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LABOUR NEWS

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PERFORMANCE PROBLEMS ARE NOT MISCONDUCT: WHY EMPLOYERS KEEP LOSING CASES

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DID YOU KNOW?

One of the most common, and costly, mistakes employers make is confusing poor work performance with misconduct. An employee who deliberately breaks a workplace rule may be disciplined.

An employee who lacks the necessary skills, experience, or ability to perform at the required standard cannot simply be disciplined for that inability. Yet, this is one of the mistakes we see time and time again.

Employers often issue written warnings for poor performance, convene disciplinary hearings, or dismiss employees without first following a fair performance management process.

THE RESULT ?

Not only do these employers lose valuable employees who may have improved with the right support, but they also expose themselves to unnecessary disputes, costly CCMA proceedings, compensation awards and significant business disruption.

Good performance management is not about accepting poor performance.

It is about identifying the cause of the performance gap, providing reasonable guidance and support, agreeing on measurable improvement, and making informed decisions based on a fair process.

Ultimately, successful performance management protects both the employer and the employee.



IT IS IMPOSSIBLE TO WARN SOMEONE FOR POOR WORK PERFORMANCE

**A MISTAKE WE STILL SEE TIME AND TIME AGAIN.
LAYER FRAMEWORK (VISUAL/MATRIX)**

This statement often surprises employers. But it is true. You cannot issue a disciplinary warning because someone is unable to perform their work to the required standard.

Disciplinary action addresses conduct.

Performance management addresses capability.

If an employee intentionally refuses to perform their duties despite being able to do so, this may amount to misconduct.

However, where an employee genuinely lacks the necessary knowledge, skills, experience or ability, the correct approach is counselling, coaching and performance management does not discipline.

Before considering termination for poor performance, employers should be able to demonstrate that they have:

- Clearly explained what was expected.
- Provided appropriate induction and training.
- Offered guidance and coaching.
- Given the employee reasonable time to improve.
- Monitored progress through regular feedback.
- Considered whether additional support could assist the employee.

**PERFORMANCE COUNSELLING IS THEREFORE
A DEVELOPMENTAL PROCESS, NOT A
DISCIPLINARY ONE.**

**UNDERSTANDING THIS DISTINCTION IS FUNDAMENTAL TO APPLYING FAIR
LABOUR PRACTICES.**

MISCONDUCT	POOR PERFORMANCE
Employee knows the rule	Employee understands the job but struggles to achieve the required standard
Employee is capable of complying	Employee may lack knowledge, skills or experience
Behaviour is a conscious choice	Performance concerns relate to ability or capability
Managed through disciplinary procedures	Managed through counselling, coaching and performance management
Objective is to correct behaviour	Objective is to improve performance

**UNDERSTANDING THIS DISTINCTION IS FUNDAMENTAL TO APPLYING FAIR
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THINK OF IT THIS WAY...

THE LIGHTBULB ANALOGY

Imagine asking your six-year-old son to replace a lightbulb. He has never done it before. Would you issue him with a written warning because he couldn't replace it?

Of course not. You would teach him. You would first explain how to fetch the ladder. Then how to position it safely. How to switch off the electricity. How to climb safely. Only then would you show him how to replace the lightbulb. Afterwards, you would watch him try. You would correct mistakes. Answer questions. Coach him.

Encourage him. Give him another opportunity. Only after repeated guidance and reasonable opportunity would you evaluate whether he has learned the skill. Managing employee performance works exactly the same way.

Employees are not born knowing how to perform every role to your organisation's required standard. Performance management is about teaching, supporting, coaching, evaluating and improving, not punishing someone for something they have not yet mastered.



MANAGING PROBATION PROPERLY

PROBATION IS NOT A WAITING PERIOD

Probation is often misunderstood. Many employers believe probation simply means waiting three months to decide whether an employee should stay. In reality, probation should be one of the most structured periods of employment.

Transparency is everything. An employee should never reach the end of probation and be surprised to hear that their performance has been unsatisfactory. We recommend structured probation reviews throughout the probation period.



PROBATION IS NOT A WAITING PERIOD



DISCUSS

- INDUCTION AND ONBOARDING
- UNDERSTANDING OF THE ROLE
- INITIAL TRAINING COMPLETED
 - EARLY CONCERNS
 - SUPPORT REQUIRED



REVIEW

- PROGRESS AGAINST EXPECTATIONS
 - AREAS OF IMPROVEMENT
- ADDITIONAL COACHING REQUIRED
- FEEDBACK FROM BOTH MANAGER AND EMPLOYEE



EVALUATE

- HAS THE REQUIRED STANDARD BEEN ACHIEVED?
- IS FURTHER SUPPORT REQUIRED?
- SHOULD PROBATION BE EXTENDED WHERE APPROPRIATE?
- IS CONFIRMATION OF EMPLOYMENT APPROPRIATE?

REGULAR CHECK-INS CREATE TRANSPARENCY, BUILD TRUST AND SIGNIFICANTLY REDUCE FUTURE DISPUTES.

DON'T FORGET YOUR RECRUITMENT PARTNER

Many employers overlook an important commercial advantage. Most recruitment agencies offer a three-month replacement guarantee or clawback period.

Where concerns about a new employee's performance are identified early and managed proactively during probation, employers may still be able to make use of this guarantee.

Failing to act within this period may result in unnecessary recruitment costs, duplicated training expenses and lost productivity.

Good probation management therefore protects both your legal position and your bottom line.



PERFORMANCE COUNSELLING SHOULD ALWAYS END WITH TWO AGREEMENTS

Every performance counselling meeting should conclude with two clear agreements.

1. WHAT IS A REASONABLE AND ACHIEVABLE STANDARD?

Employees cannot improve if they do not know what success looks like.

The expected standard should be:

- Specific
- Measurable
- Achievable
- Realistic
- Relevant
- Clearly understood

Avoid saying:

"You need to improve."

Instead say:

"Complete five client reports per day with an accuracy rate of at least 98%." OR "Reduce stock-picking errors to fewer than two per week."

2. WHEN WILL WE REVIEW PROGRESS?

Improvement requires reasonable time.

BOTH PARTIES SHOULD AGREE ON:

- Review dates
- Coaching sessions
- Resources required
- Support to be provided
- How success will be measured

Without a review date, there is no meaningful performance management process.

THE PERFORMANCE IMPROVEMENT CYCLE

STEP 1: IDENTIFY THE GAP

Define:

- Expected standard
- Current performance
- Business impact



STEP 2: INVESTIGATE THE CAUSE

Ask:

- Do they know how?
- Can they do it?
- Do they have resources?
- Are expectations realistic?



STEP 3: HAVE THE CONVERSATION

Discuss:

- Concerns
- Examples
- Employee feedback
- Barriers



STEP 4: COACH AND SUPPORT

Provide:

- Guidance
- Training
- Practical Assistance.



STEP 5: AGREE ON A PLAN

Set:

- Clear targets
- Timeframes
- Support measures



STEP 6: FOLLOW UP

Track:

- Progress
- Coaching
- Improvement outcomes



A SIMPLE TOOL: THE G.R.O.W. PERFORMANCE MODEL

G – GOAL

Define expected performance.



R – REALITY

Understand the employee's current position.



O – OPTIONS

Identify practical support and improvement actions.



W – WAY FORWARD

Agree on actions, timelines, accountability, and review dates.



THE PERFORMANCE MANAGEMENT CHECKLIST

BEFORE INITIATING FORMAL ACTION ASK:

- Does the employee know the standard?
 - Is the standard reasonable?
 - Was training provided?
 - Has feedback been given?
 - Were obstacles discussed?
 - Was support documented?
- Has enough time been allowed?
- Has improvement been measured?

If several answers are NO— pause and review whether performance management rather than discipline is required.

REAL WORKPLACE EXAMPLE

A supervisor notices that an employee has missed monthly targets for four consecutive months. The employee receives a written warning for poor performance. The employee disputes the process.

DURING REVIEW IT BECOMES CLEAR:

- Targets changed mid-year
- Training was never refreshed
- Expectations differed between managers
- No coaching records existed

OUTCOME:

**THE PROCESS BECAME DIFFICULT TO DEFEND.
ALTERNATIVE APPROACH:**

ASSESS → SUPPORT → DOCUMENT → MONITOR → DECIDE

QUICK TIPS FOR MANAGERS

- Address concerns early.
- Never surprise employees with poor performance discussions.
- Document every coaching session.
- Be clear about expectations.
- Focus on improvement rather than blame.
- Measure performance objectively.
- Recognise improvement.
- Coach before considering dismissal.
- Remember that good managers develop people, they don't simply discipline them.

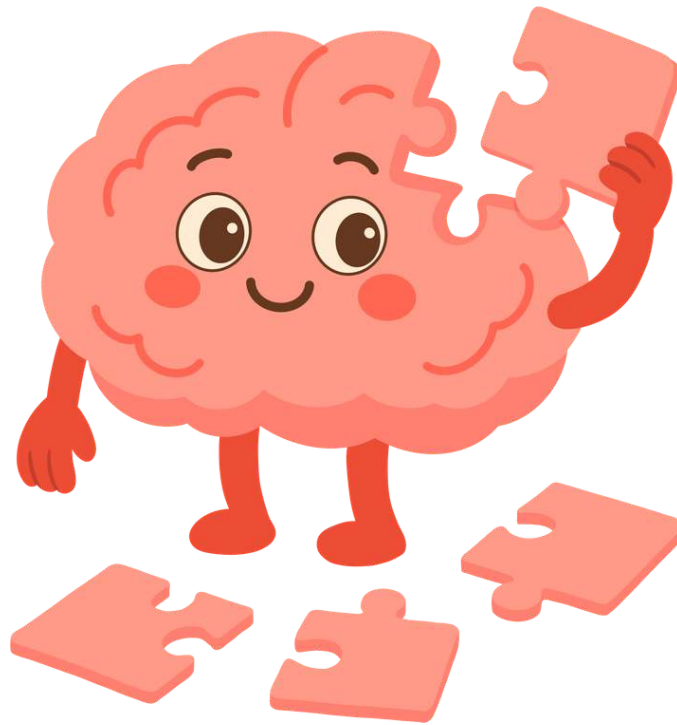
LEADERSHIP INSIGHT

"The true measure of leadership is not how quickly we identify poor performance, but how effectively we help people improve before making difficult decisions."

FINAL THOUGHT

The strongest organisations are not those that never experience performance challenges. They are the organisations whose leaders know how to respond fairly, consistently and professionally when those challenges arise. Performance management is not about lowering standards.

It is about setting clear expectations, providing meaningful support, measuring improvement objectively and making fair decisions based on evidence, not assumptions. When employers understand the difference between misconduct and incapacity, they don't just reduce legal risk - they build stronger managers, more capable employees and more resilient businesses. Before asking, "How do we discipline this employee?" ask instead, "Have we given this employee every reasonable opportunity to succeed?"



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