number of others) have embraced the International Labour Organization's Conventions (Termination of Employment, 1982) in respect of employment relationships and dealing with workplace problems. This means that, although the words may be different, the underlying principles are the same.

Before we look at processes, it needs to be said that while concepts of ‘due process’ and ‘natural justice’ are common to all, the actual legislative processing will vary between jurisdictions. We do not propose to directly refer to specific legislature. You will need to take advice on these matters from appropriate specialists, either within or outside your organization. Even if you do everything we suggest, you may still be subject to unfair dismissal claims and they could still be successful. However, the processes we recommend will mitigate against the chances of this occurring.

Your organization should have a documented procedure for dealing with misconduct and poor performance. If you do have such procedures, you need to make sure they meet the necessary requirements of ‘due process’ and ‘natural justice’ and you must then follow these procedures to the letter. Whilst there is a legal reason for this, the common sense reason is just as compelling – everyone knows and understands what to expect.

Underperformance

The selection process should be able to ensure that a person either has the demonstrated capacity to do the job in question or has the necessary potential to learn the job in a reasonable period of time and then perform it consistently to the standard required. If the person comes to you claiming to be able to do the job as advertised, the probation period must be designed to ensure that this is the case. One of the most common problems we come across with poor performers is that their application interview and referee reports say quite clearly this person can do the job from day one. We then accept errors as being due to ‘He’s new’ or, ‘She has to get used to our system’, and the person blunders on through the probation period. The fact is, people do misrepresent themselves at selection interviews, as we have discussed in [Chapter 3](#).

Assess them during the interview/selection process. Wherever possible, have them demonstrate how they would do the job; watch them do it. As we will say a little later in our discussion on poor performance, expose them to the team members they will be working with as part of the recruitment process. Let them get a feel for what the person is like. It is not just the domain of the boss to do all the recruiting.

We have dealt with this under recruiting the right team (see [Chapter 3](#)), but we can’t labour this point too much. Design the probation period to determine whether they can do the job to the standard required. If that means making it longer – make it longer. Assuming the probation period has been completed, you would expect that the person can now do the job competently, that is, to the standard required on a consistent basis.

When that performance slips, you the coach must provide feedback and develop a plan to bring about the necessary improvement. It is not enough to tell them to improve. The old 'You better pull your socks up or you will be looking for another job' is now past its use-by date. The employer is bound to do everything reasonable to try and get the employee's work up to standard. If our coaching efforts are not having the necessary impact, there is a point at which we move to counselling – the first step in the formal disciplinary process.

Four things are important here:

1. The employee needs to know that the approach has now changed and that this is a first step in a four-step process – a warning. Get your work up to standard and keep it there or, if the poor performance continues, a further two warnings. If they don't bring about the required improvement – termination of employment. Ensure that, as an outcome of this first formal interview, all of the coaching assistance (interventions) that has taken place is documented for the record.
2. The employee needs to know that help will continue – active training and continued individual development will be provided, but it is up to them then to deliver. They need to understand the impact of their performance on the organization's well-being, and that we cannot responsibly allow the poor performance to continue. They should be directly asked if there is any reason/explanation for their poor performance and/or any mitigating circumstances, and their response should be carefully recorded.
3. The best way to do this is with another manager in the room; the employee should be asked if they wish to have someone with them. For the third and final warning we usually insist, and if they refuse to nominate anyone, get a respected fellow team member to attend.
4. Counselling interviews need to be documented and the first one needs to incorporate (for the record) all the previous coaching and informal discussions that have taken place up to that point, including any incidents where coaching has produced improved performance/conduct.

It will always be your judgement as to whether the process is working, how long an employee should be given to improve, and over what period the warnings might be spread and still justify termination.

Conduct

If ongoing poor performance (incapacity to perform) is difficult to deal with, misconduct is even more so. Oddly enough, serious misconduct, that is, misconduct that warrants summary dismissal (immediate dismissal without notice) is often easier to deal with than ongoing misconduct, which can be extremely disruptive and frustrating. Summary dismissal does, however, always raise the question, 'Does the punishment fit the crime?'

A QUESTION

What would you do with an employee working in a food factory who, for a joke, fills up a food product with hot chilli powder and packs it ready to go out to some poor unsuspecting customer? What would you do to his colleagues who encouraged him to do it? Does this conduct warrant instant dismissal for one? For all? Fortunately the organization had a provision for suspension in its employment agreement and the company chose to suspend the perpetrator for one month and the accomplices for two weeks.

Is this what you would have done? The fact that none of them had been in trouble before, were good workers and were genuinely remorseful made the decision a little easier, but you can never be absolutely sure you are doing the right thing.

One thing is for certain: a serious application of the workplace coaching approach will help enormously in bringing these situations to a head, correcting the behaviour (and getting on with life) or delivering the ultimatum – 'Change your behaviour or your employment will be terminated.'

As with the performance area, the procedure we follow is critical if we are to have the particular behaviour/conduct turned around. Again, the four key principles are:

1. They must know this is no longer coaching:
 - this is a formal process with four steps (or perhaps less if the misconduct is bordering on serious – see below under 'Serious misconduct');
 - the second to last step will be a final warning followed by dismissal for a repeat breach for which there is no satisfactory explanation.

2. We will help them but they must also help themselves. They must be directly asked (and we would say encouraged) to provide any explanation, reason, or an event or circumstance that may have affected their behaviour and should be taken into account in judging the seriousness of their misconduct. They should be told to speak now if they have anything to say because a further wilful or deliberate act of misconduct could lead to the termination of their employment.
3. Ensure another supervisor/manager (preferably removed from the day-to-day management of the employee) is present and that the employee has a representative. If they refuse to nominate one, you select a colleague to be present.
4. All interviews should be recorded and the first one needs to incorporate (for the record) all of the previous coaching and informal discussions that should have taken place plus any particular training, induction or communications to employees about this type of behaviour.

As discussed earlier, the areas of conduct/behaviour for which clear expectations need to be established fall into two categories: a) those that are generic and would apply to every workplace, and b) those that are specific to a particular workplace.

Generic behavioural standards

These include (but are not limited to):

- attendance;
- punctuality;
- smoking;
- drugs and alcohol;
- sexual harassment;
- bullying;
- racial discrimination or abuse;
- honesty (with handling of company assets);
- OH&S;
- teamwork.

Specific behavioural standards

These include (but are not limited to):

- hygiene (food and health sectors);
- dress;
- appearance (hospitality industry);
- language/demeanour to customers/other team members/students;
- security;
- e-mail/internet use;
- examination severity/plagiarism.

The issue of personal harassment often arises as well. 'I've been treated differently to other people in the group' is a common complaint when people are pulled up for behaving outside the standards. This can be particularly serious for an organization as it can lead to claims against it. One of the most frequent problems with discipline these days is the stress claim.

CASE STUDY

A common case arises where an employee has been allowed to 'get away with' certain conduct over a protracted period of time. In coaching we have talked about early intervention – for disciplinary processes it is even more important. We are reminded of one such scenario: an employee with a misguided belief that he could effectively do as he wished in terms of coming and going in the workplace – leaving without permission, arriving late without explanation and then objecting strongly by walking away from his manager and refusing to talk.

The first time any of these things happened there should have been a formal one-on-one to explain that this was unacceptable and must not happen again. The next time should have been a written warning. Since there was no definitive disciplinary action, it occurred time and time again for 14 months. As it then gradually became formal disciplinary action, the employee went into a stressed state and perceived the manager's behaviour as bullying. The employee went on stress leave and never returned. The employee lost his job, the company lost money and a lot of stress was created for all concerned.

We say again that if workplace coaching had been in place, there would have been a quiet word as soon as any minor infringement was identified (or repeated). One cannot emphasize how important 'due process' is in these situations. As we said earlier, it is not just a legal issue, it is also a matter of perceived fairness – justice being seen to be done. Remember our first objective in all of these circumstances is to turn the person's performance (or behaviour) around. We have invested a lot of money recruiting, inducting and training the person and it would be a good result for both parties if we can get him or her back on track. But, if the person can't respond – he or she has to go (goodbye) and it is important that he or she is not reinstated because of a flawed process. We cannot therefore leave this subject without some discussion of the legal aspect of 'due process'.

The first rule is, if the coaching hasn't worked or the discipline process isn't working or you believe an employee is guilty of serious misconduct, then seek advice.

A failure to abide by the rules can be very expensive (legal fees and/or compensation) and lead to a serious undermining of morale in your workplace if the guilty party is reinstated. The courts have shown they will not overlook a blatant failure to provide natural justice. There is a New Zealand case where an employee was sacked for fighting (which resulted in a jail sentence) but received compensation because 'due process' was not followed. A better example worth recounting here is the case of *Shields vs Carlton and United Breweries (NSW) Pty Ltd CUB* (1999) (1) FCA 377 (8 April 1999). We are grateful for an excellent overview of this case put together by John Cooper and Adam Goodinch from Freehills for the Australian Company Secretary (July 1999) which we have summarized here.

The incidents that led to the termination of Shields' employment occurred at a company sales conference at a Queensland resort. The judge's description of Shields' behaviour is as follows:

Mr Shields and another seconded employee behaved in a disgraceful fashion at this conference. There was a dinner on the Thursday night. It seems everybody in attendance at the dinner consumed considerable quantities of alcohol. Certainly, that was true of Mr Shields. He had multiple drinks before, during and after the dinner.

On the night in question, Mr Shields' behaviour included:

- abusing a disc jockey during the course of the night and, towards the end of the night, being involved in what Wilcox J (the judge) described as 'a very threatening scene';

- waking up a room-mate by lying on him or being present while his colleague did so;
- entering the swimming pool area, where other guests were present, either completely naked or naked from the waist down;
- ignoring the reproach of a senior officer and ignoring the instruction to put on some clothes;
- making noise outside the door of a hotel guest who was not part of the Guinness party, and exposing himself to her when she opened the door;
- wandering about the conference premises at 4.00 am with no clothes on in front of a female receptionist.

The judge said that, in effect, he appreciated the two employees were intoxicated but indicated his view that their conduct could not be 'regarded as acceptable in people whose job it was to promote the good image and reputation of Guinness Australia and indirectly, their employer CUB'.

There was evidence that Shields had been warned to behave himself at the event. Shields provided the defence which we alluded to earlier, in effect, 'Others have behaved this way and not been sacked, therefore I should not be sacked.' Shields ran a video of a previous conference (several years earlier) showing grossly improper behaviour for which no one was punished. CUB had a culture of accepting such behaviour and he said his employment should not be terminated. The appeal court decided that the events on the videotape were less serious, particularly as they did not impinge on outsiders.

The court concluded there had been a valid reason for the dismissal and turned to the procedural fairness issue. Basically you must give employees the opportunity to defend themselves and, as this court said, it must not be a case of going through the motions. The appeal court determined that Shields had not been afforded procedural fairness because of three main failures in the process:

1. Whilst it gave him an opportunity to answer the allegations of misconduct, it did not give him the opportunity 'to put forward any mitigating factors, for example a history of good behaviour or his successes as an employee'.
2. Shields was not given an express invitation to argue that dismissal was not the appropriate punishment.

3. Even if he had put forward mitigating factors, they would have been ignored because the managers conducting the investigation had instructions to fire Shields if the allegations were established. In other words, they were effectively told to disregard any mitigating factors or explanations.

The court said it is up to the employer to determine whether there are any mitigating factors and the employer must carefully consider these issues before deciding the action to be taken.

There have also been cases of employees being absent for 120 days in a year, being sacked, and winning their case because the employer failed to act earlier. More recently, a dismissal for being intoxicated at work failed with the employee being reinstated because the employer had allowed the employee to continue working even though it claimed he was intoxicated.

In essence, the sorts of situations described above may have been prevented, or at least had a different outcome, if a code of conduct and/or clear policies regarding behaviour had been in place. If they had then been acted upon (early intervention) the situations might have been nipped in the bud or at least been managed better in the long run. Clarity of expectations with instant intervention for a breach is the key to our approach.

In dealing with the counselling/disciplinary area, two other matters require discussion: serious misconduct, and dealing with complaints by employees against other employees.

Serious misconduct

The world of work has changed dramatically. Natural justice must be provided through the processes of the investigation and unless you can prove serious misconduct, summary dismissal (that is, without notice) is prohibited. Suffice to say here, that theft, fraud, assault, failure to carry out a lawful and reasonable instruction, and behaviour that is likely to harm the business or harm the health of another person, are all included.

Prevention is best. We mentioned earlier on the importance of establishing a relevant code of conduct/behaviour to ensure expectations are absolutely clear. The matter of intoxication is one that cannot be ignored. For all organizations (regardless of size) a clear written policy should be in place. Consistent with our workplace coaching approach, in larger organizations we support a policy that states that any employee who has a problem with alcohol or drugs should come forward and, if they do, we would use an employee assistance programme to help them overcome their problem.

In all organizations the policy should clearly state that people will not be allowed to work if intoxicated or smelling of alcohol. Where hazards exist in relation to equipment, vehicles or other potentially dangerous environments

(for example, knives in abattoirs), a zero tolerance policy should apply and a clear statement that employees found in the possession of drugs or alcohol (except prescription drugs which should be notified to the employer) or found using drugs or alcohol, will be summarily dismissed or will be subject to disciplinary action up to and including termination of employment. With the latter of these statements, it provides some latitude for dealing with individual cases (if this is what you want).

Dealing with complaints from employees

Before summarizing this important area, here are a few words about dealing with complaints/grievances. Every organization should have a written policy which clearly explains to all employees that if they have a complaint or grievance regarding another employee (or manager) they should follow a predetermined procedure.

Again this is not just a legal issue. Yes, we do have a duty of care to provide a workplace that is harassment-free and, in particular, where behaviour of a bullying kind is specifically banned. But it is common sense that, if we want a quality workplace (which you need to develop for the workplace coaching approach to be successful), people must be given respect. The only way to ensure this happens is to set clear expectations (hopefully with employee input) about how people are required to behave towards each other. This includes a grievance procedure whereby an employee can confidently raise an issue and know it will be dealt with both professionally and fairly.

CASE STUDY

A classic case in this area is a large public sector organization that has very lengthy documented procedures for dealing with grievances but no real emphasis on early intervention/early warning signals or clear performance standards for managers. After a *year* of alleged bullying and harassment, an employee makes a complaint of over 30 alleged instances of bullying. An inquiry is set up, conducted by a senior counsel who then decides four incidents did actually occur. But because the complainant refuses to participate in the inquiry, the charges are eventually set aside one year later, meaning huge costs, a serious impact on people and their reputations, and a bad scene all round. Only because a new HR manager brought some sense to the process and introduced new grievance procedures, was the matter eventually resolved.

If a person wishes to proceed with the complaint/grievance after an initial verbal notification, it must be put in writing and submitted to the offender if you propose to take formal disciplinary action. In a team environment it is not uncommon for an employee to simply want something to stop. They don't want anyone punished, they don't want to make a formal complaint – they just want the behaviour to stop.

If you have this inappropriate behaviour dealt with in your code of conduct and/or induction programme, it is relatively simple to either go to the group (or the individual if you choose) and advise them:

- there has been a complaint;
- if it is accurate and based on substantiated evidence (and you have no reason to doubt this) it is a breach of the code of conduct (our expectations) and (if relevant) may be a breach of the law (sexual harassment, bullying or racial abuse);
- what the behaviour/conduct was;
- that no action will be taken this time other than this general warning;
- any further transgression will lead to disciplinary action up to and including dismissal.

If you have the workplace coaching processes in place, the majority of people will respond to this and the behaviour will be curbed. If you have no processes/procedures, code of conduct or anything else, you have a much more difficult task to try and change a behaviour which the instigator probably believes is quite OK. If he or she continues to offend, the organization may bear the brunt of it.

Conclusion

Four factors (at a minimum) must be taken into account to determine whether a dismissal was fair or not:

1. There must be a valid reason for the dismissal related to the conduct of the employee, or the incapacity of the employee to perform his or her job or operational requirements (redundancy).
2. The employee must have been notified.

3. The employee must be given an opportunity to respond to any reason given.
4. The employee must have been warned (in the case of unsatisfactory performance) or must have known that his or her conduct was unacceptable.

However, it is wise to have behavioural and performance standards documented and to ensure employees are promptly and clearly advised when they are not meeting those standards. Coach employees up to the standard you require and when you switch from coaching mode to discipline mode, do so definitively – employees must know that their future is now in their hands.

Taking stock

In [Chapter 3](#) we stressed the importance of the coach being involved in getting the right people on their team. We have extended this role of involvement to discipline in this chapter. We have set the boundaries to assist in the role of managing discipline with serial offenders who cannot conform to standards of competence and behaviour.

Disciplining an employee is never easy, but it must be dealt with without fear or favour. We conclude with a reaffirmation of some key points:

- Know and abide by the rules that govern the management of poor performance or misconduct.
- Seek advice if unsure.
- The consequences for failing to do so might be costly.