

Migraine Australia is a national patient advocacy organisation to support all Australians living with migraine and their families. We are the voice of migraine in Australia.

# MIGRAINE & DISCIPLINARY ACTION



# MANAGEMENT ACTION

Any management action must be reasonable and carried out in a reasonable manner. Standard management action can include:

- Performance appraisals
- Ongoing meetings to address underperformance
- Investigations into alleged misconduct and disciplinary meetings

This factsheet will discuss employees' rights in the reasonable management process and what to look out for if you feel you are being 'managed out'.

## PERFORMANCE MANAGEMENT

Performance management should be used as a tool to assist an employee to succeed in their job. Underperformance can include:

- Not carrying out work to the required standard or not doing the job at all
- Not following workplace policies, rules or procedures
- Unacceptable behaviour at work
- Disruptive or negative behaviour at work

If performance management is the decided course of action an employee must be made aware of the issue as soon as possible. If a meeting is to take place, an employee must be given prior notice of what is going to be discussed, be able to respond to the issue at hand and be able to bring a support person.

In resolving an issue, a performance improvement plan (PIP) may be implemented. In developing a PIP, an employee is to have input in solutions and agree on a way to resolve the issue. The PIP must clearly set out the issue, required outcomes, clear timeframes and strategies and the support available to the employee to meet the outcome.

However, it is illegal to use performance management as a way to 'manage out' an employee. This could include setting unrealistic goals that are used as a reason for termination or being micro-managed or bullied to the point where an employee feels they have to resign. Some red flag to look out for include:

Being placed on a PIP without any previous informal or formal discussions about the alleged performance issue

- The goals are vague or not measurable
- An impossible timeline to improve
- Not being provided with necessary resources, training or support to meet the PIP
- Lack of support or communication from your manager causing you to feel confused about what you need to improve

Please seek legal advice and/or assistance from:

- Your union (<https://www.australianunions.org.au/>) OR
- A community legal centre (<https://clcs.org.au/findlegalhelp>) OR
- Private solicitor

**MISCONDUCT**

Management action can also include investigations and meetings regarding the conduct of an employee, also known as disciplinary meetings. Misconduct will be considered ‘serious misconduct’ and carry the risk of immediate termination if the conduct is wilful, or deliberate behaviours that is inconsistent with the continuation of employments and has caused imminent and serious risk to the health, safety or a person or reputation, viability or profitability of the company (*Fair Work Regulations 2009* (Cth), reg 1.07).

Employers must have clear policies and procedures on how to conduct disciplinary meetings, ensuring the rights of the employee are upheld.

When allegations of misconduct or serious misconduct are brought to the attention of management, the employee must be informed of the accusations as soon as possible. The employee must be given prior notice of the allegations. In some instances, an employee may be stood down pending an investigation. A permanent employee must be paid their usual base rate of pay during this time.

In a disciplinary meeting, the employee must have the opportunity to respond to the allegations and be able to bring a support person. Where the employee denies the allegations and offers alternative evidence, this must be investigated by management.

<ul style="list-style-type: none"> <li>• When you are first notified of allegations made against you, seek advice from your union.</li> <li>• Prepare your response to the allegations before the meeting and try not to say more than is necessary. Avoid filling in the silences.</li> <li>• You or your support person take notes of the meeting.</li> <li>• Ask for reasonable adjustments.</li> </ul>	<ul style="list-style-type: none"> <li>• Being brought into a meeting without any notification of the allegations. If this happens, ask to have time to prepare your response and seek advice from your union.</li> <li>• Being told you can't have a support person or they cannot assist you in the meeting.</li> <li>• Not been given enough time to consider the allegations and your response to them.</li> </ul>

Outcomes of a disciplinary can include the allegation being found to be unsubstantiated and therefore no action taken, a warning or termination with or without notice (if found to be serious misconduct).

If you believe you have been unfairly dismissed, please seek legal advice and/or assistance from:

- Your union (<https://www.australianunions.org.au/>) OR
- A community legal centre (<https://clcs.org.au/findlegalhelp>) OR
- A private solicitor

**SUPPORT PERSON**

A support person can be a union representative or delegate, friend, family member or co-worker. It is

the employee's choice who they want as their support person. Where your chosen support person is unavailable, an employer is obligated to take practical steps to ensure the support person can attend, such as postponing the meeting.

It is a common misconception that a support person can only act as emotional support for the employee during the meeting and is not to speak or advocate on their behalf. However, a support person can assist in an active way, not merely a passive observer. The Commission has stated:

*“A support person does more than offer pseudo-supportive comments of ‘there, there’ in the face of negative commentary, or to offer tissues when bad news is communicated. They may suggest things to say ....., or even to advocate when the employee is unable to.” (KB v The Agency [2018] FWC 6937 [72])*

## CONNECT WITH MIGRAINE AUSTRALIA

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