

## Managing difficult workplace behaviours

Nicola Cuervo

18 September 2020

Managing misconduct and performance can be difficult, especially for new or inexperienced managers. For instance, should an employer address concerns in an informal or formal way, and when should you consider something a performance issue rather than a disciplinary one?

### Addressing difficult behaviour informally

Addressing poor performance or conduct can be stressful – having to face someone and tell them you are disappointed with them is not usually something any of us look forward to. Remembering to cover off special steps in line with your legal obligations and the organisation's policies for dealing with performance or conduct concerns can add to the complexity of the situation. Sometimes this means that you might want to err on the side of a more formal process, to make sure you capture everything.

Keep in mind that a formal process isn't always necessary or appropriate – at least not in the first instance. Launching an informal process can be an opportunity to see if there is an underlying cause without going in too hard at an early stage, which can risk putting the employee on the defensive. You might make some initial enquiries, or let the employee know what you've noticed and check in to see if anything is wrong. Being free and frank with your employees – all part of employer's good faith obligations – and being upfront about your concerns before things get tricky can be constructive. It can also head things off at the pass and prevent bigger or recurring issues from developing.

Sounds easy, right? While there is no 'one size fits all' approach, if you approach the conversation as if the employee in front of you is your best employee and think about how you would feel in their shoes, you will set yourself up well to ensure you comply with your good faith obligations to be open and honest, to give the employee the benefit of the doubt, and be reasonable. A reasonable employee will appreciate the issues being raised with them informally, so they can explain or remedy things. Asking whether everything is okay and whether they need any support or assistance is never going to be a bad approach, or one that is viewed dimly by the Employment Relations Authority or Employment Court.

There will be times where a formal process is clearly necessary and appropriate – either from the outset due to the nature of the concerns, or because of what comes up during an informal process. When you initiate a formal process, follow the steps set out your policies, and if you are moving into a formal process from an informal one make sure that is clearly communicated to the employee.

### Formal employment processes

Good faith principles of being open and honest continue to apply and New Zealand employment law requires that you justify any performance management or disciplinary process on substantive and procedural grounds. Substantive justification means that you must have good reasons – on the facts – to initiate the process and to support the outcome you ultimately decide upon, judged against the standard of what a reasonable employer in your circumstances could have done. Procedural justification requires you to properly investigate your concerns, let the employee know before taking any action, give the employee a fair opportunity to respond, and consider the employee's explanation with an open mind.

It's important to be clear when you communicate your concerns to your employee, and to explain why what they have or have not done is problematic. This will involve some thought and care on your part to work through, especially where your concerns are about the employee's behaviour – and you will need to articulate your concerns carefully, frankly, and objectively if you expect to see a positive change. If you are raising serious disciplinary concerns with your employee, take particular care with the formal allegations. Make sure you set out the facts as alleged accurately, and that you explain why you consider that could amount to misconduct or serious misconduct. Refer to the employee's employment agreement and position description if those are relevant, and to any organisational policies that the employee has, in your view, fallen short of.

### Performance or misconduct?

Sometimes it will be clear whether difficult behaviour should be addressed as a performance issue or conduct concerns. Other times, it is less clear which category the behaviour falls into. While it is important that you are clear, it is okay to be uncertain about whether the matter is a performance or conduct concern, and undecided as to whether you should deal with the matter via a

performance or disciplinary process. Just make sure you are clear with the employee and, once you decide what process is appropriate, let them know.

Performance concerns arise when the employee has failed to meet your reasonable performance expectations. There might be a problem with the quantity, quality, accuracy, or timeliness of the employee's work. Misconduct on the other hand involves an element of wrongdoing. Misconduct is a failure to meet your reasonable behavioural expectations, often assessed by considering whether the employee has complied with your workplace policies. In our experience, the key to determining whether a matter should be addressed – at least initially – in a performance or disciplinary way is considering whether there is potentially an element of wrongdoing on the employee's part in terms of what they are alleged to have done.

As above with moving from an informal to a formal process, it is okay to change your approach and address a matter that you thought was a performance issue in a disciplinary way, or to move out of a disciplinary process and into a performance one. When you do that, make sure you let the employee know so they are clear what process they are subject to and what the potential outcomes might be.

If you have both performance and conduct issues to consider, keep in mind that you are dealing with different processes and different rules (and probably policies) will apply, and the options in terms of outcome are not the same. You might want to consider addressing the conduct issues first. If you do address performance and conduct concerns at the same time, make sure you are clear which facts and allegations you consider relevant in terms of each process – and if you address both issues in the same meeting, make sure you make it clear what you are dealing with, when.

Finally, sustained poor performance can of course become a conduct issue. Considering whether there is an element of wrongdoing to the employee's behaviour will be helpful in terms of determining how to best address the problem. It may be that the issue is more capacity or capability to meet the standards required than bad behaviour.

## **Behaviour outside of the workplace**

Disciplinary concerns can arise in respect of an employee's behaviour outside of the workplace. Examples where this might arise would be in the case of serious criminal offending (which may call into question whether the employer can trust the employee), where the employee has brought the employer into disrepute, where the employee has damaged their relationships with colleagues, or where the employee's conduct otherwise means they cannot discharge the requirements of their role.

It will always be a question of fact and degree, and there must be a link between the employee's behaviour outside the workplace and their employment for an employer to lawfully initiate a disciplinary process in respect of it.

## **Concluding comments**

Whatever the nature of the difficult behaviour you find you are dealing with, the key is to keep your good faith obligations in the forefront of your mind, be clear and specific about what your concerns are, keep an open and enquiring mind about what might be going on for the employee, follow your processes, and – above all – be kind. Every situation will be different.

*This article was written by [Nicola Cuervo](#) (special counsel) and Brooke Marriner (law clerk).*

### **Auckland**

**188 Quay Street  
Auckland 1010**

**PO Box 1433  
Auckland 1140  
New Zealand**

**P: +64 9 358 2555  
F: +64 9 358 2055**

### **Wellington**

**Aon Centre  
1 Willis Street  
Wellington 6011**

**PO Box 2694  
Wellington 6140  
New Zealand**

**P: +64 4 499 4242  
F: +64 4 499 4141**

### **Christchurch**

**83 Victoria Street  
Christchurch 8013**

**PO Box 322  
Christchurch 8140  
New Zealand**

**P: +64 3 379 1747  
F: +64 3 379 5659**