FACT SHEET
Procedural Fairness

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Procedural fairness means acting fairly in the process of making a decision. It is critical that employers act fairly during processes that may lead to a decision regarding an employee's employment.

This Fact Sheet provides general guidelines on procedural fairness, and outlines specific procedural fairness guidelines for employers to follow when:

- Managing performance or taking disciplinary action (e.g. issuing a warning);
- Conducting an investigation;
- Determining an employee's physical or psychological capacity to perform the inherent requirements of their role; and
- Terminating employment.

Following a process that is procedurally fair provides an employer with the best possible opportunity to defend the process they followed and the decision they made. This is particularly important if an employee lodges a claim with an external tribunal or court such as Unfair Dismissal, General Protections or Discrimination claims.

RISKS OF FAILING TO PROVIDE PROCEDURAL FAIRNESS

UNFAIR DISMISSAL CLAIMS

If an employee lodges an Unfair Dismissal claim with the Fair Work Commission ('FWC'), the FWC will determine whether the dismissal was harsh, unjust or unreasonable. Section 387 of the *Fair Work Act 2009* ("FW Act") outlines the criteria for the FWC to consider when determining this, such as whether there was a valid reason for the dismissal linked to capacity or conduct.

The criteria also lists procedural requirements that the FWC must consider in determining whether the dismissal was harsh, unjust or unreasonable such as:

- *"any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal";*
- *"if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal"; and*
- *"whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person".*

(This is not an exhaustive list of the criteria).

Following these procedural considerations and making the decision to terminate as a result of a fair process reduces the risk of the FWC finding that the dismissal was unfair. Where a dismissal is found to be unfair, the FWC may order that the employer pay compensation to the now former employee or reinstate employment.

Please note that an employee is not eligible to make an Unfair Dismissal claim with the FWC if their employment ends during their Minimum Employment Period ("MEP"). Section 383 of the FW Act defines the MEP as 6 months of employment, or 12 months for small business employers (a business with fewer than 15 employees).

GENERAL PROTECTIONS AND DISCRIMINATION CLAIMS

Claims such as General Protections or Discrimination are still possible for employees unable to make an Unfair Dismissal claim. For example, employees may lodge General Protections or Discrimination claims while they are still within their MEP. Additionally, employees may lodge these claims with regards to any adverse action taken by their employer (e.g. warnings or other decisions regarding employment), and not just for termination of employment.

Unlike an Unfair Dismissal claim, procedural fairness may not determine whether a General Protection or Discrimination claim is successful. Procedural fairness can however assist an employer in demonstrating that the reason for the action they took (e.g. termination due to performance, conduct, capacity, or operational reasons) was the actual reason the action was taken. This is important, as where an employee lodges such a claim, the employer must demonstrate that the reason they took the adverse action was not due to the alleged unlawful or discriminatory reason. If an employer is found to have terminated or taken adverse action against an employee for an unlawful or discriminatory reason, the employer may be ordered to pay compensation to the employee.

Refer: QHA's Terminations Provisions Fact Sheet.
QHA's General Protections Fact Sheet.
QHA's Unlawful Discrimination Fact Sheet.

GENERAL GUIDELINES FOR PROCEDURAL FAIRNESS

Employers should apply the following procedural fairness guidelines during processes that may lead to a decision regarding employment:

1. Deal with matters promptly and efficiently;

2. Ensure that the process and steps taken align with internal policies and procedures (e.g. Performance Management policy, Discipline and Termination policy or Grievance policy);

3. Provide notice of any meeting you want to hold with the employee, preferably 24 hours in advance, and in writing wherever possible. The notice should inform the employee of the following:

    a. The purpose of the meeting and what will be discussed;

    b. The time and location of the meeting;

    c. Whom from the employer will be present; and

    d. That the employee may bring a support person to the meeting.

    Note: an employee's request to have a support person cannot be unreasonably refused for a meeting that may result in termination of employment;

4. Meet with the employee and clearly present all relevant matters or facts being relied upon or considered to the employee. Depending on the matter, this may include previous warnings, and evidence such as CCTV footage, statements, medical evidence, policies, or other relevant information;

5. Provide the employee with the opportunity to respond either verbally and/or in writing to the matters that are raised in the meeting;

6. Take a reasonable amount of time to consider the employee's responses before deciding on an outcome. For complex matters that may result in termination, it may be suitable to take a longer break, and inform the employee of the decision in a separate meeting;

7. Ensure matters are dealt with thoroughly before deciding the outcome. For example, after meeting with an employee, the employer may need to gather further information or evidence before deciding the outcome;

8. Ensure that matters are dealt with professionally and confidentially. All parties involved should be informed of the requirement to maintain confidentiality, and their commitment to that requirement obtained and recorded.

   NOTE: While an employee needs to be informed of any decision regarding their employment, an employee is not entitled to be informed of a decision regarding another employee. For example, whether disciplinary action has been taken against another employee;

9. Ensure that matters are addressed without bias or a pre-determined outcome. In a situation where the decision maker may have potential bias, the employer should seek external assistance to carry out a fair process; and

10. Record and document each step and ensure that meetings are recorded or documented in an appropriate manner.

PERFORMANCE MANAGEMENT AND/OR DISCIPLINARY ACTION (NON-TERMINATION)

Where a matter is related to performance management and/or disciplinary action that is not likely to result in the termination of employment, in addition to the general guidelines, the following additional considerations are relevant:

1. Consider the employee's performance or conduct concerns, and before meeting with the employee identify:

   a. The nature, severity, and duration of the concerns;

   b. Incidents where the employee has demonstrated the performance or conduct concerns, and the time and date of these incidents;

   c. The time and date of any previous discussions with the employee regarding the concerns; and

   d. How the matters of concern impact the business and the extent of that impact.

2. Meet with the employee, talk through the above, and:

   a. Allow the employee an opportunity to respond to the concerns and explain why they have not been meeting expectations, or why they have engaged in a certain course of conduct;

   b. Inform the employee of the expectations (which are specific and achievable) moving forward. For performance concerns, set an action date and review date of the expectations. Ensure these expectations are followed up per the review date time frames;

   c. Confirm the employee understands the expectations and ask the employee if they need additional support or training to meet the expectations; and

d. Inform the employee that if similar concerns occur, further disciplinary action may be taken.

3. Meet with the employee again within a reasonable time frame to review the concerns and take further action if needed such as creating a formalised Performance Management Plan.

   The Unfair Dismissal criteria for considering whether a dismissal is harsh, unjust or unreasonable includes with regards to termination related to unsatisfactory performance, *"whether the person had been warned about that unsatisfactory performance before the dismissal".* Implementing a Performance Management Plan demonstrates that the employee was warned, and provided an opportunity to improve; and

4. Record and document the meeting and agreed expectations, and where suitable, provide the employee a copy.

WORKPLACE INVESTIGATIONS

Where a workplace investigation is required, in addition to the general guidelines, the following additional considerations are relevant:

1. Ensure that the investigation is conducted by an appropriately trained and unbiased person, or by an external investigator;

2. Ensure that complaints and statements specify all relevant details, such as date, time, timeline, witnesses, specific actions, or conversations involved, and relevant history;

3. Where possible, request that complaints are provided in writing, or take a written record of the complaint and relevant statements;

4. Ensure preliminary views are not formed before a thorough investigation is completed;

5. Ensure that before a decision is made regarding the allegations, the employee is fully informed of the allegations and evidence, and is given an opportunity to respond to the allegations that are the subject of the investigation; and

6. Ensure the outcome of the investigation is not based on irrelevant facts or anything other than the evidence and responses collected during the investigation.

Refer: QHA's Investigating a Workplace Incident Fact Sheet, for a suggested investigation procedure.

CAPACITY

'Capacity' refers to an employee's physical or psychological ability to perform the inherent requirements of their substantive role.

Employers may have concerns regarding an employee's capacity where:

- An employee has been absent from the workplace for an extended period due to an illness or injury; and/or
- The employer has become aware of an employee's physical or psychological illness or injury, which may impact their ability to safely perform the inherent requirements of their role.

Before addressing concerns regarding an employee's capacity, it is recommend that employers seek advice from the QHA's Employment Relations Department. This is recommended as the process taken will depend on the specific situation, and should take into account the multiple protections that exist for employees under the:

- *Workers' Compensation and Rehabilitation Act 2003 (*Qld);
- FW Act; and

- State and federal legislation prohibiting discrimination due to physical or mental disability.

Where an employer has concerns regarding an employee's capacity to perform the inherent requirements of their substantive position, in addition to the general guidelines, the following additional considerations are relevant:

1. Decisions cannot be made regarding an employee's capacity without medical advice. Decisions cannot be made purely on an employer's observations or concerns;

2. Where an employer would like medical advice regarding an employee's capacity, this may only be sought where reasonable. In instances of prolonged or regular personal leave, it is generally not recommended to seek medical advice regarding capacity until the employee has been absent on unpaid leave for a total of three months out of the applicable 12 month period;

3. Where possible, medical advice should initially be sought from the employee's treating medical practitioner (and not one of the employer's choice);

4. When seeking medical advice the employer should provide the employee with relevant documentation to take to their treating practitioner which:

    a. Identifies the inherent requirements of the employee's substantive position;

    b. Asks the practitioner to confirm:

        i. Current and future capacity of the employee to perform the inherent requirements of the employee's substantive position;

        ii. Risk of aggravation by the employee performing their substantive position;

        iii. Reasonable adjustments the employer could make; and

        iv. If applicable, expected timeframe until the employee can return to work or will be fully fit.

    c. Provides a relevant position description that the medical practitioner can refer to for capacity assessment purposes.

5. Where the medical information provided is inadequate or inconclusive, or where the employer is considering terminating due to incapacity, it may be necessary to gain further information through an Independent Medical Assessment.

If the medical evidence shows that an employee no longer has capacity, and reasonable adjustments cannot be made, the employer is recommended to contact the QHA's Employment Relations Department for assistance. The QHA's Employment Relations Department can assist members to assess their risk if they terminated employment after following a procedurally fair process.

TERMINATION OR POSSIBLE TERMINATION OF EMPLOYMENT

In most instances, before considering termination of employment the employer will need to have followed a fair process of performance management and/or disciplinary action, investigation, or assessment of capacity. Once the employer has followed such a process, the employer will need to meet with the employee to provide them an opportunity to respond before a decision to terminate employment is made.

When meeting with an employee which may result in termination of employment, in addition to the general guidelines and guidelines for the applicable process taken as outlined in this Fact Sheet (e.g. performance management, investigation, etc), the following additional considerations are relevant:

1. Provide notice of the meeting you want to hold with the employee, preferably 24 hours in advance, and in writing wherever possible. The notice should inform the employee of:

    a. The details listed in point 3 in the general guidelines section of this Fact Sheet; and

    b. That the meeting may result in disciplinary action, including termination of employment (note: commentary should not be made on the likelihood of termination).

2. A decision to terminate should not be made until:

    a. All the relevant facts have been gathered and considered;

    b. The employer has considered the risk of the termination against external claims such as Unfair Dismissal, General protections and Discrimination;

    c. The employee has been provided the opportunity to respond either verbally and/or in writing to the concerns and evidence, and provide reason why their employment should not be terminated; and

    d. The employer has taken a reasonable break to consider the employee's responses and mitigating circumstances (such as tenure and history). For complex matters, it may be suitable to take a longer break to consider the employee's responses, and inform the employee of the decision in a separate meeting.

3. After taking a reasonable break to consider the employee's responses, the decision to terminate employment needs to be communicated to the employee, as well as the reason for termination.

    It is essential to provide the reason for termination even if an employee is still within their MEP (which means they do not have access to Unfair Dismissal). Providing a valid and lawful reason for termination linked to performance, conduct or operational requirements, will assist the employer to defend other claims the employee can lodge such as General Protection or Discrimination;

4. The National Employment Standards ('NES') in the FW Act prescribe that the employer must provide written notice to an employee when terminating employment. The notice must state what date their employment terminates. Additionally, the written notice needs to be provided on the date of termination, for the termination to take effect on that date. The date of termination cannot be before the date that the written notice is given.

    In order to meet this requirement, the employer could provide a generic termination letter to the employee after breaking to consider the employee's responses. A more specific letter outlining the reasons for termination can be provided after the termination date. A template NES termination letter is available for free on the QHA website (Employment Relations Department Template Documents Tab). Further templates are available for purchase as part of the QHA's HR Manual.

    While casuals are not entitled to written notice of termination as part of the NES, the QHA still recommends providing written notice to a casual, confirming their date of termination, in line with the above recommendations; and

5. Providing a pre-prepared letter of termination to the employee in a meeting where the employee is being given the opportunity to respond is not recommended. Doing so suggests the employer had already decided the outcome before considering the employee's response.

Refer: QHA's Redundancy Fact Sheet, for the required process if considering making a position redundant.

ADDITIONAL CONSIDERATIONS

FORCED RESIGNATION

When addressing staffing matters, employers should not encourage or offer resignation, or force an employee to resign. An employee that has resigned can lodge an Unfair Dismissal claim if they believe they had no other option but to resign. In this instance, this a jurisdictional issue and it would be up to the FWC to determine whether the employee was forced to resign due to the conduct of the employer. Forced resignations are also referred to as constructive dismissal.

If an employee wishes to resign instead of facing disciplinary action or having their employment terminated, the employer should allow an employee to resign at their own initiative. Where an employee resigns in the course of disciplinary proceedings, the employer should ask the employee to confirm the resignation in writing within a reasonable timeframe after the employee first provided their verbal resignation.

HEAT OF THE MOMENT RESIGNATIONS

If an employee resigns under extreme pressure or in the heat of the moment, they may lodge an Unfair Dismissal claim regarding their resignation. If this occurs, this is a jurisdictional issue, and the FWC will have to determine whether the dismissal was at the initiative of the employer, or if the employee was forced to resign due to the conduct of the employer.

Where an employee resigns under extreme pressure or in the heat of the moment, it is recommended that the employer ask the employee to confirm their decision to resign in writing within a reasonable timeframe after the employee first provided their verbal resignation.

VALID OR LAWFUL REASON FOR TERMINATION

In considering whether a dismissal was harsh, unjust or unreasonable the FWC must also take into account whether there was a valid reason for the dismissal. Ensuring that a termination is for a valid and lawful reason will also assist in defending against General Protection or Discrimination claims.

In situations other than proven serious and wilful misconduct, the existence of a valid reason for dismissal depends on a number of factors, including conduct, performance or capacity, the employee's disciplinary history as well as other factors such as workplace policies, established workplace practices and medical or expert evidence. A valid reason for dismissal must be one that, when having regard for the circumstances, is sound, well founded and defensible and not capricious, fanciful, spiteful or prejudiced.

The following <u>are not</u> valid reasons for dismissal:

- A temporary absence due to illness or injury;
- Union membership or participation in union activities;
- Non-union membership;
- Seeking office, acting, or having acted as an employee representative;
- Participating in proceedings against the employer involving alleged violation of the law;
- Race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction, or social origin;
- Absence from work during maternity or other parental leave;
- Exercising a workplace right, or any other right provided for in the FW Act*;*
- Failing to negotiate, sign, extend or vary a workplace agreement;
- A non-genuine redundancy contrived to avoid a performance management process; and
- The employer deciding they simply don't like the employee.

Further Assistance
Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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