

Disciplinary Process & Warnings - Employees

This document has been created to provide Clubs with a guide on how to undertake a staff disciplinary process.

It is important that throughout a disciplinary process, a Club documents all actions that are undertaken, such as meetings and warnings, particularly where dismissal is possible.

Please note that this is not an exhaustive list of everything that may be relevant in a disciplinary process and members should seek advice when looking to formally discipline employees and **particularly when looking at termination.**

Volunteers

Whilst this document concerns the process for paid employees, some approaches detailed within can be useful and good practice when it comes to issues with volunteers e.g. meeting to discuss any concerns, warning if you do not want to end the relationship yet but have concerns etc.

Whilst any risk of claims is very much lessened with volunteers, as they aren't covered by the *Fair Work Act 2009* (Cth) and the agreement can be ended by either party for any reason, discussions and meetings should still be held. This will allow any issues to be rectified and decrease potential turnover of staff. Also, whilst volunteers don't have a number of the protections afforded to employees, they still are protected against discrimination, harassment etc, therefore appropriate meetings and procedures should be taken in case they allege this was the reason that their volunteer relationship was ended.

Negative Impact of Underperformance and Misconduct

It is important that Clubs deal immediately with staff who are underperforming or are guilty of misconduct, as to not do so will risk the issues continuing and possibly worsening.

There are numerous issues that affect a Club by underperformance and misconduct, including but not limited to:

- Fall in productivity
- High turnover of staff
- Underperforming and unmotivated staff
- Increased chances of workplace conflict
- Unhappy members and customers
- A poor Club culture and reputation

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12 Top Tips for Undertaking the Disciplinary Process

When looking at the disciplinary process there is a lot that needs to be considered and each issue can bring with it its own unique issues and requirements. For an in depth look at the process, Members should look at the document in its entirety, however below are some “best practice” tips:

1. **“Nip it in the bud”** – Where issues with employees exist it is important to deal with them early and not leave them until the issues become major.
2. **Consider the issue** – Carefully consider the issue and if you don’t have all relevant information or evidence at hand, consider if it is something that will require a formal investigation.
3. **Documentation is Vital**– Where counselling is undertaken, disciplinary discussions are held, formal warnings are given etc, always keep these in writing for evidence.
4. **Is formal disciplinary action necessary?** – If the issue is minor and/or in its early stages, consider if you could deal with it through a more informal discussion first, or if other options like training or counselling may work.
5. **Communication is key** – Ensure that where an issues exists you very clearly discuss and explain this with the employee so they are aware of the issue and can look to rectify it.
6. **The importance of meetings** – Unless circumstances exist meaning this is not reasonably possible, always look to meet in person with the employee and any relevant witnesses to discuss the issues. Give the employee reasonable notice of the meeting/s and a chance to bring a support person.
7. **Let the employee respond** – allowing an employee the opportunity to respond is of great importance as it shows procedural fairness and can help get to the bottom of why the issues exist.
8. **Give the employee time to improve** – Unless the issue is one that justifies immediate dismissal, ensure the employee is given sufficient time to improve performance or rectify any misconduct they have committed.
9. **Keep emotion out of it** – When dealing with issues it is important to remove any emotion and look at the matter in a clear and calm manner and also to remain respectful.
10. **Ensure the issue justifies the disciplinary action taken** – If disciplinary action is taken, ensure that it is a fair and reasonable response to the issue at hand taking into consideration not only the issue but any previous discussions and warnings.
11. **Only terminate where procedural fairness has occurred and it is justified** – When considering termination, think very carefully about the issue and if it justifies dismissal, consider if the employee was provided procedural fairness e.g. they were clearly made aware of the issue, given time to improve etc.
12. **Where you aren’t sure, seek advice** – If you aren’t sure what steps to take and whether the issue justifies disciplinary action, then speak to Clubs SA.

The Disciplinary Process

Where there are persistent or significant issues, a Club needs to look at taking disciplinary action against an employee.

It is not uncommon for Clubs to let issues persist without any formal disciplinary action being commenced and/or only limited discussions being held and then have issues reach “breaking point”. A Club is then left with a serious lack of due process if they want to terminate the employee as there is little evidence that the employee was made aware of the issues and in turn advised that failure to improve could lead to termination.

When looking to take disciplinary action, a Club must ensure it follows the correct procedure, the aspects of which will all be detailed in the rest of this document.

Before the Disciplinary Process

Where an issue is minor, or is in its initial stages, a Club could firstly consider if there are other ways to approach the issue, rather than looking at a formal disciplinary process. This is unless the issue is of such a nature that it would require formal disciplinary action such as an immediate warning or termination.

Sometimes an employee may genuinely not be aware that their behaviour or performance is unsatisfactory and therefore a discussion should be held to make them aware of this. Additionally, matters such as a lack of training or outside causes such as difficulties in their personal life may be the cause of the issues and steps could be taken to try to help rectify this.

A Club could consider counselling an employee initially if appropriate, with meetings taking place where any issues can be discussed, and a manager can look to provide assistance to improve their performance. Written records of these meetings should also be kept as evidence should the issues persist and more formal disciplinary measures need to be taken at a later date.

In some situations however, making notes of the meeting may not be appropriate, such as where the meeting is conducted informally and/or where it involves personal issues that the employee will not be comfortable having recorded.

If counselling is undertaken, then it should not be expected that improvement will necessarily be immediate and there may need to be multiple sessions and gradual improvement.

Should the above not prove successful, then formal disciplinary processes will have to be looked at.

There may also be situations where something like serious physical or mental health issues are affecting the employee and not making it possible for them to undertake their duties to a normal standard. This will need to be factored into any decision as to whether disciplinary action is justified and the Club will need to consider its WHS obligations to protect the safety and wellbeing of the employee as much as possible. Where the issues

involve something serious like depression or the employee discloses thoughts of self-harm the Club should urge them to seek professional assistance, or it may be necessary for the Club itself to contact an emergency services provider.

Disciplinary Meetings

Setting up a Formal Disciplinary Meeting

Where a Club is looking to discipline an employee, a Club needs to hold a meeting with the employee to discuss the issues.

A Club needs to ensure that they have all the necessary facts with them and that the issues are of a nature that requires disciplinary action e.g. the issues are significant and/or have been ongoing. Before a disciplinary meeting is held, a Club needs to give the employee sufficient notice of the meeting and sufficient information on the concerns so that they can adequately prepare. The employee should also be invited to bring a support person with them (more information on support persons can be found in the next section). In terms of how much notice to give, 24-48 hours' notice should be provided although if a bit more is given then this is generally OK and could add to the reasonableness of the notice (although the meeting should not be held or put off for an unreasonable amount of time e.g. weeks after the event).

Any invitation should be in writing and should specify that the employee needs to keep this confidential and also who will be conducting the meeting. The invitation should be in the form of a formal invitation letter and a copy provided to the employee in person or sent to their address via registered post. If sent via email then a read receipt should be requested and steps taken to ensure this was received e.g. a follow up call or message. An invitation to a meeting should not be done verbally as no record will then exist of this being given and a text advising of the meeting should never be the sole or primary means of communicating the invite. A text could be alright provided it is just used as a means to notify the employee that a more formal invite is coming via email etc.

Support Person & Representatives

During a formal workplace meeting, an employee is entitled to bring a support person if they wish. The *Fair Work Act 2009* (Cth) doesn't specifically state that employers have to offer employees a support person, but rather that they can't unreasonably refuse one. It is best practice however to make it clear to an employee that they are entitled to bring a support person and to encourage them to do so.

In terms of the role of the support person, it is not to advocate on the employee's behalf but to act purely in a supporting capacity. Should a support person begin disrupting the meeting or advocating on behalf of the employee, then the meeting can be paused and the support person should be reminded of their role. Should the disruptive behaviour continue, then the meeting can be closed. A support person can however ask for clarification on points and request some reasonable time to speak to the employee.

Generally, an employee's support person should be permitted, though there are circumstances where a Club can dispute an employee's choice. For example if the support person has a conflict of interest such as being a witness to an issue that is being investigated, then they should not be attending.

In terms of if the employee has a representative instead of a support person, such as a union representative, and communicate they wish to bring them, they should be allowed where the meeting is of a nature allowing this in a Modern Award or other legislation (e.g. a representative is allowed under the Clubs Award where a discussion concerns "major workplace change" such as possible termination and the delegates rights clause allows a workplace delegate to represent employees for disciplinary matters). Also, where the matter is generally complex enough that denying a representative could also be seen as detrimental to procedural fairness they then should be allowed.

Workplace Meetings – During the Meeting

During the meeting, the Club should make the issues clear and why the employee's performance or conduct is unacceptable. An employee then needs to be given the opportunity to respond and raise anything they wish in their defence.

If there has been previous discussions about the issue/s, such as where it relates to performance, then this should also be raised.

It is important that a written record of the meeting is kept and the employee is made aware of this so as to avoid disputes regarding the discussions. During the meeting, whilst it is preferable to consider having two people at the meeting so one can run it and ask questions, while the other acts as a witness, there should not be so many people that it appears the employee is being targeted or victimised. Those who are running the meeting should also ensure they stick to the facts and conduct themselves in a professional manner, as failure to do so could raise issues later.

Once both parties have had their say, the meeting can be concluded. A Club then needs to take time to consider the employee's response and then decide on the disciplinary action that will be taken against them.

Should a meeting time be set and the employee does not attend without sufficient reasons for their absence, then a Club can make a determination in their absence. It is important though that evidence is kept that the employee was provided with notice of the meeting and witnesses can attest that despite this the employee did not attend the meeting. Any invitation to the meeting should also specify that if they don't attend without reasonable justification then a determination can be made in their absence.

Response in Writing Instead?

In some very select circumstances it may be necessary for a response to be sought in writing rather than a meeting being held face to face. This may be necessary where there is a legitimate threat of violence from the employee, or a face to face meeting is not possible due to geographical constraints.

If a response in writing is sought, then a Club will have to provide the employee with a clear written outline of the issues/allegations so that they have enough information to respond appropriately.

If a Club seeks a response in writing, then a valid reason for not having a face to face meeting is required and the Club will have to ensure they have evidence that the employee was made aware of the need for a written response and was provided with sufficient information to make a response. A Club should send the request and any information on the issue to their home address by registered post if possible and allow a suitable amount of time for it to be received and a response returned. Any date to respond should be clearly stated. A call should also be made informing the employee of this.

If a Club sends this request by email instead, then caution should be exercised as the Club will have to ensure that it is received and as such a “read receipt” should be requested and any email followed up with a call. Email should also only be used where it is a common form of communication between the two parties.

A Club should always seek to have a meeting face to face, however if this is not possible due to a valid reason, then the employee must still be given a reasonable opportunity to respond in writing to any issues.

Investigations

Workplace Investigations

Depending on the issues, sometimes a formal workplace investigation may be necessary. A formal investigation is where an instance of misconduct has occurred that will require a Club to speak to and interview affected parties and witnesses to gather sufficient evidence or proof of the misconduct occurring.

Some instances where this will be necessary include where:

- complaints or allegations of harassment, bullying or discrimination are made;
- there are concerns or potential breaches of work health and safety legislation; or
- there have been instances of theft, fraud or misuse of confidential information.

For more general issues relating to performance a formal investigation will likely not be needed.

Investigation Process

Below is a sample investigation process only and it should not be relied upon as a full and comprehensive explanation of the investigation process in all circumstances

Where the issue is related to a policy and procedure that the Club has in place e.g. harassment, the Club needs to ensure they follow any procedure that is contained within.

Should a complaint be made against another employee or there are concerns of significant breaches, a Club will need to firstly assess the issue and what is to be undertaken/obtained such as any relevant documents, footage or statements including who will need to be interviewed.

If the issue is brought by a complainant then that employee will need to be notified that an investigation is to be undertaken by the Club.

Where a significant complaint is made such as one of harassment, fraud, bullying etc, and the complainant states they don't want this investigated or to go further, a Club will still have a duty to investigate. A Club has a duty of care to its employees and as such should this occur, a Club needs to explain to the complainant that the Club is obligated to investigate as they have a duty to ensure a safe workplace.

1. Confidentiality

When an investigation is necessary, a Club needs to protect, to the best of its ability, the confidentiality of the parties involved, in particular the complainant and the accused.

Where a complaint is made, the Club will have to explain that while they will keep information as confidential as possible, in order to conduct an effective investigation, certain information will need to be disclosed on a "need to know" basis. For example, the person being accused will need to have sufficient information to be able to respond, therefore it will not be possible to keep all information concerning the allegation confidential from them.

The Club will need to determine the potential witnesses and only disclose as much information as necessary to them in order to assist the process.

2. Protections

A Club will need to ensure that adequate protections are given to the accused whilst the investigation is ongoing. As well as confidentiality, a Club will need to consider whether the employee needs to be suspended for the period of the investigation so as not to impede the investigation. Suspension should however only be done where this is likely to occur, the investigation concerns alleged gross misconduct and should not last beyond a reasonable amount of time.

Any suspension pending investigation must also be paid.

Where the issue involves a complainant and an accused, there will need to be consideration given as to if they need to be appropriately separated while the investigation continues and if so, how this can be done. A Club could consider such things as a temporary change in rosters to avoid them working together and/or separating them as much as possible during working hours. Anything done can't be too burdensome for the complainant.

3. Investigating and conducting interviews

A Club will have to determine who will conduct the investigation. The investigator must be able to look at the issues without bias and possess the skills to undertake any interviews and examine any relevant evidence.

Clubs should firstly look at having a manager or someone of sufficient authority do this but they could also consider having an outside party undertake the investigation.

Interview questions should be developed in order to gather as much information as necessary, although as interviews progress, it may be necessary to add further questions. Any complainant should also be asked how they would like the situation resolved which can help in determining any action. Importantly their request should not necessarily be the eventual outcome if the person they have accused is found to have engaged in the alleged misconduct.

Should accusations be made by a complainant, then a Club should firstly decide if they need to clarify anything with the complainant prior to discussions with others in order to have all necessary information. This also allows the Club to work out who may be a potential witness.

When completed, or where the issue is not raised by a complainant but instead observed / noted by management, the accused will need to be presented with details of the allegations so they can then be in a position to respond. The accused should be properly invited into a meeting and allowed to present their side of the story. Following this, any other witnesses will need to be invited into separate meetings to discuss the issues. During the interviews an investigator will have to assess the credibility of the witness's responses and also keep appropriate notes for evidence. Each party should be allowed to provide their story and a heavy handed approach should not be taken e.g. act as if an interrogation is taking place.

Once witnesses have been interviewed, a Club will need to assess whether they need to have a meeting with the accused, or if relevant the complainant again to iron out any inconsistencies and clarifications.

4. Coming to a decision

Once all the information has been gathered during the investigation, a Club then needs to make a determination on the facts gathered and what appropriate disciplinary action, if any, should be taken.

Clubs also need not confine possible action to the accused, should it be determined someone else has also done something that warrants disciplinary action being taken against them. If this occurs however, then a Club needs to ensure this person has also had sufficient opportunity to respond prior.

The accused should be brought into a meeting in the proper manner (invited in writing, allowed a support person etc.) and informed of the findings and the outcome. Any necessary disciplinary action will then need to be taken and confirmed afterwards.

Any complainant also needs to be notified of the outcome and a Club should also ensure that this person is followed up as necessary e.g. if it concerned a complaint of sexual harassment then a Club should ensure that the employee has appropriate support, their wellbeing is maintained etc.

All parties also need to be reminded again of the need to maintain confidentiality.

5. Closing investigation

Once the final meeting is held and any disciplinary action has been taken, the investigation can be concluded and the parties should be notified that the matter has been closed. Parties should be brought into a meeting area and notified that the investigation has closed and then given confirmation of this in writing, including any warnings, termination letters etc., which also need to be in writing.

Clubs should also take the opportunity to look at their processes to determine if they can implement ways to reduce any related risks arising in the future e.g. further training, policies and procedures etc.

Warnings

Written Warnings

Should approaches such as counselling or discussions not result in the improvement of an employee's behaviour or performance, or a Club has serious concerns over an employee's conduct or performance, then they need to consider issuing them with a written warning.

Before issuing a warning, a Club must ensure that a proper disciplinary process has been undertaken, with a meeting having taken place allowing the employee to respond to the issues. A Club should ensure that if a workplace investigation is required then this has been done appropriately.

Should the Club decide to issue an employee with a warning after a disciplinary meeting then this should be in writing. A Club should also not have a warning pre-prepared before the meeting is held and need to wait a period of time before issuing so as to consider the employee's response e.g. if a meeting is held in the morning then wait until at least later in the afternoon.

Where a written warning is issued it is important that the reasons for the warning are made clear, any expectations going forward are specified and it is made clear that a failure to improve could lead to termination.

Warning letters do not have to be signed by an employee but if they are willing to sign them then Clubs can have them do so as further proof the employee understood the warning. A record of this warning needs to be kept on the employee's file.

Final Warnings

Where there has been a previous warning or warnings, or the issue is significant but not to the extent that termination is justified, a Club may consider issuing an employee with a final written warning. A final warning must make it clear that there are serious issues that need to be addressed by the employee as soon as possible and any failure to rectify this is likely to result in their dismissal. Depending on the nature of the issue and/or previous warnings, a Club may have grounds to terminate rather than have to issue a final warning

first. As with general written warnings, the reasons for the warning and the improvement needed will need to be contained in the letter and it needs to be clear that significant improvement is needed ASAP.

Verbal Warnings

Verbal warnings are less formal than written warnings and could be considered as a starting point when dealing with less serious issues and to warn employees for minor infractions.

For more serious or ongoing matters however, a formal written warning needs to be provided to the employee so as to make it clear that should these issues continue then it could result in termination. Written warnings ensure evidence is on hand that the employee was warned.

Verbal warnings should not be relied on by themselves for termination or serious issues as this will risk a “he said, she said” scenario occurring. Should a verbal warning be given, it is good practice to still keep a record of the conversation including where and when this occurred (a transcript) so there is a record in writing to confirm a verbal warning was made.

Performance Management Plans (PMP)

Where an issue is in relation to an employee’s general performance rather than an instance of misconduct, a Club can consider putting the employee on a performance management plan. These plans set out a number of key performance indicators (**KPI’s**) that the employee needs to show improvement on and can be such things as punctuality, quality of work etc. The more specific a Club is with the KPI’s, the better, as this will show the employee clearly what the issues are. Whilst a warning can also serve to make an employee aware of issues, the benefit of a PMP is that it is a formal guide that expands beyond what a warning normally contains and provides evidence that monitoring was ongoing. A PMP should also detail the type of things and what level is required to satisfactorily pass the PMP. Generally someone should need to achieve at least satisfactory across all or most of the KPI’s but a Club should also not make the requirements too onerous e.g. needing an average of “excellent”.

Performance management plans can be very helpful in not only making it clear what areas of performance are the issue for an employee, but also showing that they were provided with a sufficient period of time to improve before further disciplinary action is to be taken.

If an employee is to be put on a PMP then just like with a warning and any other disciplinary action taken, a meeting needs to be conducted first and a reasonable amount of time taken before issuing.

When an employee is issued with a PMP they should be brought back into a meeting room and told that they will be being placed on a PMP, what it means and also given a notification of the commencement of the PMP including a copy of the PMP. A warning can be issued at the same time as a PMP is implemented and this is often useful in emphasising the need for improvement and that a failure to do so could lead to termination.

In terms of how long a PMP should extend, it needs to be for a sufficient enough time so as to allow the employee to improve. Generally 6-8 weeks is a good marker, but this could need to be more or less if there were previous warnings, whether the issues are minor or major etc. Another meeting needs to be scheduled at the time the PMP will end (referred to as the review date) and at that time the results can be discussed. Clubs can also have review dates at other times throughout the period such as a mid-point review.

Clubs will need to have someone such as the employee's manager continually monitor them over the PMP period so that the manager can appropriately judge how the employee has performed. It is also good practice for the manager to catch-up every now and again so they can notify the employee of any issues and generally determine how they are going.

Should sufficient improvement not be reached then depending on how poorly the employee has performed and if they have been warned previously, a Club can consider such things as:

- Issuing a warning or another warning; and/or
- extending the PMP; or
- termination.

Termination

Should an issue be significant enough and/or sufficient time and warnings have been provided to an employee then a Club may consider termination.

Before terminating and regardless of the reasons, a Club will need to hold a disciplinary meeting with the employee and put the issues to them, as is the case before taking any disciplinary action. Correct disciplinary process and records are needed from any previous warnings.

Where termination is being considered, it is crucial that Clubs ensure:

1. There is a valid reasoning for the dismissal e.g. the performance issues or misconduct is significant enough.
2. If the issue is not one that justifies instant dismissal that the employee was made aware of the issues and given adequate time in which to rectify this.
3. The employee was afforded proper procedural fairness e.g. they were allowed to respond to the issues, allowed a support person in meetings, were given warnings prior etc.

How many warnings before we can terminate?

There is a common myth that an employee needs to be given three warnings before termination, but this is not true.

Depending on the nature and length of the issues, warnings will vary in number, or in some cases there may not need to be any prior warnings if the issue can be viewed as serious misconduct (explained further on the next page).

Whilst the number of warnings is not set, a Club needs to consider various factors that may mean multiple warnings are needed before looking to terminate such as:

- If the employee has had lengthy service
- The particular conduct or performance issue is not a major or ongoing issue
- There are other factors contributing to the issue such as a lack of training or support
- Prior to this issue there have not been any other performance or misconduct issues

Dismissal - Probation

Permanent employees will often have a probationary period in their contract.

During a probationary period either party can end the agreement for any reason (provided that it isn't due to a discriminatory or other prohibited reason). This allows an employer time to assess if the employee is right for the role at the Club and if their performance is up to standard then the employee can be informed they have not passed probation and their employment will be terminated.

When notifying someone that they have not passed probation the employee should be informed of the reason so as to avoid the employee claiming they didn't pass due to a prohibited reason and so they are aware of what went wrong and can hopefully rectify this in their next role.

Probationary periods should not exceed 6 months as this should provide sufficient time to see if an employee is suitable and also is this relates to the minimum engagement periods for unfair dismissal, which is explained below. Having a probationary period longer than this and relying on it can certainly bring risks.

Casuals do not have probationary periods as this is at odds with the nature of casual employment. Additionally where a casual is regular and systematic they can make unfair dismissal claims and as such need to be approached in the same manner as permanent employees when it comes to termination.

Short Term Dismissal – Minimum Engagement Periods for Unfair Dismissal

Where an employee has been engaged for a short period of time, a Club can often look to terminate their employment in a simpler manner than long term employees.

To be able to make an unfair dismissal claim, an employee needs to have been employed with an employer for either 12 months, where the employer is a small business or if not then they need to be employed for 6 months.

Small business employer means an employer that has less than 15 employees, which includes:

- The employee who is being terminated;

- Regular and systematic casuals (not all casual employees though); and
- Employees from any other associated entities.

Due to the above, where an employee has not been engaged for a minimum engagement period there is much less risk in dismissing an employee. Clubs still should be notifying the employee of any issues with their performance or their conduct, however it is good practice to still provide warnings as necessary and meet so they are aware of any issues and can try and rectify them.

Employees can also still make other claims such as discrimination and general protections claims regardless of their length of service, so Clubs must ensure the reason for dismissal is due to a legitimate and legal reason e.g. not due to something like their age, sex, taking time off work due to legitimate illness etc.

Further information on general protections claims can be found on page 16.

Small Business Dismissal Code

Where a business is considered a small business, they will be afforded protection against claims where they follow what is known as the “*Small Business Dismissal Code*” rather than the Fair Work Act as a whole.

A copy of the code can be found [here](#).

The Small Business Dismissal Code, whilst of potential assistance to a small business, is not something that will allow the business to fail to follow proper procedure and to not have a valid reason when dismissing an employee. The chance to fix an issue or improve the employee’s capacity to do the job must be given where the issues relate to their performance in particular and evidence will need to be shown such as warnings.

Serious Misconduct and Summary Dismissal

In certain circumstances, an employee may be summarily dismissed, which is where they are terminated without notice and they don’t need to have prior warnings. This can occur where the employee has engaged in serious misconduct.

Serious misconduct is defined in the *Fair Work Regulations 2009* (Cth) and in particular Regulation 1.07 states it is:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment; or
- conduct that causes serious and imminent risk to the health or safety of a person or the reputation, viability or profitability of the employer's business.

The regulation also gives examples of what could be serious misconduct such as:

- theft;
- fraud;
- assault; and

- sexual harassment.

Where an employee has engaged in serious misconduct, a Club must still follow the proper disciplinary procedure and undertake any necessary investigation and determine if circumstances justify dismissal.

Failure to follow proper procedure could risk unfair dismissals being made and even if the reasoning for dismissal is valid, failures with process and procedure could risk the dismissal being found as unreasonable.

Where a Club is looking to terminate due to serious misconduct, it is very important that sufficient evidence is at hand to show that it was reasonable for the Club to conclude that the serious misconduct occurred.

Unfair Dismissal and General Protections Claims

Unfair Dismissal

An unfair dismissal claim can be made to the Fair Work Commission by an employee where a dismissal is found to have been harsh, unjust or unreasonable.

In terms of what harsh, unjust and unreasonable means:

- Harsh – The dismissal was disproportionate to the offence committed
- Unjust – There was not a valid reason for the dismissal
- Unreasonable – Where an employer acted unreasonably during the dismissal, or they were not given procedural fairness

Just one of the above is enough for dismissal to be unfair. The terms above will determine the compensation payable as will other factors such as the extent of the failings by the employer, length of service, how much longer the employee would have been employed should proper processes have been taken etc.

Additionally, an employee can also claim unfair dismissal where they can show they were forced to resign or had no choice to resign as a result of the employer's actions. This is referred to as constructive dismissal.

To be eligible to make an unfair dismissal an employee firstly needs to either be a permanent employee or a casual who was engaged on a regular and systematic basis and had a reasonable expectation of continuing employment.

An employee also needs to:

- Work for a national system employer (e.g. in the private sector, that being businesses or organisations not run by Government)
- Have been employed for the minimum engagement period, that being:
 - 12 months – where the employer employs fewer than 15 employees (small business employer), or
 - 6 months- where the employer employs 15 or more employees.

- Those who have an annual rate of earnings below the high-income threshold (as of July 2024 this was \$175,000.00) unless they are covered by a Modern Award or Enterprise Agreement in which case they can earn more than the high-income threshold

In order to make an unfair dismissal, an employee has to make the application within 21 days of their date of dismissal. The Fair Work Commission will only grant extensions where exceptional circumstances exist e.g. the employee can demonstrate it was due to a representative error or they were incapable of making a claim due to severe injury or illness. Ignorance of the time period alone has been stated as not meeting the standard of exceptional circumstances many times by the Fair Work Commission.

Should an employee successfully claim unfair dismissal they can receive as much as the equivalent of 26 weeks' pay and can even look at reinstatement, although this is rare as this will only be ordered where the Fair Work Commission believes the employment relationship has not been irreconcilably damaged.

Where an unfair dismissal is claimed, a club will firstly have to respond to the ex-employees claim. Following this, a conciliation will be held to try to resolve the matter and avoid it progressing to a hearing. A large number of claims are settled during conciliation, but in order to do so, a claimant is likely to seek some form of monetary compensation and can also seek such things as statements of service, references and apologies.

Should a conciliation not resolve the matter then it will be sent to the Fair Work Commission for a hearing which can take a lot of time and effort to resolve, as well as financial costs of running the matter. Parties can still seek to resolve the matter after conciliation however, with settlement agreements permitted all the way up to the hearing.

A Club must ensure that when they terminate an employee they have done so for appropriate reasons and that they have followed all due process. Not doing so increases the risk of an unfair dismissal claim being made and being found to have occurred which can be costly both in terms of time and money.

General Protections Claims

Under the *Fair Work Act 2009* (Cth) a person can't take adverse action against someone due to them exercising a workplace right. In terms of what is meant by adverse action, this includes taking disciplinary action against them, overlooking them for promotion and roles and termination. As such, a Club can't discipline or terminate an employee's employment where the reasoning for doing so is due to a protected reason which includes but is not limited to:

- Exercising a workplace right such as taking leave or taking part in lawful industrial action
- Because of a discriminatory reason such as age, sex or disability
- Due to absence from work whilst genuinely sick or injured
- Being a workplace delegate (e.g. a union representative)

Unlike with unfair dismissal claims, there is no minimum engagement period needed to be able to make a claim and they can even be made by someone who was passed over for employment.

In order to be successful, a claimant will need to show that the reasoning for adverse action being taken was due to or principally because of a protected attribute such as their age, marital status, taking sick leave etc.

General protections claims unlike unfair dismissals are not capped, meaning that there is no upper limit on the amount of compensation someone can seek or receive.

As with an unfair dismissal claim, a general protections claim will firstly result in the need to respond to the claim form and then have a conciliation taking place. Should a claim not be resolved at conciliation though then it can be sent to the Federal Court if the employee wants it to go further, meaning costs of running a defence can far exceed those of an unfair dismissal.

Where a claim is made, this can cost a Club a lot of time and potentially a great deal of money.

Where adverse action is taken a Club needs to be clear as to why this is being taken and not do so due to a protected reason.

As with an unfair dismissal claim, where a general protections claim is made in relation to dismissal, it needs to be made within 21 days of the dismissal date. Where the claim is not involving dismissal however, the time limit is 6 years from the date the adverse action occurred.