

# White Paper Conference on Dismissal

Active Resistance

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## The Question

How do you keep control of a performance process where the employee actively resists – going off sick, alleging bullying, or raising a complaint against HR?



## What is “Active Resistance”?

- Conduct by the employee that disrupts the management of the process
- May be done in good faith or may be tactical

### **Common forms:**

- Going off sick (often stress/anxiety)
- Raising a grievance, e.g. alleging bullying, discrimination or harassment by line manager
- Raising a whistleblowing complaint
- Raising a complaint against HR

The challenge: how to deal with the issues and still keep a fair process moving

## What are the risks?

### Unfair Dismissal

- Capability is a potentially fair reason for dismissal
- Must relate to work of the kind employee was employed to do pursuant to their contract of employment
- “Capability” is assessed by reference to skill, aptitude, health or any other physical or mental quality
- Fairness
  - substantive fairness – did the employer act reasonably in treating reason as sufficient reason for dismissal?
  - procedural fairness - did the employer follow a fair procedure?
- Note changes from January 2027
  - reduction in qualifying service requirement to six months
  - removal of cap on compensation
- *Polkey* arguments

## Managing Performance

- Effective use of probationary procedures
- Importance of objective setting and regular appraisals/check-ins
- Informal procedures, e.g. performance improvement plans
- Acas Code of Practice on Disciplinary and Grievance procedures
  - Tribunals obliged to consider the Code
  - Potential increase in compensation of up to 25%
- Reasonable assessment/investigation
- Warnings – Code recommends at least two warnings be given before dismissal
- Support/training
- Review progress
- Poor performance hearings: notify employee in advance of performance failures, possible consequences and right to be accompanied

## What are the risks?

### Other Risks

- Discrimination
  - direct
  - indirect
  - harassment
  - victimisation
  - reasonable adjustments
- Whistleblowing
  - detriment claim
  - automatic unfair dismissal

## Case Study

## Case Study

- You are the HR Director of SocialiseMedia Limited, a digital marketing agency
- Mark joined the company six months ago as its new Head of Finance
- He comes to you to complain about one of his direct reports, Amira, his Financial Controller. Mark says that Amira’s work is generally accurate but consistently late
- Mark says that he has given this feedback to Amira informally over the last three months but that she has been resistant and simply says that she has too much on to meet his deadlines
- Amira has been with the company for ten years. You recall that Mark’s predecessor, Jeremy, used to joke about Amira constantly missing deadlines but said he would never dare address this because Amira could be “very prickly”
- You check on the system and see that at her last appraisal eight months ago she was rated by Jeremy as “meeting expectations”

### **What would you do next?**

## Case Study

- You advise Mark to start an informal performance improvement process
- Mark meets Amira together with Rachel, the HR Business Partner for corporate services. At the meeting Mark explains to Amira where her performance is falling short and about the importance of delivering work on time. He sets Amira a specific objective about meeting deadlines and says that he will meet with her in a month's time to review progress
- The following day Rachel receives an email from Amira saying that she has reflected on the meeting the previous day and believes that the PIP is "bullying dressed up as performance management" and that Mark has been targeting her ever since she joined. She refers to the fact that she has worked for the company for ten years and that these issues have never been raised with her before
- Amira does not expressly say that she wants her email to be treated as a formal grievance

### **What would you do next?**

## Case Study

- Rachel meets with Amira to explain that Mark has genuine concerns about her performance and that the PIP is simply an informal process to address these. Rachel confirms that she and Mark will meet with Amira next month to review progress
- The following month Mark and Rachel meet with Amira again. Mark says that, although he had noticed some improvement, Amira was late delivering a draft report last week that Mark was due to present to the board. As a result, Mark had to work over the weekend to finalise it
- Mark informs Amira that the PIP will continue and, unless he is happy that she is meeting all deadlines by the end of next month, the company will have to move on to the formal disciplinary process
- A week after the meeting Amira sends an email to Sarah, the CEO, alleging that Mark has failed to comply with the company's expenses policy and recently accepted an invitation to Twickenham from a supplier in contravention of the firm's Anti-Bribery and Corruption policy. Amira says that her performance management process should be paused whilst these allegations are investigated

### **What would you do next?**

## Case Study

Would you:

1. Allow Mark to continue with the PIP and investigate Amira's allegations once it has been completed?
2. Carry out an investigation into Amira's allegations but allow Mark to continue with the PIP at the same time?
3. Pause the PIP while you carry out an investigation into Amira's allegations?
4. Pause the PIP and change Amira's reporting line while you investigate the allegations?
5. Do something else?

## Case study

- Mark continues with the PIP whilst Amira's allegations are investigated. Mark concludes that Amira is still not meeting the required standard and that she should attend a formal disciplinary meeting
- In the meantime, the internal audit function establishes that there have been no material breaches by Mark of the expenses policy and that the invitation from the supplier was approved in accordance with the ABC policy but not properly recorded
- After she is informed of the outcome, Amira submits:
  - an appeal alleging that the internal audit investigation was a “whitewash”
  - a grievance alleging that being asked to attend a formal disciplinary meeting amounts to whistleblowing detriment and direct sex/race discrimination

### **What would you do next?**

## Case Study

### Appeal

1. Would you hear the appeal against the outcome of the internal audit investigation?
2. If not, why not?

### Grievance

1. Would you postpone the disciplinary meeting until you have concluded the grievance process?
2. Would you appoint different managers to conduct separate but concurrent processes in relation to the grievance and disciplinary allegations?
3. Would you appoint one manager to consider the grievance and the disciplinary allegations at the same time?
4. Would you do something else?

## Case study

- You appoint Carl, the Chief Operating Officer, to hear both the grievance and the disciplinary allegations and send Amira a letter inviting her to a meeting
- On the day before the meeting Amira submits a fit note stating that she is suffering from “work-related stress and anxiety” due to being placed on a PIP. She is initially signed off for four weeks, but then submits a fit note for a further four weeks
- You ask Amira to attend an assessment with Occupational Health but Amira refuses alleging that she is being bullied and harassed by HR

### **What would you do next?**

**If Amira agrees to attend an OH but remains off sick, what could you do to keep the processes moving forward?**

## Key Points

## Overlapping grievance and disciplinary processes

- A grievance does not automatically stop performance management/disciplinary processes
- Consider whether to pause, run concurrently, or address together. Pause only where there is good reason to pause
- Acas Code: where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently
- Acas Guidance: may be appropriate to pause disciplinary if grievance alleges conflict of interest, bias or discrimination against the hearing manager
- But do not allow indefinite drift

## Dealing with alleged conflicts of interest

- Make sure you have separate investigator/hearing manager/appeal manager
- Keep HR role advisory, not determinative
- If conflict of interest is alleged against investigator/hearing manager/HR adviser – check if there is a genuine conflict
- Replace the conflicted investigator/hearing manager/HR adviser if necessary but not automatically

## Keeping the process on track

- Follow procedures and be clear on the procedure that applies
- Document each stage and the rationale for each decision
- Keep meeting records, emails, notes of conversations and medical evidence
- Specify required improvement, support, timetable, and review dates
- Actively manage absences due to ill health with prompt referrals to OH and requests for medical evidence/assessments
- Consider what you can do to adjust the process to deal with ill health/disability issues (e.g. submitting questions and requesting answers in writing, gathering other evidence)
- Use disciplinary procedure for culpable refusal to engage

## Unfair dismissal - prepare for changes in January 2027

- Consider dealing with any underperformance issues now
- Beware employees looking to extend/postpone procedures
- Review performance management procedures
- Review probationary procedures
- Train senior managers in performance management
- Set clear, measurable objectives, particularly for senior managers
- Establish regular progress reviews/check-ins
- Document and keep a record of any performance issues

Questions?



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