INSTRUCTIONS:

- A fair and equitable process for matters warranting disciplinary action, and if necessary subsequent dismissal, shall be followed.
- Facility Management Team to contact Hardi Aged Care Human Resources Manager prior to conducting any disciplinary interview, disciplinary action and any action which may result in potential termination.
- Keep records of all discussions with the employee and the outcomes of the process.
- Complete appropriate Checklists.
- Hardi Aged Care also recognises that after counselling, many staff members improve their performance. Therefore, so as not to penalise improvers, the amount of time a formal warning will remain on a staff member’s file and have an effect on future discipline, will depend on the nature of previous warnings and the commitment to improvement that the staff member has displayed.

THE EMPLOYMENT CONTRACT:

The primary purpose of a disciplinary interview is to correct a staff member’s behaviour. It is not necessarily a pre-cursor to termination, or other disciplinary action.

Every employment relationship is based upon a common law contract of employment between the employer and the employee. This is regardless of whether the employee is covered by an agreement. An agreement does not replace a contract of employment but supplements it, providing likewise minimum terms and conditions of employment. Further, most workplaces function on the basis of enforced policies and procedures. All workplaces must operate in accordance with employment legislation.

Employees have an obligation to conduct themselves in a manner which honours all of the above. The employee also has a duty to act in accordance with all common law employee obligations and all lawful and reasonable instructions as issued by the employer.

A disciplinary interview will only arise if an employee appears to have breached obligations to his or her employer, whether it be a breach of their agreement, a breach of legislation, a breach of the employer’s policies, procedures or regulations or a breach of common law responsibilities.

The onus is on employers to ensure that employees comply with all lawful requirements. If an employee persists in behaving in an unlawful and unacceptable manner, then the employee’s services may be terminated. However, the process below must be followed prior to the consideration to terminate.

It is important to remember that in all dealings with an employee, and especially in regard to disciplinary procedures and dismissals, the employer must in the first instance comply with the terms in the employment contract between the parties.

An integral part of any disciplinary process is the actual counselling/disciplinary interview AND all investigatory work and documentation carried out prior to such meeting, including placing staff on paid suspension for their own protection.
Following this meeting, management retains the discretion to enforce disciplinary action. Disciplinary action includes, but is not limited to counselling, disciplinary interviews, re-education and training, working under close supervision, re-rostering of shifts, verbal warnings, written warnings, dismissal with notice and summary dismissal (i.e. termination of the employment contract without notice).

Warnings are probably the most important part of the employer’s disciplinary process. Warnings should be given as a response to acts of misconduct short of serious misconduct justifying summary dismissal, and as a response to unsatisfactory work performance. An employer should document all warnings given to an employee. This will assist in defending any unfair dismissal claim that may arise.

“Pre-meeting” and “During meeting” checklists have been included in this guide. Also included is a suite of “outcomes” – generic template letters have been created to match each outcome (except where the outcome is verbal only).

In addition, the following sequence of warnings is commonly adopted where the employee exhibits ongoing unacceptable behaviour/work ethic or a deterioration of work performance:

- Management should note that this sequence of warnings is a guide only.
- Sometimes it will be essential to issue ‘First and Final Warnings’ and on other occasions, further verbal or written warnings, in addition to those recommended in the guide, will be necessary.
- It is important to remember that both the degree of warning and the number of warnings issued must be fair and reasonable, in light of the unacceptable behaviour or deterioration in performance. In other words, the punishment must fit the crime.
- The level of responsibility held by the employee must also be regarded, as must be any precedents set by the organisation, via previous action taken.
- Consideration of all mitigating circumstances is also important.
PRE-MEETING CHECKLIST
This pre-meeting checklist will need to be repeated at all stages of the disciplinary process including and up to the final stages of termination (if applicable). This is so “procedural fairness” may be applied at all times.

Step 1: Identify the issue
- Start by writing down specific examples of the staff member’s behaviour that’s causing an issue, and when it’s occurring. Gather any documents that demonstrate the issue (e.g. work examples, complaints or performance statistics).
- Also write down why the behaviour is an issue – it may be affecting the facility, other staff, residents or the safety of the workplace.
- Write down how the behaviour needs to change.

Step 2: Assess the issue
- Before meeting with the staff member, think about how serious the issue is and how long it’s existed.
- Assess how wide the gap is between what is expected of the staff member and what they’re doing.
- Think about the possible cause of the issue – make sure to keep an open mind.

Further guidance
1. Upon learning of a performance deficiency or unacceptable behavior, a decision to further investigate must be made.
2. The supervisor/manager/co-worker making the initial claim of performance deficiency or unacceptable behavior must place their allegation in writing otherwise no action should be taken. They may use a Staff Communication Form. This may vary in exceptional circumstances.
3. The manager/supervisor/co-worker claiming performance deficiency or unacceptable behaviour must have written documentation reflecting their observations and any communication between themselves and the staff member.
4. The manager/supervisor/co-worker claiming performance deficiency or unacceptable behaviour should provide a witness report. Other witness reports should be included.
5. Where management are investigating, the staff member should be advised verbally of the allegations, informed that an investigation is in process and told that pending the outcome of investigation, a counseling meeting and possible disciplinary action may take place.
6. So long as the performance deficiency or unacceptable behavior being investigated is not gross misconduct warranting summary dismissal, the staff member may continue to work during the investigation or the staff member may be placed on paid suspension.
7. The investigation should comprise of a gathering of information. Such information may either support the allegations or not. Aside from witness reports, information should include dates, times, places, persons involved and correlating or coinciding events.
8. Following the investigation, management should decide whether or not to conduct a counseling/disciplinary meeting. The staff member should be advised of any outcome.
9. Where a meeting is to take place, the staff member should be informed beforehand (a good rule of thumb is 48 hours) and given a brief outline (agenda) of what will occur at the meeting and why it is being called.
10. If allegations relating to misconduct have been made, the staff member should be provided with copies of written witness statements and other documentation prior to the meeting. If there are no statements from witness(es), minutes of meetings with witness(es) are to be provided to the staff member.

11. The staff member should be told of their right to invite a support person of their choice.

**DURING-MEETING CHECKLIST**

**Step 3: Meet with the staff member**
- Discuss the issue with the staff member as soon as possible – ignoring it is likely to make it worse.
- Arrange to meet with the staff member at a time and in a place where you won’t be interrupted, overheard or rushed.
- Let the staff member know in advance what the discussion will be about so they don’t feel ambushed.
- Allow the staff member to bring a support person of their choice to the meeting, if they want to. *(The role of a support person is to support the staff member during the meeting, not to speak or advocate for them.)*
- Clearly describe the issue, using examples, along with how it’s affecting the facility.
- Invite the staff member to respond.
- Explore the issue and possible causes by asking open questions.
- Make sure the staff member understands the change required.
- Think about the impression that your body language gives – face the staff member, adopt an open posture, maintain good eye contact and try to be relaxed.

**Step 4: Jointly devise a solution**
- Explore possible solutions by asking open questions.
- Invite the staff member to suggest solutions.
- Agree on a way to resolve the issue.
- Offer appropriate support (e.g. training, close supervision, re-rostering, etc).
- Agree on a time for the staff member to improve their performance and set a date for review.

**Step 5: Monitor performance**
- Make sure you follow through with any training or other support offered to the staff member.
- Monitor the staff member’s progress and provide ongoing feedback – be very clear.
- Meet with the staff member to review their performance at the agreed time.
- If the staff member’s performance has improved, acknowledge that the issue has been resolved and discuss how to maintain the improvements – continue to offer support and encouragement.
- If the staff member’s performance hasn’t improved, extend or repeat the process, or consider progressing to the formal steps.

**Step 6: Keep records**
- Keep notes of discussions with your staff and the outcome of the process.
FORMAL STEPS CHECKLIST WHEN FURTHER ACTION IS REQUIRED

Step 7: Pre-Meeting preparation
- Prepare for the meeting, using the pre-meeting checklist as before.
- In addition, arrange to have a senior manager to attend as a witness and note-taker.
- Tell the staff member why you want to meet with them and who will be at the meeting.
- Allow the staff member to bring a support person of their choice to the meeting, if they want to. *(The role of a support person is to support the staff member during the meeting, not to speak or advocate for them.)*
- Carefully plan what you want to say at the meeting using a Meeting Plan Template.
- Gather relevant paperwork (e.g. Staff Appraisal Form, Staff Appraisal Action Plan, Position Description, Job Routines, any previous performance improvement plan) and any documents that demonstrate the underperformance (e.g. work examples, complaints or performance statistics).

Step 8: During the meeting
- Clearly explain why the meeting is taking place with the staff member.
- Describe the underperformance in issue and clearly explain why it’s an issue, using specific examples and focusing on facts.
- Set out any steps taken so far to resolve the issue (e.g. feedback and warnings) as well as the support provided (e.g. training, etc).
- Invite the staff member to respond to what has been said and to explain their performance, and ask them what they think can be done to improve it.
- Consider what the staff member has said. If more time is needed to think about or look into what the staff member has said, close the meeting and agree to meet again in a day or two.
- Decide on a way forward with the staff member, including the provision of any further assistance or support or making any adjustments. Record in the improvement action plan.
- Tell the staff member if a verbal or written warning will be issued. Provide them with a written warning using the template warning letters, or record a verbal warning in the personnel record.
- Explain what will happen next if the staff member’s performance doesn’t improve (e.g. a further warning, etc).

Step 9: After the meeting
- Confirm the outcome of the meeting in writing and invite the staff member to respond. Include:
  1. What was discussed (including any issues raised by the staff member).
  2. What the staff member needs to do to improve their performance.
  3. Any support or assistance that will be provided.
  4. Whether a verbal or written warning was, or will be, issued.
  5. What will happen next if the staff member’s performance doesn’t improve.
- Keep thorough notes of the meeting(s) and copies of any letters, emails or warnings, and sign and date these documents. Ask the staff member and any witnesses to do the same. If the staff member refuses, make a record of the refusal.
- Give the staff member a reasonable period of time to improve their performance (typically 6-8 weeks).
Regularly check-in with the staff member over that period to discuss how they're progressing.

Formally meet with the staff member again at the end of the period to review their performance.

If the staff member’s performance has improved enough, close the process. Follow up in writing and clearly explain that they must maintain the improvement.

If the member’s performance hasn’t improved, consider taking further action and consult with Hardi Aged Care Human Resources Manager.

Further guidance during meetings with staff members:
1. Another management person should be present as management’s witness. This person should maintain an observatory role only, unless directly involved in working with the staff member.
2. The meeting should be held in a private room where other staff cannot see or hear. Two members of the Management Team are to be in attendance. Minutes of the meetings should be taken.
3. Only items covered by the meeting agenda should be discussed. The staff member should be asked questions relevant to the allegations of poor performance or misconduct, and in relation to the witness statements.
4. Mitigating circumstances need to be taken into account. These include the seriousness of the problem, duration of the problem, frequency and nature of the problem, staff member’s work history, factors outside of the staff member’s control, degree of warning (is this the first, second or third time the staff member is being addressed?), history of the organisation’s disciplinary process, implications for other staff, senior management support.
5. Where the problem is poor work performance, state where the staff member’s performance falls short of the standard contained in the staff member’s Position Description and Job Routines, and specifically note the shortcoming.
6. If the meeting relates to poor work performance the employer should ascertain from the staff member how the organisation could assist the staff member in performing their job adequately. It is the management’s responsibility to provide extra training for the staff member if it is required.
7. In the case of misconduct, it is useful to describe the member’s conduct as being in breach of Hardi Aged Care policy, citing the relevant policy.
8. The staff member should be given the opportunity to respond to the allegations made against him/her. If the staff member’s explanation is reasonable, then disciplinary action is not an option.
9. If the staff member’s explanation is not reasonable, disciplinary action may follow. Additionally the employer may seek recourse via other methods such as placing the staff member under observation or close supervision.
10. Where performance deficiency is the issue, dates for appraisal or “improvement checks” should be set. These dates should be agreed to in the minutes. Management should clearly outline all expectations.
11. The minutes taken at the meeting should reflect the outcome of the meeting, disciplinary action (if any) taken, details of the points discussed, questions and responses should be noted, dated, signed by all parties present (and by any witnesses) and filed. The staff member should be given a copy of the minutes.
12. In cases where the staff member refuses to sign the record of interview, it is a good idea to request that the support person sign a document that states that the staff member did attend the interview. A letter confirming what was discussed at the interview should also be sent to the staff member.

OUTCOMES
Subsequent to the holding of a counselling/disciplinary meeting, the employer retains the discretion to enforce disciplinary action. Alternatively, the employer may feel that disciplinary action is not warranted on this particular occasion.

The Verbal Warning
The verbal warning is often considered the very first step taken in any disciplinary process. Verbal warnings may be applied where a staff member is being addressed on a deficiency for the very first time and where Management do not wish to formalise the process to the extent where a formal written warning is issued and placed on the staff member’s file. Verbal warnings often co-exist with disciplinary action such as change of shift or working with close supervision for a set period of time. All this should be recorded on a Staff Communication Form.

Warning Letter – First and Second Formal Warnings
A written formal warning is often considered the second or third step in a disciplinary process, although sometimes Management prefer to issue a written formal warning as the first step. This is because it is considered safer to place everything in writing. The written warning should refer to the meeting held with the staff member, and must also state that it is a written warning.

All warning letters should clearly identify:
- What the staff member has done wrong, how they have breached certain obligations;
- Time, place, date of the meeting and all parties present;
- How the staff member is to perform his/her job in the future OR expected acceptable behaviour;
- That it is a warning letter;
- Reference to previous verbal/written warnings;
- Consequences to the staff member if there is a further breach – that is (if it is the case) warnings should state that non-improvement in performance or further misconduct may lead to dismissal from employment. As a general rule, first written warning should make reference to further disciplinary action and possible dismissal, second written warnings should state that dismissal will definitely take place if behaviour/poor performance continues;
- A date on which the improvements of poor performance (or incompetence) will be reviewed;
- Reference to the staff member’s explanations given during the meeting should be made and dismissed as being unacceptable.

Warning letters are an important part of the dismissal process and should be drafted carefully. If the dispute ever goes to court, any warning letters will be scrutinised. It is important to seek senior management assistance, and as appropriate legal assistance if you have any concerns.
Final Written Warning

Final written warnings usually arise where a first and second warning have already been issued to the staff member.

- If the staff member’s performance does not improve, or there is another occurrence of misconduct, then a final written warning may be given to the staff member. The process outlined for the first written warning would apply.
- The final warning should state clearly that this is the final warning and that if the staff member’s performance or conduct does not improve then employment will be terminated. Once again a meeting should be held to allow the staff member a chance to respond.

Employers should note however, that a “First and Final Warning” may be issued depending upon the degree and seriousness of performance deficiency or unacceptable behaviour.

Dismissal – Termination With Notice

- Where a staff member’s conduct or performance does not improve following a final warning, then the staff member may be dismissed. The manager must discuss this with the Human Resources Manager prior to any decision to dismiss a staff member. Termination of employment must be authorised by the Hardi Aged Care CEO.
- Where the conduct or performance of a staff member warrants dismissal, the staff member must still be provided the opportunity to defend their actions. Therefore, a meeting must be called and guidelines followed. Call a meeting in private and let the staff member know that in accordance with their last warning, continued unacceptable behavior or poor performance would warrant dismissal. List the allegations or deficiencies in the staff member’s work performance and again give the staff member an opportunity to respond.
- Terminate the meeting and consider the staff member’s response or any other reasons the staff member feels that he/she should not be dismissed. If dismissal is appropriate, prepare a letter of dismissal. Letters of dismissal are not to be prepared prior to any meetings as this indicates pre-determination of the situation without proper consideration of the staff member’s view point. It is our policy to provide all staff members with every opportunity to explain their actions. Consider whether you require the staff member to work out their notice period. If you do not, the employer may give the staff member payment in lieu of notice.
- The letter of termination must be as detailed as possible, outlining all previous meetings and warnings relating to the problem area(s). This letter must also contain a date of termination, a breakdown of final moneys paid (if notice is not worked out), any accrued entitlements owed and a date when money should be expected in the staff member’s personal account. A Separation Certificate must also be included.

In the case of more serious incidents of misconduct, the disciplinary procedure may commence from the first written warning or even the final warning. Remember, a dismissal may be justified in the mind of any employer but it is essential that there is:

- A good reason for dismissal; and
- The correct procedures must be followed in dismissing the employee.
Summary Dismissal – Termination Without Notice
Summary dismissal involves termination of the employment contract without notice. Again, the manager must discuss this with the Human Resources Manager prior to any decision to dismiss a staff member. Termination of employment must be authorised by the Hardi Aged Care CEO.

Summary dismissal is confined to cases where serious and willful misconduct has taken place. Current tests or conventions as to conduct which justifies summary dismissal include but should not be limited to theft, fraudulent activity, slander, threatening, causing harm or injury to another person in the workplace, elder abuse including physical, sexual or financial assault, extreme verbal abuse, intoxication, unauthorised administration or theft of restricted drugs, professional misconduct, bullying, harassment, deliberate destruction of Hardi property, severe breach of contract and refusal of duty. The employee’s contract of employment should, in most circumstances, contain further actions which the company will not tolerate, specific to that particular organisation’s operations.

Where summary dismissal occurs, the serious and willful misconduct of the employee must be proven OR appear to have definitely taken place, based on the balance of probability.

Termination without notice for serious and willful misconduct can be difficult. It is not appropriate to let the person continue at work, as this may jeopardise the justification for summary dismissal by condoning the conduct. On the other hand, to summarily dismiss an employee without proper preparation and a full investigation of the matter, may create a situation where the Fair Work Ombudsman may easily uphold an unfair dismissal claim.

In this situation it is generally best to suspend an employee on full pay while the matter is being investigated. The pre-meeting and meeting checklist must still be adhered to, however, rather than have the employee at work, they will remain on paid suspension until the investigation is complete. The employee should be advised in writing of the allegations, the investigation and the need for paid suspension, for their protection as well as the organisation’s.

In all events where actions appear to warrant summary dismissal, the employer must act as expediently as possible. Investigation must take place as soon as allegations are brought to the manager’s attention – which could mean the employee in question may face immediate paid suspension.

Acting upon allegations, weeks and months after the serious and willful misconduct has taken place is not acceptable.

All processes, interviews and letters in cases of serious misconduct resulting in summary dismissal, must be fair and reasonable in the circumstances. Employers will need to prove that the employee’s misconduct was so serious that the action of the employee led to the conclusion that he or she no longer wished to be bound by their employment contract and that the confidence and trust that an employer is entitled to have in the employment relationship has irretrievably broken down.

Employers should give employees warnings in writing before ending their employment. If a business does use warnings they need to make sure:
they are clear about the reason for the warning
they write down all the details
they set clear expectations about what needs to be done differently
that the warning is fair and reasonable in the circumstances.

For specific advice about using warnings and terminating staff, it’s best to get independent advice from an employer association or lawyer.

Where payment of notice is required, the conditions of the *Fair Work Act 2009* and the Hardi Group Enterprise Agreements shall apply.

These guidelines have been developed with reference to:

CHECKLISTS:
Pre-Meeting Details *(tick as completed)*:
- 1. Staff member provided with 48 hours notice of the intended meeting
- 2. Staff member advised of the reason(s) for meeting
- 3. Agenda for discussion provided
- 4. Staff member invited to bring support person
- 5. If all of the above was placed in writing, attach copy
- 6. If required, copies of witness accounts supplied
- 7. If required, copies of other documentation of events supplied
  - i) ‘Counselling or Fact Finding Meeting Letter’ requiring staff member to attend OR
  - ii) ‘Paid Suspension Letter’ confirming paid suspension followed by, ‘Counselling or Fact Finding Meeting Letter’ requiring staff member to attend

Post-Meeting Details *(tick appropriate follow-up actions)*:
- 1. Staff member provided with a copy of ‘Record of Counselling Disciplinary etc Letter’
- 2. Counselling
- 3. Re-education and training
- 4. Working under close supervision
- 5. Re-rostering of shifts
- 6. Verbal warning – must be documented on record of meeting
- 7. First formal written warning
- 8. Second formal written warning
- 9. First and final written warning
- 10. Final warning
- 11. Dismissal with notice
- 12. Summary dismissal
- 13. Other written warning