

Factsheet Nineteen

Performance Management

Employees have a responsibility to follow reasonable directions given to them by their employer, and to follow their employer's policies about how work is performed and how people conduct themselves in the workplace. Equally, employers have a responsibility to provide clear instructions and guidelines, and adequate training to enable their employees to work in a safe manner and to the standard required.

Sometimes an employer may consider there is a problem with the way an employee is performing their work, behaving in the workplace or receive a complaint about an employee. When this happens, the employer will follow their 'disciplinary process' or 'performance management' policy (if they have one), this is likely to be commenced by inviting the employee to a meeting.

Disciplinary Meetings

Your employer may request you attend a disciplinary meeting to discuss allegations of misconduct or performance concerns. This is a reasonable and lawful directive; however, your employer needs to ensure they follow procedural fairness. That is the employer should provide you with at least 24 hours' notice of a disciplinary meeting.

It is important to note that you are not obliged to attend a meeting at a time that is not possible for you. This can be due to sickness, a rostered day off, caring responsibilities, or the meeting being held outside your working hours. If this is the case, you have a right to ask your employer to reschedule the meeting, and suggest another time when you can attend.

I have been asked to attend a meeting in fifteen minutes, what should I do?

While you should be given adequate notice of any disciplinary meeting to discuss your employment, sometimes this does not happen. If your employer insists that you attend a meeting at short notice, then you should go but only listen to what they have to say and

find out as much as possible about why they have called the meeting. Try not to answer any questions, unless you are very confident about your facts.

If they do not provide you with clear allegations with specific details – you can request this in writing and advise your employer that you will respond in writing.

Am I entitled to take a support person?

You have the right to take a support person to any meeting with your employer. This can be a friend, or family member or you can request to bring a trusted co-worker but it is important this person does not have a conflict of interest. If you are a union member you can bring a union official.

If you need an interpreter, then they should either arrange for one, or allow you to bring someone who can interpret for you.

If your employer unreasonably refuses your request to bring a support person, and later terminates your employment, their refusal will be considered in any Unfair Dismissal application you make.

What does a support person do?

A support person is not there to advocate for you, and they are usually not allowed to speak, but they can provide you with valuable moral support and be a witness to what is said and done. They may be able to speak up if you become very emotional, or to clarify things if you are struggling to understand what your employer is saying, or to convey what you wish to.

It is best to take someone who is able to remain calm, will be confident to speak up if you need a break or other assistance, and can take good notes. It is also helpful if they have a good understanding about workplace rights and will identify if your employer is not doing the right thing.

Can I tell anyone?

Employers will often state in any letter inviting you to a meeting, that you are not to speak to anyone about the content of the letter, and that if you do you may face further disciplinary action up to and including termination.

There are good reasons to keep the content of disciplinary meetings confidential. It is best to comply with a direction not to discuss the matter with any colleagues, however you cannot be prevented from seeking advice. You are entitled to speak to your union, a lawyer, or the NTWWC.

What should I do before a meeting?

It can be stressful going to a meeting to discuss your employment, so it is important to be as well prepared as possible. When you are asked to attend a meeting, you should be told what the meeting is about, when and where to attend, who will be there, whether you can bring a support person and whether there are any relevant documents that will be referred to. Relevant documents might include HR policies, job descriptions, a Code of

Conduct, a complaint summary or others. It is okay to ask whether there are any and request a copy. Read any relevant documents you are given and make notes about any discrepancies or important facts.

You should have clear information from the employer about what the topic for discussion is. If the meeting is in relation to an incident or complaint and you know what they are referring to, write out your version of events as factually, clearly and in as much detail as you can, and take your notes with you. Your support person can discuss the allegations privately with you.

If the meeting is about your performance, do you know why? Look at your job description and contract to see what is expected of you. Consider whether you have been fulfilling the role as you understand it. Think about whether you have been trained properly, or if there is any support you have asked for and not received. If you have ideas about what can assist you to improve your performance, write them down and suggest them to your employer.

If you are aware your performance has slipped lately but there is a good reason then you might wish to share that with your employer. Most employers will be understanding when personal hardship impacts on work, and they may be able to provide additional support while you need it.

If you don't believe there is anything wrong with your performance, is there any evidence you can present to support that view, such as positive customer or client feedback, sales figures, KPI reports? Think about it and go prepared.

I've had time to prepare, but what should I do at the meeting?

Try not to get emotional during the meeting and remember you can request a break if you feel yourself getting angry or upset. If you are taking a support person they can take notes and discuss the allegations privately with you. If you become overwhelmed and have trouble responding, a support person can clarify your responses for you. You and your support person may agree on a signal you can use so they can request a break for you.

Your employer may have someone at the meeting taking minutes, but you can also take your own notes. This is a good job for your support person.

If you had enough information prior to the meeting to prepare thoroughly, then it can be a good idea to provide a copy of your statement as well as responding verbally at the meeting. If it is a first meeting, and you only receive detailed information once there, then arrange to provide a thorough written response later (which may be at a second meeting).

At the meeting:

- You are entitled to respond to the allegations raised and your employer must consider your responses when determining the outcome of the meeting;
- Only answer questions if you are sure of your answer. If you have any doubts, say you don't know and will have to think about it;

- Keep your answers concise and to the point;
- Be factual and only address the allegations raised;
- Be accurate. Don't be tempted to exaggerate or make things up;
- You can request your employer view CCTV footage if you believe it supports your responses;
- If your employer has mentioned reviewing CCTV footage, you can also request to view this before responding to allegations;
- Don't agree with anything that you do not know from your own experience to be true;
- If you need more information before you answer a question, say so and ask for what you need;
- If there are other documents or records that may provide the answer, or evidence of what you are saying, provide or direct your employer to them;
- Don't be rushed or pressured into saying things you don't believe or aren't sure of;
- Ask for a break if you need one, especially if you're feeling emotional;
- Ask on what basis they are making allegations, and request any evidence they have;
- It is also good to highlight a record of good behaviour or raise any mitigating circumstances which may have led to the incident in question;
- Ask what process they are following, what will happen next, and what the possible consequences for your employment are.

It is in your best interest to cooperate with your employer and participate in the meeting to your best ability; however, you also need to protect yourself. If the matter has implications outside the workplace, such as criminal charges, then you should seek legal advice before attending a meeting.

Can I record the meeting?

Modern technology makes it easy to record conversations secretly, but it is not a good idea to do this, and you should always seek permission first if you wish to record a meeting. Your employer does not have to agree to this.

Although the *Surveillance Devices Act* (NT) allows parties to a private conversation to record it without permission, if it is to protect their legal interests, it is not advisable. The Fair Work Commission has found in a number of cases that doing so breaks the necessary 'mutual trust and confidence' between an employer and employee, and have declined to order reinstatement or compensation for dismissed workers who have sought to use secret recordings as evidence.

Some employers will tell you they wish to record the meeting and if they do, you should ask for a copy of the recording and any transcript made of it, or say you would also like to record it.

Do I need to do anything after the meeting?

It is important to ensure there is a shared understanding of what has occurred at a meeting, so it can be a good idea to follow up with an email, outlining what was discussed and what is to happen next. Many employers will do this and if that is the case then you may not need to - but ensure you reply if you don't believe their account is accurate, providing your version.

Even if you provided a verbal response to the issue at the meeting, it may be a good idea to also provide it in writing, particularly if you have any concern about your information being considered. If you did not respond at the meeting, then make sure you provide your response in writing in the agreed timeframe.

If you weren't given clear information at the meeting about what process is being followed and what the possible consequences are, then follow up requesting that information in writing.

Performance Management

Each employer has different approach to determining disciplinary outcomes. It is best practice for an employer to have a clearly defined disciplinary process to ensure both the employer and employee are aware of the processes in place when issues in the workplace emerge.

There are many reasons an employer may wish to speak with you about your performance. If you are invited to a meeting to discuss your performance, don't panic. It may be a simple matter of clarifying expectations, or you may be able to allay their concerns by showing that you have been doing your job correctly.

If your employer does have genuine concerns about your ability to do your job, or the standard of your work, then they need to raise them with you. You should be given clear information about what their expectations are, what their concerns are, and given an opportunity to respond.

You should also be given clear information about what you need to remedy or improve in order to meet the requirements of your role. You must be given reasonable opportunity to make any changes or improvements, which may involve the employer providing you with additional training or support and allowing you a reasonable time in which to improve. Sometimes employers will use a Performance Improvement Plan (PIP), which should clearly set out what is required and how your progress will be monitored and assessed, with clear and achievable timeframes.

A PIP is not a disciplinary action in itself, but failure to meet it may result in disciplinary action, ultimately including termination of employment. If you are told you need to improve, try to keep an open mind and be proactive. Engage with the process and actively think about ways to improve your performance, and what you can do to achieve the goals your employer has given. Identify what support you will need, including

training, and make sure that input is on the record. If your employment is later terminated and your employer has not provided the identified support, that would be a consideration in assessing the fairness of the dismissal.

Ask your employer for a copy of their policy regarding performance management and ensure they are following it.

Can I be stood down, what does this mean and for how long?

Your employer may stand you down with pay when they are investigating allegations concerning your performance or conduct. This does not mean your employer has decided to terminate your employment. The stand-down period typically lasts until the investigation is finalised, and usually finishes when you are delivered with an outcome. It is important that you remain available to attend a disciplinary meeting during this stand-down period. Unless a Modern Award, agreement or your employment contract specifies suspension in certain circumstances, there is no general right for an employer to tell an employee who is ready and willing to attend, not to come to work. However, as long as they continue paying you, and keep the suspension as brief as possible, it is most likely lawful for them to direct you not to attend work while they establish what has happened.

Suspension should only occur when the employer has a real concern that your presence poses a health and safety or other risk to the business, or you may interfere with witnesses. Depending on the circumstances, it may be appropriate, however if you believe being stood down is unwarranted you can speak to your employer and propose alternatives such as working from home or in a different location.

Procedural Fairness

Your employer must afford you procedural fairness throughout any investigation or disciplinary process. Procedural fairness is sometimes referred to as natural justice, although they are not exactly the same thing. Procedural fairness is one part of natural justice and the courts have described it as being concerned with a fair decision-making process, as opposed to a fair outcome.

What does that mean for me?

The requirement for procedural fairness means that your employer needs to:

- Provide you with all the information they are basing the disciplinary process on. You are entitled to know the full details of any allegations and the factual basis for those allegations (this does not mean you are entitled to see the complaint or witness statements, often a summary of the information is sufficient);
- Give you the opportunity to respond to the allegations. This could be orally or in writing, but we suggest it is prudent to provide a written response;
- Give you reasonable time to respond. What is reasonable may vary from a day to a month, depending upon the complexity of the issue, whether an urgent decision is essential, and other relevant factors;

- Inform you of the possible decision, the criteria for making that decision, and the information on which any such decision will be based;
- Only take into account relevant factors;
- Give you adequate notification of the date, time, place of any meeting or interview, so you can prepare;
- Allow you to bring a support person to meetings or interviews;
- Be aware of language difficulties and consider whether the services of an interpreter are needed;
- Where audio recording is to be used, seek your prior consent;
- Conduct any investigation without unnecessary delay;
- If new information arises during an investigation, which is credible, relevant and significant to their decision making, then you must be given the information and an opportunity to respond to it;
- Ensure the decision maker makes reasonable inquiries or investigations with an open mind before forming a settled view or making a decision as to the outcome. If the decision maker is not the investigator, they must give proper and genuine consideration to your case and critically assess it, not just rely on a recommendation;
- Ensure that the decision maker and/or the investigator is unbiased. This may mean appointing someone other than the person who would usually have that responsibility.

External Investigations

The term investigation is used in many different ways. It could be used to describe the process your manager or supervisor has undertaken before meeting to discuss performance concerns, or the process HR have used to put allegations to you and seek your response.

Sometimes, due to the nature of your employer's concerns or of a complaint received, or because it is their policy, they will hire an external investigator.

What should I do?

Being investigated is a stressful time, so look after yourself. Let your friends and family support you and consider whether talking to a counsellor could be useful; your employer may have an EAP which provides free counselling sessions to employees.

Any investigator appointed by your employer should be impartial and have no connection to you or the other party/ies. Ask your employer or the investigator about their qualifications and experience. You can also request a copy of their Terms of Reference (TOR), which should outline clearly the reason for the investigation, the remit (scope) of

the investigation, and the report (what the investigator is to deliver – are they just fact finding or providing recommendations - and in what form). If you have any concerns about the investigator or the TOR, then you can raise that with your employer.

Seek professional advice from your union, the NTWWC or a lawyer, before meeting with an investigator. It is important to cooperate with an investigation and participate as much as is safely possible. If you, your advisor or your doctor think it is not safe for you to attend an interview, then you can request their questions in writing, and state that you will answer them in writing to ensure you provide a thorough well-considered response. It will more likely be accepted if you back that up with a letter from your doctor or psychologist to say you are fit to participate, but not in person.

If you are safe to attend, or if the investigator insists on meeting in person, then you should take a support person. If they prepare a written statement from the interview, and ask you to sign or otherwise confirm it, then read it very carefully and note any inaccuracies, however small, in writing and provide your corrections. If you are forced to sign it as it is, then you can write something like ‘I haven’t had the chance to check this fully’ or ‘this statement is not a full account of my story’, if necessary.

Where can I get more help?

NT Working Women’s Centre Ph: 1800 817 055 www.ntwwc.com.au	Your Union Unions NT Ph: 8941 0001 www.unionsnt.com.au	NT Anti-Discrimination Commission Ph: 1800 813 846 adc.nt.gov.au
Australian Human Rights Commission Ph: 1300 656 419 www.humanrights.gov.au	Fair Work Ombudsman Ph: 13 13 94 www.fairwork.gov.au	Fair Work Commission Ph: 1300 799 675 fwc.gov.au
NT Police Ph: (emergency) 000 If calling from a mobile: 112	Office of the Commissioner of Public Employment (OCPE) Ph: 8999 4129 www.ocpe.nt.gov.au	NT WorkSafe Ph: 1800 019 115 www.worksafe.nt.gov.au

Your HR Department

Aboriginal Interpreter
Service

Ph: 1800 334 944

www.ais.nt.gov.au

To access an interpreter
Interpreting and Translating
Service NT

Ph: 1800 676 254

www.itsnt.nt.gov.au/

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