dk LEGAL

Navigating Mental Health During Termination Processes

A case for deploying respectful responses to claims arising from termination, where the applicant is demonstrating mental health vulnerability.

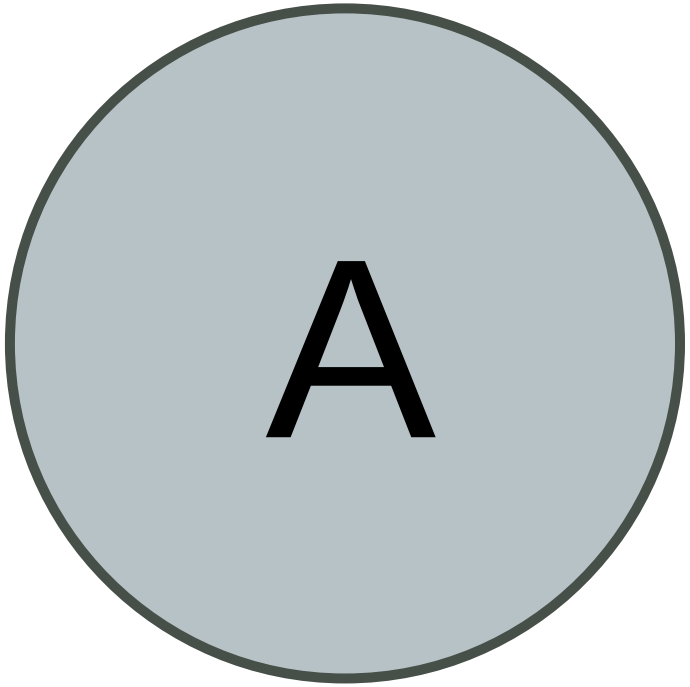
Presented by Danny King

What is “mental health”?

Humans are important, and a bit of extra effort can make a huge difference to another person’s quality of life.

Language is important

Mental Illness



Clinically significant disturbance in an individual's cognition, emotional regulation, or behaviour. It is usually associated with distress or impairment in important areas of functioning.

Anxiety disorders

Eating disorders (for example anorexia or bulimia)

Mood disorders (for example depression or bipolar)

Personality disorders (for example borderline personality disorder)

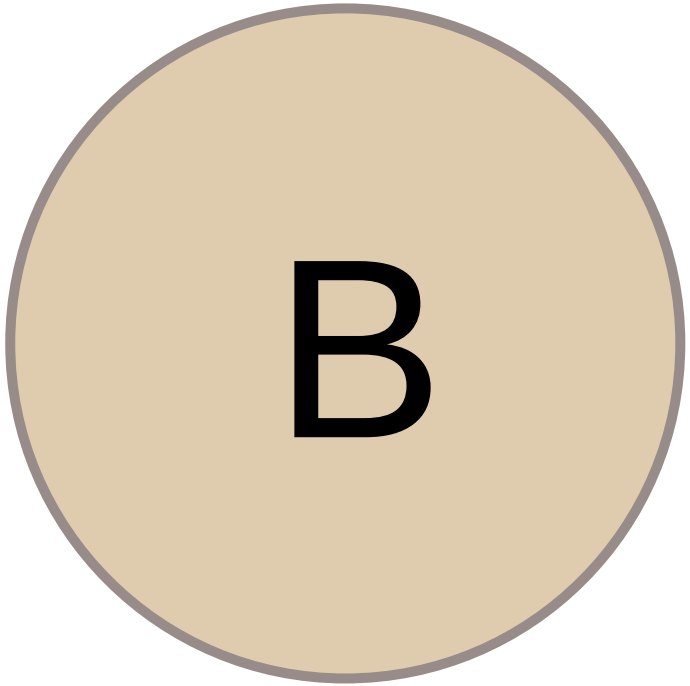
Psychotic disorders (for example schizophrenia)

Substance abuse disorders (for example drug addictions)

Trauma-related disorders (for example post-traumatic stress disorder)

Language is important

Neurodivergent



Having a brain that functions in ways that diverge significantly from the dominant societal standards of "normal" (or neurotypical).

Innate neurodivergence is life-long, and impact on how an individual interacts with the world. E.g. Autism, dyslexia, or ADHD.

Neurodivergence arising from alterations in brain functioning can occur from an event that changes the brain, such as trauma.

Multiply neurodivergent is the combination of different aspects of neurodivergence.

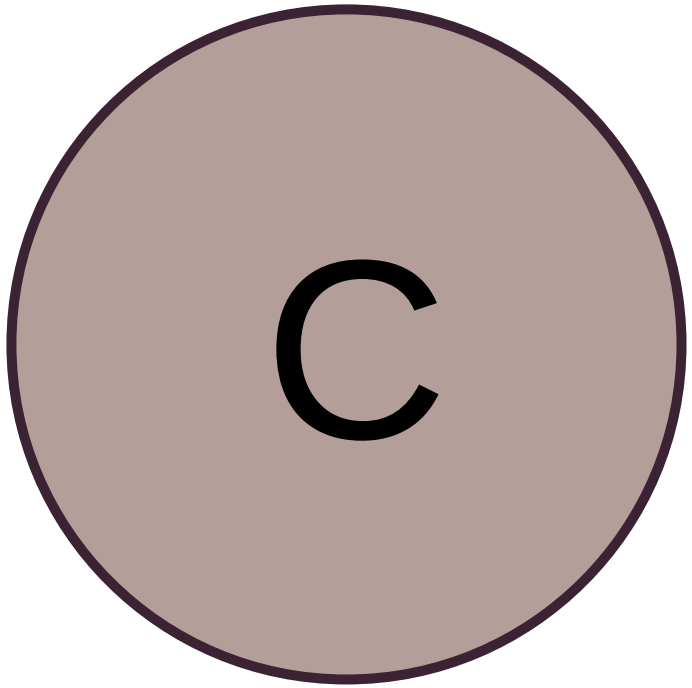
ADHD

Autism Spectrum Disorder

https://www.planetneurodivergent.com/neurodiversity-and-neurodivergent-basic-terminology/

Language is important

Psychosocial disability



A disability that may arise from a mental health issue (including mental illness and neurodivergence). Not all people with mental illness or neurodivergence have a psychosocial disability.

A psychosocial disability may restrict a person's ability to:

Be in certain types of environments

Concentrate

Have enough stamina to complete tasks

Cope with time pressures and multiple tasks

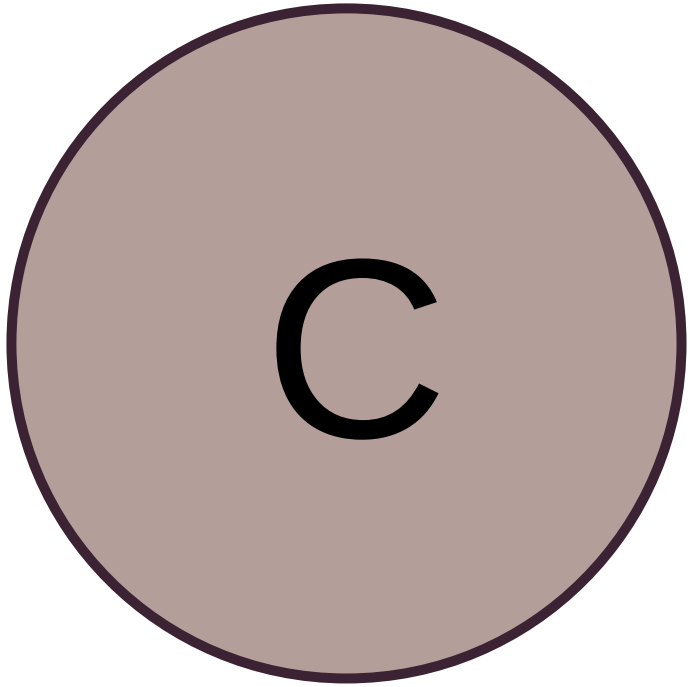
Interact with others

Understand constructive feedback

Manage stress

Language is important

Psychosocial disability



Prevalence

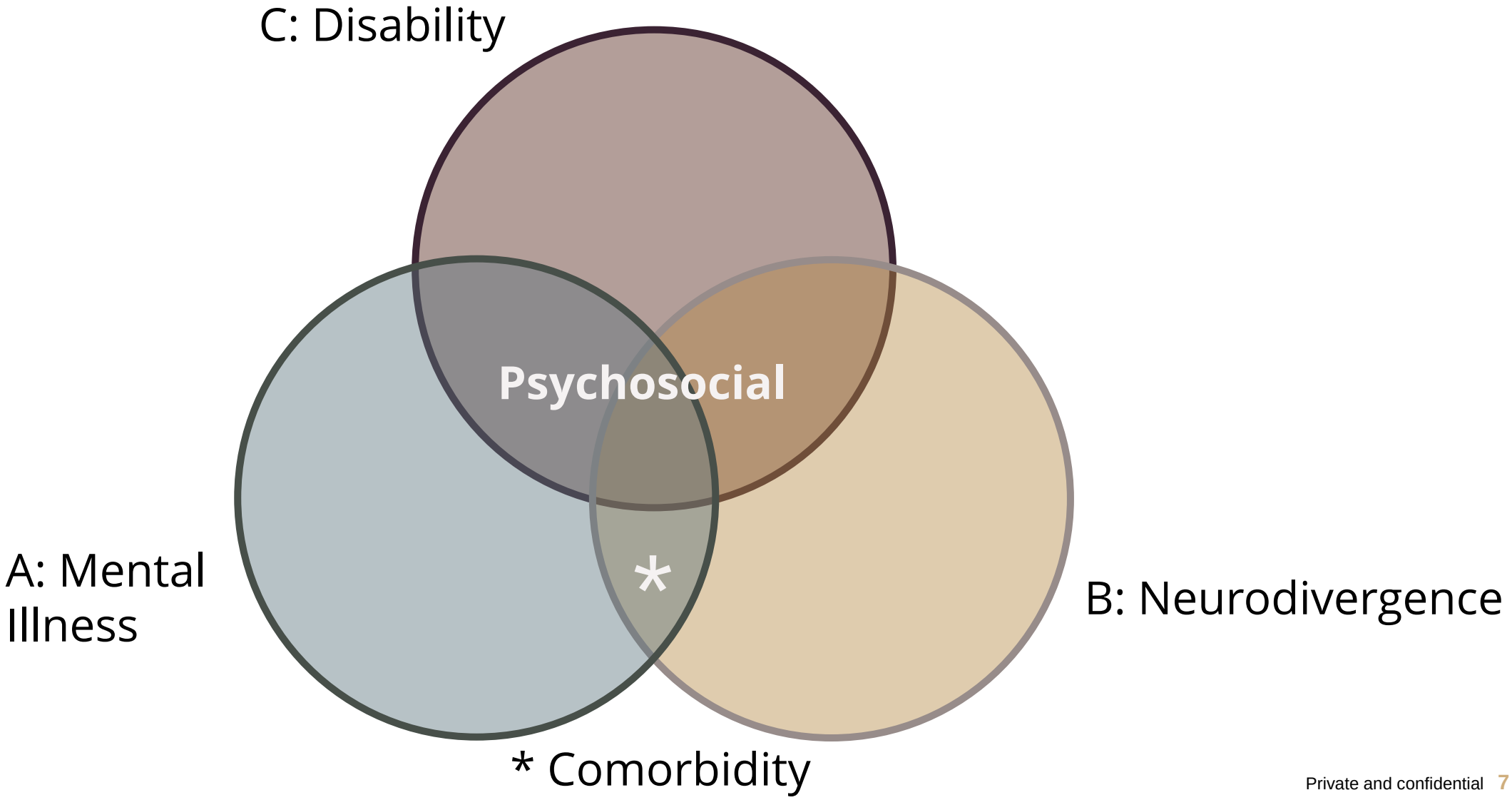
In 2018, of the 4.4 million Australians with any disability over one-quarter (26.0%) had psychosocial disability:

- 1,137,800 people, up from 1,045,900 in 2015
- 4.6% of all Australians, similar to 2015 (4.5%)
- 85.5% of those with psychosocial disability (972,100 people) had at least one other disabling condition
- 14.5% (165,400 people) had no other disabling condition, that is their psychosocial disability was their only disability.

https://www.abs.gov.au/articles/psychosocial-disability

Understanding interactions

Not to scale

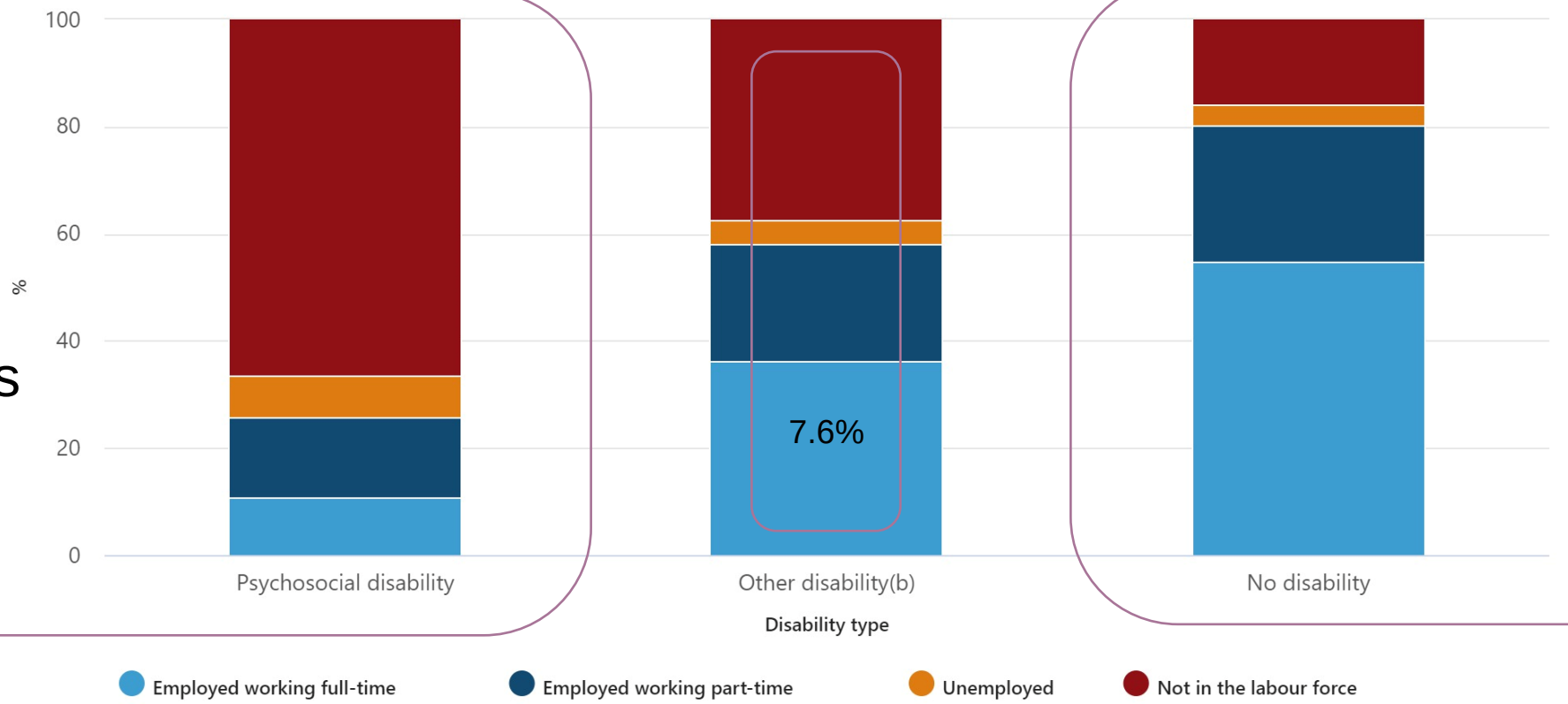


Impact for workforce

Graph 7. All persons (a) aged 15-64 years, labour force status by disability type, 2018

1.1 million people

4.6% of Australians



20.3 million people

88% of Australians

a. Living in households
b. Excludes all people who have a psychosocial disability, regardless of whether they also had another disability
Excludes all people who have a psychosocial disability, regardless of whether they also had another disability

Source: Australian Bureau of Statistics, Psychosocial disability 25/09/2020

Identifying mental health risks in employees, and increased stressors in termination contexts.

You are not a doctor – better to assume everyone has sensitivity and accommodate for that.

Who is this aimed at?
Employers and their HR management, This presentation speaks to roles who must conduct performance management

Who is this about?
All people in the office at all levels.

What are we suggesting?
Apply best practice in all termination processes to actively support the mental health of all employees.

Why bother?
Risk reduction; brand protection and ensuring inclusivity at all stages of employee/employer relationship lifecycles.

How do you do it?
Slow down, skill-up and listen.

Legal Minefield

- Implied duties – under contract and/or tort law
- *Fair Work Act 2009* (Cth) (including unfair dismissal, general protections and bullying)
- *Work Health and Safety Act 2011* (NSW) (and equivalent)
- *Workers' Compensation and Rehabilitation Act 1987* (NSW) (and equivalent)
- *Racial Discrimination Act 1975* (Cth) – incl criminal liability under racial vilifications provisions
- *Sex Discrimination Act 1984* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Age Discrimination Act 2004* (Cth)
- *Human Rights and Equal Opportunity Act 1986* (Cth)
- *Anti-Discrimination Act 1977* (NSW) (and equivalent)

Context and sources of risk

The risk employers exist in:

- The landscape of employer obligations is a complex mix of federal legislation, state legislation and diverging caselaw
- Increased employee awareness and enforcement of rights
- The nature of work is changing, and our expectations of work are changing
- Mental health is not a static state, and is not always able to be seen
- Performance management is a necessary part of an employer's role which is confronting – even without mental health concerns
- Termination of employment is inherently stressful for the employee

Conduct vs Performance

Performance

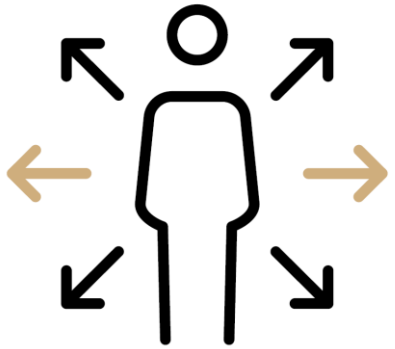
What an employee does – relates to tangible work outputs, and failure to meet required performance standard – e.g. dropping the ball, not meeting expectations, deadlines.

Conduct

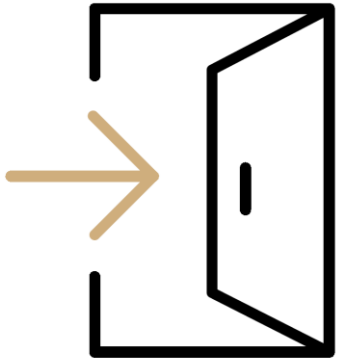
How the employee performs their role – standards of behaviour, and employee attitude – e.g. being rude or inappropriate with a client, taking liberties with stationery.

- Often overlap between the two
- Conduct or performance could be symptomatic of an illness.

Why Performance Manage?



Performance management isn't about managing people out, it's about getting the value out of your resources.



It can be very costly to replace an employee who doesn't have to leave.

Performance management can and does achieve results.

By getting the process right, you manage your risk.

Compliance Culture vs Best Practice Culture

- People remember how they experienced a process, rather than what was actually said or done.
- A strictly compliance-based process will not inspire trust or engagement.
- Developing a Best Practice Culture should be a key focus.

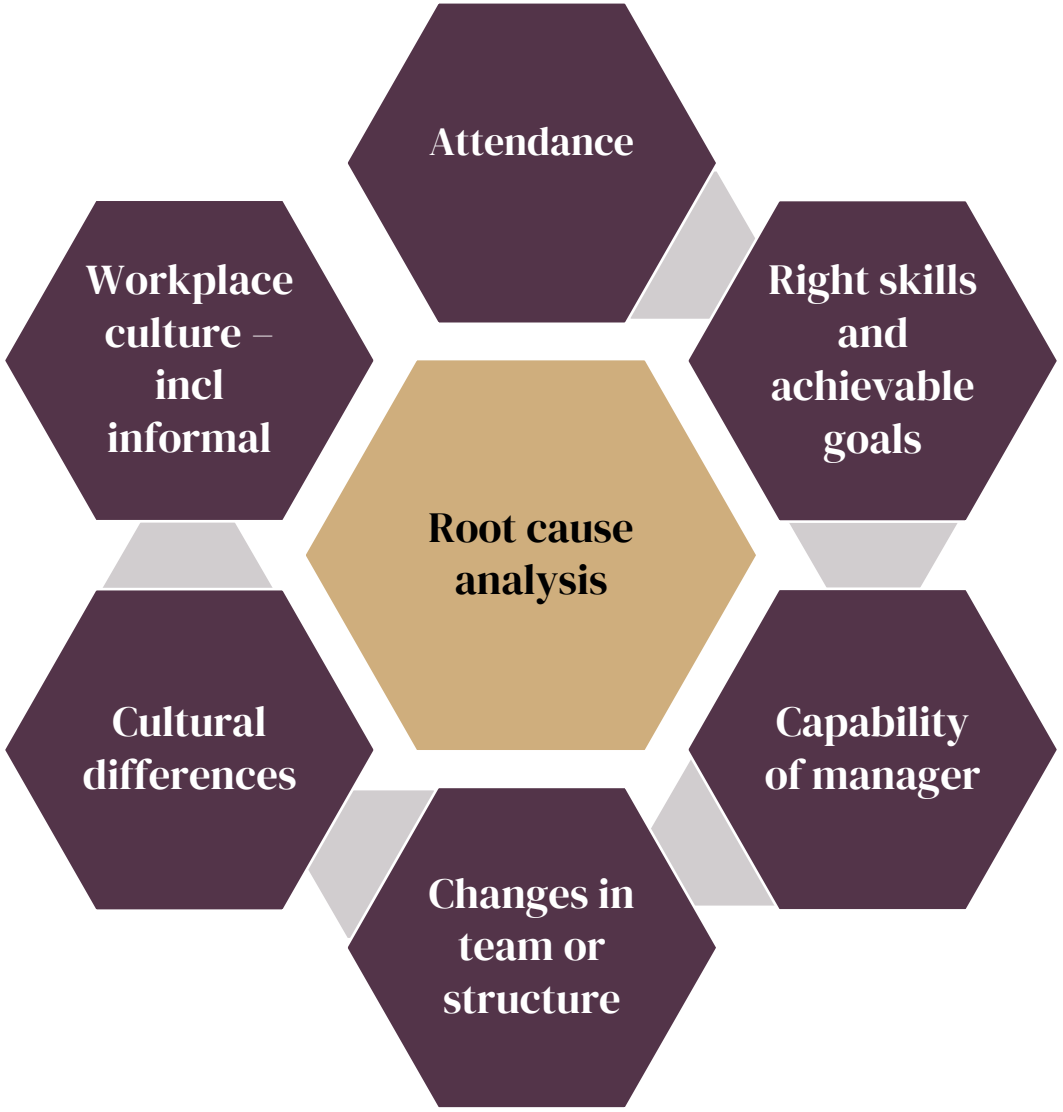
Mindset

- Adopt a positive growth mindset
- Assume others have a positive intent
- Suspend judgement – maintain an open mind
- Conduct yourself with integrity

Guiding Principles

- Focus on the whole person, not just an incident
- Be transparent and consistent about the process
- Create opportunities for people to tell you what the problem really is
- Obtain multiple inputs of data, and test your hypotheses
- Be impartial in the process – separate investigator from decision maker
- Be gentle and respectful
- Give people time and space – don't rush

Consider other causes



Best Practice Culture: Procedural Fairness

What	How
Ensure the employee understands the consequences of not meeting expectations	• Be clear and transparent, don't hide the worst case outcomes. • Cover off in policies and in the process itself. • Repeat consequences at each step – don't rely on single statements as covering this need.
Ensure employees understand what is expected of them	• Have clear and consistent policies relating to workplace standards. • Ensure your employees have up to date position descriptions and KPIs and understand what is expected of them in their role. • Take extra care: give them more time to ask questions, slow the process down, schedule extra meetings, where early indications of performance or conduct concerns present.
Support person	• Even though this is not a requirement, ALWAYS offer and facilitate the employee having a support person with them – don't be silent or assume the employee knows to ask for what they need. • Take extra care: if necessary, reschedule meetings and discussions to accommodate the support person's availability.
Give the employee the opportunity to respond	• Consider the particular needs of the employee, and any information processing impairments. • Ensure they understand the issues being raised. • Offer them more time to respond, give them the opportunity to clarify the process and ask questions.
Give the employee the opportunity to improve	• Ask what the employee needs to be able to improve and listen to what they say. • Ensure the employee has all the necessary resources to improve. • If there are any medical reasons preventing/slowing their improvement, provide support to accommodate these – obtain medical evidence, as necessary.

Best Practice Culture: redundancy processes

- Consider impact on individual first, and adjust process to accommodate
- Be generous with time for consultation
- Ensure information or changes are meaningfully understood
- Try very hard to redeploy
- Buy-in great outplacement/career transition support

Risks and Pitfalls

Speed
Moving too quickly, or with inadequate evidence to support the decision – might suggest you have prejudged, and if the employee has a protected attribute, this may result in a claim.

Care
Employee has previously put you on notice that they may have a health issue (e.g. by taking sick leave) but you missed that detail and so didn't adjust the process as needed.

Luck
"Eggshell Skull" rule – (subject to a few statutory modifications) you take your employee as you find them – if the impact of performance management on your employee is catastrophic, for reasons unrelated to your process, this can be very expensive bad luck for both parties.

Avoiding the land mines

Unfair Dismissal	General Protections	Bullying	Discrimination	Workers' compensation	Work Health and Safety
Valid reason	Adverse action	Reasonable management action	Was protected attribute a reason?	Performance based concerns	Process implemented responsible
Procedurally fair	**Unrelated to workplace rights**	**Implemented reasonably**	Reasonable adjustments	Reasonable management action	**Reasonably practicable care**
			No indirect disadvantage	**Implemented reasonably**	

It's all about the *what* and the *how*

Preventative measures: creating a positive workplace culture

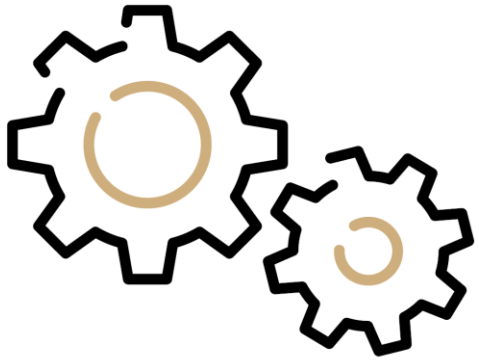
- Carrot instead of the stick: reward, support and encourage good performance
- Create an “everyday feedback” culture
- Provide training for your staff, especially managers
- Mental Health First Aid
- Have up-to-date policies on performance management, acceptable standards of behaviours and discrimination
- Provide access to an Employee Assistance Program (EAP) or equivalent support
- Internal and external support networks
- Be respectful, on purpose, all of the time

What not to do

Don't:

- × Advertise someone's role while they are still in it
- × Make a decision before you have completed the process
- × Discuss it with people other than those who need to know
- × Use performance management in retaliation
- × Make decisions based on medical condition without medical evidence
- × Threaten people with termination

Summary – key messages



Compliance is the minimum, best practice is the aim

Remember there are humans involved, and how scared they may be

Approach the process with integrity, awareness and care

Be respectful of the needs of each individual and overcompensate if in doubt

Gift: Model for giving feedback

Situation	Example
Set scene of the need to address the issue	"I'd like to give you some feedback on the meeting we had today, so that you can reflect on it before the next meeting."
Talk to the skills and behaviour identified	"Specifically, what I noticed was…"
Outline the impact of the behaviour	"The result of this was that…"
Ask for input, and invite action	"What is your view? How do you think you might approach it differently?"
Ask for permission, and propose alternatives	"Can I make a suggestion? Perhaps if you did….then you might get….as the result."
Agree actions and seek commitment, offer help and confirm review	"What do you think you can reasonably commit to doing differently next time?"
Offer help	"Is there anything you need from me to support you to do that?"
Confirm review	"Let's get together to review this again in a fortnight."

Gift: Diffusing defensiveness in others

Steps	Example
Interrupt the pattern by interrupting the dialogue	"Name [pause], I want to stop the direction this conversation is going in [pause]."
Acknowledge their reaction and clarify your intent	"It is not my intention to blame or criticise you [pause]. I'm simply trying to understand what happened, so that we can develop a plan to fix it [pause]."
Move back to the issue, but remember to come from a place of sincerity	"So let's start again. I need to understand …."
If the conversation is back on a constructive path, seek ownership	"So what you're saying is that you had planned to come back to this once you had [finished reviewing the budget]."
OR if the person is still showing signs of defensiveness, defer the discussion to a later time	"I can see that you are still feeling upset with this discussion. Rather than continue when you're feeling this way, I think we should pause this conversation, and when you're feeling like you can have a constructive conversation of the issues, lets reconvene."

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