

Obstructive Behaviour & Progressing Performance Management

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THORNY DISMISSAL QUESTIONS FACING EMPLOYERS

OBSTRUCTIVE BEHAVIOUR:

How do you progress a performance management process where an employee actively resists by refusing to engage, alleging bullying, or going off sick partway through?

A DIFFICULT QUESTION!



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LEGAL FRAMEWORK: UNFAIR DISMISSAL

A reason will fall with **capability and qualifications** if it:

“relates to the capability or qualifications of the employee for performing the work of the kind which he was employed by the employer to do”

LEGAL FRAMEWORK: UNFAIR DISMISSAL

“**capability**...[the employee’s] capability assessed by reference to skill, aptitude, health or any other physical or mental quality”

“**qualifications**...any degree, diploma, or other academic, technical or professional qualification relevant to the position which he held”

LEGAL FRAMEWORK: UNFAIR DISMISSAL

- Did employer act reasonably?
- ACAS Code of Practice on Disciplinary and Grievance Procedures
- ACAS non-statutory guidance: Discipline and Grievances at Work

OTHER POSSIBLE CLAIMS

- Discrimination
- Breach of contract
- Constructive dismissal

AVOIDING OBSTRUCTIVE BEHAVIOUR

- Performance Improvement Plan
- Managing expectations / aligning objectives
- Identify and address at earliest opportunity
- Avoid surprises
- Effective use of probationary periods
- Importance of appraisals / feedback

EMPLOYMENT RIGHTS ACT 2025

- Qualifying period in section 108 ERA 1996 to be amended from 2 years to **6 months**
- Removal of cap on compensation
- In force with effect from 1 January 2027 (expected)

SCENARIO

HR Administrator, joined business in 2023, coming over to your team September 2025.

Struggles with deadlines. Makes regular mistakes.

Main concern, careless with employee data.

PROCESS ADOPTED TO DATE

- Informal discussions
- Investigation / assessment
- Informal warning and the chance to improve
- Offered coaching and support

MOVE TO FORMAL PROCESS

- Invite employee to formal meeting
- First formal warning issued:
 - Identify issues
 - Set out what improvement requires
 - Reasonable timeframe
 - Clear warning of consequences

GRIEVANCE ALLEGING BULLYING

- Is it a grievance or an appeal against the warning?
- Who should deal with the grievance?
- Is there a need to suspend? How do you manage the employee in the meantime?

GRIEVANCE ALLEGING BULLYING

- Should the performance process be paused?
- Do we have to cancel the process?

PRACTICAL STEPS

- Involve someone objective
- Act promptly
- Keep control
- Clear communications
- Support for the employee
- Implied duty of trust and confidence

REPEATED GRIEVANCES

- Follow due process
- Reasonableness is key

EMPLOYEE GOES OFF SICK

- What is the anticipated length of absence?
- What medical evidence do we have?
- Should we refer to OH?

EMPLOYEE GOES OFF SICK

- Do we have to pause the process?
- Do we have to cancel the process?

PRACTICAL STEPS

- Act promptly, but be patient
- Keep control
- Clear communications
- Support for the employee
- Ensure you have a full picture
- Implied duty of mutual trust and confidence

REPEATED SICKNESS ABSENCES

- Follow due process
- Specific medical evidence required?

SCENARIO CONTINUED

Grievance alleging bullying is not upheld.

Performance management process continues.

Employee goes off sick.

On return, employee refuses to work with their manager.

OTHER CONSIDERATIONS

- Mediation?
- SOSR dismissal?
- Protected conversations?
- Ill-health dismissal?

FINAL REMINDERS

- Importance of a well-planned and communicated performance management process cannot be overstated
- Performance management should not be avoided
- Increased importance given ERA 2025 changes!

QUESTIONS & DISCUSSION

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