

MANAGING POORLY PERFORMING EMPLOYEES WHILE AVOIDING STRESS AND DISCRIMINATION CLAIMS

When implementing steps to manage a poorly performing employee, an employer must ensure that the procedural fairness principles as outlined in the Fair Work Act 2009 (Cth) are followed to avoid a subsequent stress/anxiety related illness claim

An employer must also avoid performance managing an employee based upon any of the personal attributes as outlined below to prevent a discrimination claim.

How to avoid a stress/anxiety related illness claim resulting from a procedurally unfair process

When requesting an employee to attend a disciplinary meeting and/or undertake performance management, the following guide will assist to ensure that employers satisfy the procedural fairness requirements and minimise the risks of a subsequent stress/anxiety related illness claim:

1. Request the employee attend the performance management discussion. Advise of the location and time in advance.
2. When inviting the employee to the meeting, afford them the opportunity to bring a support person.
3. Prior to the meeting, draft a clear outline of the identified performance issues that you will be discussing. Group these issues together (ie. team work, customer service, absenteeism).
4. Prepare for the meeting – know the issues, provide examples, put bullet points in order and refer to them often so that you stay on track.
5. When commencing the meeting, explain the structure of the meeting:
 - a. Introduce all parties and their role, eg. the manager, support person etc;
 - b. Identify the employee's performance issues;
 - c. Provide the employee an opportunity to respond (they may wish to confer with their support person privately before responding); and
 - d. Offer a commitment from management as to how you can support the employee to improve the situation.
6. Agree on how to go forward by developing a structured performance management plan with:
 - a. Timeframes;
 - b. Review periods;
 - c. Expected outcomes;
 - d. Training and development; and
 - e. Mentoring.
7. All parties need to commit and sign off on the performance management/improvement plan. The employee must receive a copy of the plan.
8. Note: the employee should be given an opportunity to have 'buy-in' to the performance management/improvement plan. While the manager may outline some necessary points, ask if the employee has any further suggestions. Let the employee have a few days to consider the draft plan before finalising it.
9. If the employee's performance does not improve within the timeframe, disciplinary action (ie. a formal written warning, termination of employment) may need to be taken.



Most importantly, you must document the performance or disciplinary process (particularly the performance management meeting) as you may need to rely upon this information to minimise any risk of a stress/anxiety related illness claim as a result of the performance management.

How to avoid discriminating against the employee

An employer is prohibited from performance managing an employee based upon their:

- race
- colour
- sex
- sexual orientation
- age
- physical or mental disability
- marital status
- family or carer's responsibilities
- pregnancy
- religion
- political opinion
- national extraction or social origin

If the reasoning behind the performance management is not related to any of the above personal attributes, the basis of the action may not be considered unlawful discrimination.

This document is intended for general information purposes only and should not be regarded as legal advice. Please contact Employer Assist by Industry Legal Group for any legal advice.



AAAA Member Benefits

Employer Assist provides AAAA members with advice and assistance in relation to any issues that arise in their workplace. It can assist you through disciplinary and performance management processes.

Contact Employer Assist on 1300 735 306 or aaaa@employerassist.com.au if you require any assistance.