

White Paper Conference - 19 March 2025

Disciplinary process challenges

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Question

What are the key ways to progress a disciplinary process when the employee counters with multiple grievances, refuses to engage or goes off sick?



Key themes

Don't despair! Resilience and persistence are key.

Know your contracts, policies and the ACAS Code – how do/can they help you?

Core principles: reasonableness, fairness, consistency.

Accept there will be risks to balance – what is your appetite?

Case study

You work in the People Team of a high-street retailer.

Last week a sales assistant, Adam, was reported by a colleague, Lisa, for making a sexual comment to her in the breakroom. Adam's supervisor, Jayden, investigated and held meetings with Adam and Lisa. Adam denied the allegation; Lisa maintained her complaint. Adam was suspended with pay pending a disciplinary meeting.

The disciplinary meeting was supposed to start 40 minutes ago with Adam's department manager, Jane. Adam has not turned up – he has not made contact and is not answering his phone.



Failure to engage

- May be a genuine reason but may be a delaying tactic.
- What do contract, policies and ACAS say?
- ACAS Code:
 - *Employers and employees should raise and deal with issues promptly and should not **unreasonably** delay meetings, decisions or confirmations of those decisions.*
 - *Where an employee is **persistently** unable or unwilling to attend a disciplinary meeting **without good cause** the employer should make a decision on the evidence available.*



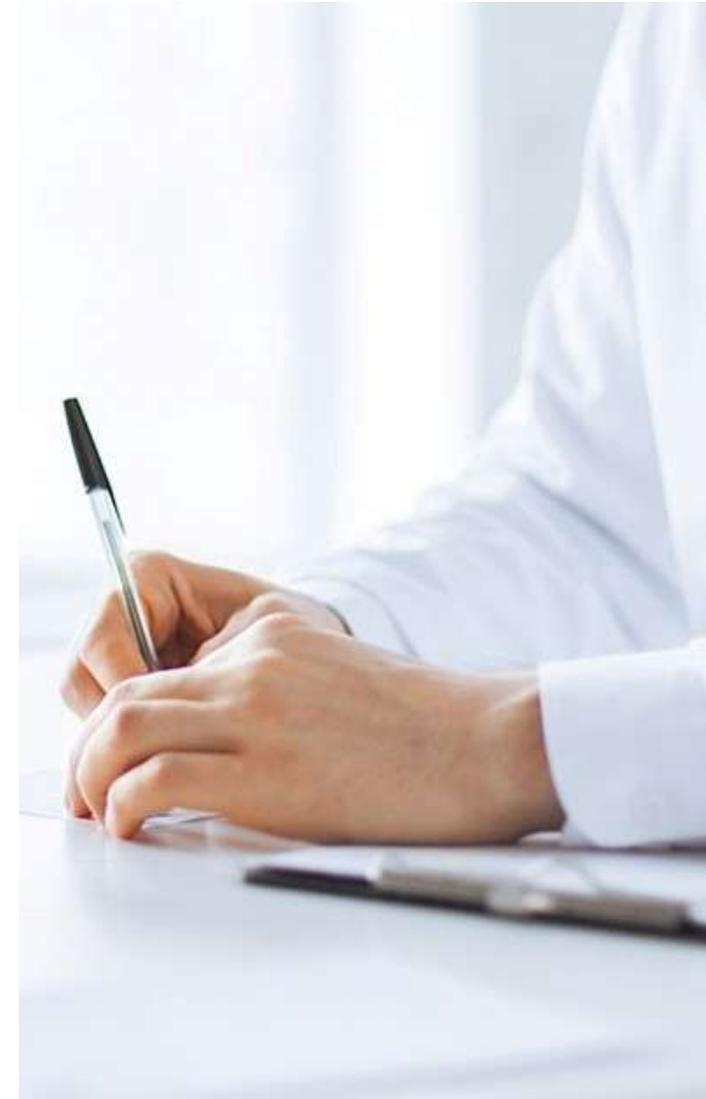
Options to progress

- Going ahead in absence - some risks may be obvious (unfair dismissal) but some may not (discrimination). May decide to take that risk, but circumstances will be limited.
 - *Bridgeman v Family Mosaic Housing Association*
- Rearranging – provides an opportunity to find out more and manage risks. But keep the momentum and don't forget paper trail!
 - Try to contact the employee
 - Reschedule promptly
 - Make clear in invitation decision may be made in absence if fail to attend
 - Offer options to participate, if available and reasonable

Case study

Jane attempted to contact Adam several times but there was no reply. The disciplinary meeting has been rescheduled for two days' time.

Jane has just received an email from Adam apologising for his no-show and attaching a GP fit note. This covers a four-week period for 'stress and anxiety'. Adam says he is unwell and so can't attend the rescheduled meeting.



Sickness

- Common scenario for employees to be signed off during disciplinary process
- Again, may be genuine but may be a delaying tactic
- What do contract, policies and ACAS say? Sick pay provisions and medical report consent can be very helpful!
- Fitness to work not same as fit to attend meeting
- Unresolved issue drifting may be more damaging – DWP 'Health and Work Handbook'

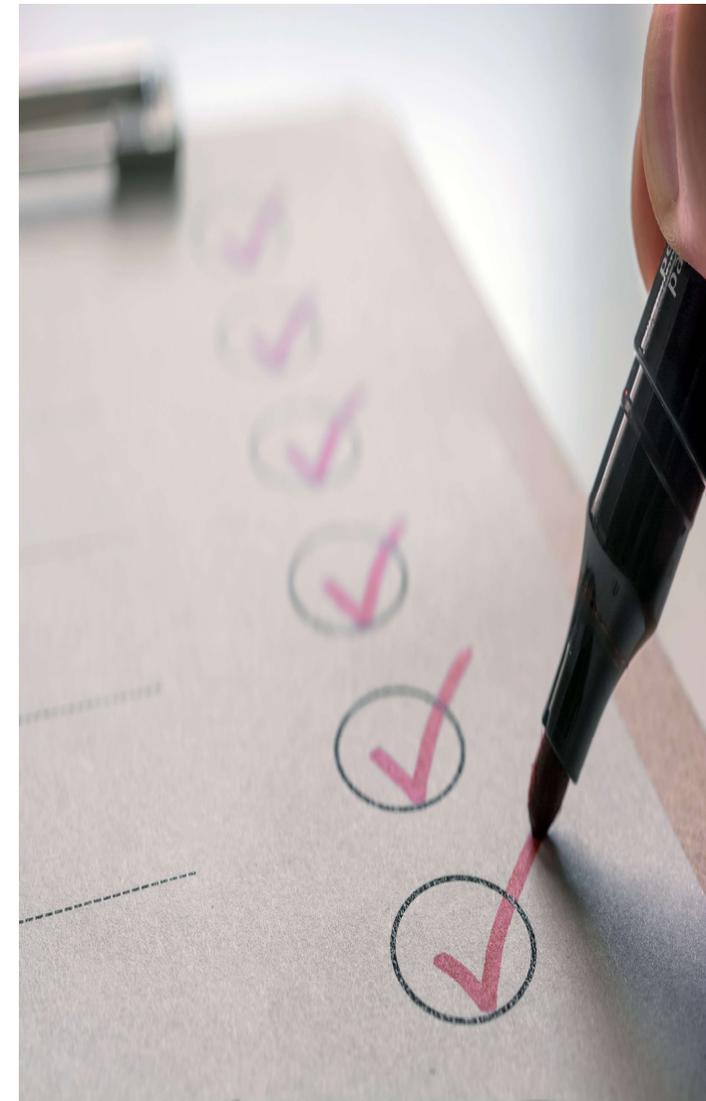


Options to progress

- Try to keep rescheduled meeting alive - offer options to participate (meeting format, location, companion, support)
- If employee is not amenable?
 - Making decision in absence - risks will be heightened; unfair dismissal and discrimination. May decide to take that risk, but circumstances will be limited
 - *William Hicks v Nadal*
 - Postponing – provides an opportunity to find out more and manage risks. But keep the momentum and don't forget paper trail!
 - Maintain (reasonable) dialogue with the employee
 - Medical advice. OH vs GP? When? What to ask?
 - Proceed on basis that employee may be disabled.

Medical advice

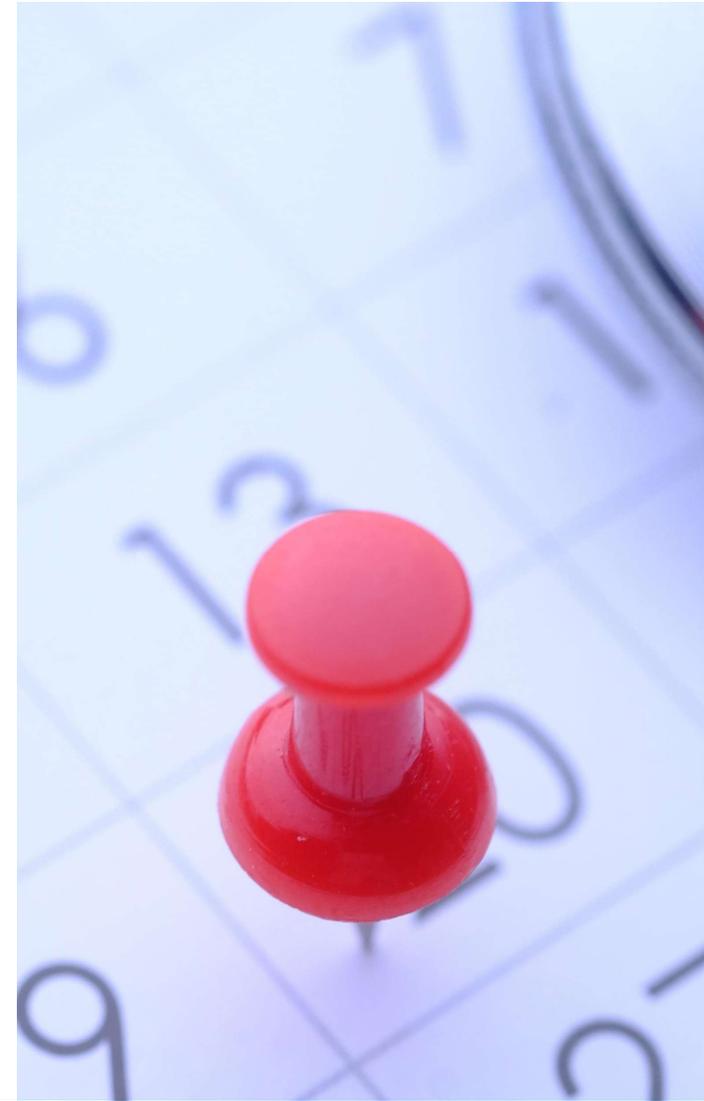
- Does the employee have the ability to understand the allegation?
- Is the employee well enough to respond (with or without assistance)?
 - In-person
 - Virtual
 - In writing
- Is the employee able to instruct a friend or representative to assist?
- Any adjustments which would enable the employee to participate?
- If not now, prognosis for when?



Case study

The first rescheduled meeting was postponed. After advice from occupational health, Adam agreed to attend a second rescheduled meeting by video next week, with a family member.

Today, Jane has received an email from Adam titled "Grievance". Adam says that Jayden and Lisa are good friends outside of work and Lisa is always given preferential treatment with shifts and overtime. Adam says he thinks Jayden believed Lisa during the investigation because of their friendship and not the facts. Adam says sexual 'banter' is rife across the department and Jane knows it.



Grievances

Common scenario for employees to raise counter issues during disciplinary process

What do contract, policies and ACAS say?

No rule that disciplinary will have to pause in each case – will depend on circumstances

ACAS Code – may "temporarily" suspend or deal with "concurrently"

Can you separate the issues?

Grievances

- Fact and risk-based decision.
- *Jinadu v Docklands Buses Ltd and Others*
- ACAS Guide: allegations where it may be appropriate to pause:
 - Conflict of interest relating to disciplining manager
 - Bias in conduct of disciplinary meeting
 - Selective evidence provided through investigation
 - Possible discrimination

Options to progress

- Pause the disciplinary and deal with grievance first:
 - Will need to conclude grievance (and appeal stage?) before resuming disciplinary
 - *Samuel Smith Old Brewery (Tadcaster) v Marshall*
 - Number of managers involved will increase.
 - Is it worth it? What are the risks?
- Deal with concurrently:
 - Same manager wears two 'hats'. Grievance meeting followed by disciplinary meeting.
 - Opportunity to appeal for each; again same appeal manager if appropriate.
 - What are the risks?

Case study

The disciplinary process was paused pending consideration of the grievance, which was not upheld (including at appeal). The disciplinary meeting has been rescheduled for today with adjustments as previously agreed and Jane has been replaced by another manager, Blake.

Adam just sent a message to Blake saying the whole situation is a joke and a cover-up and he won't be attending.



Reaching decision in absence

- ACAS Guide: factors to consider
 - Any rules the employer has for failure to attend.
 - Seriousness of disciplinary issue.
 - Disciplinary record, work record, work experience, position and length of service.
 - Medical opinion on whether fit to attend.
 - Consistency with other cases.
- Allegations/evidence must still be fully considered in the meeting. Don't just rubber stamp a decision. Show your working out in the outcome letter!





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