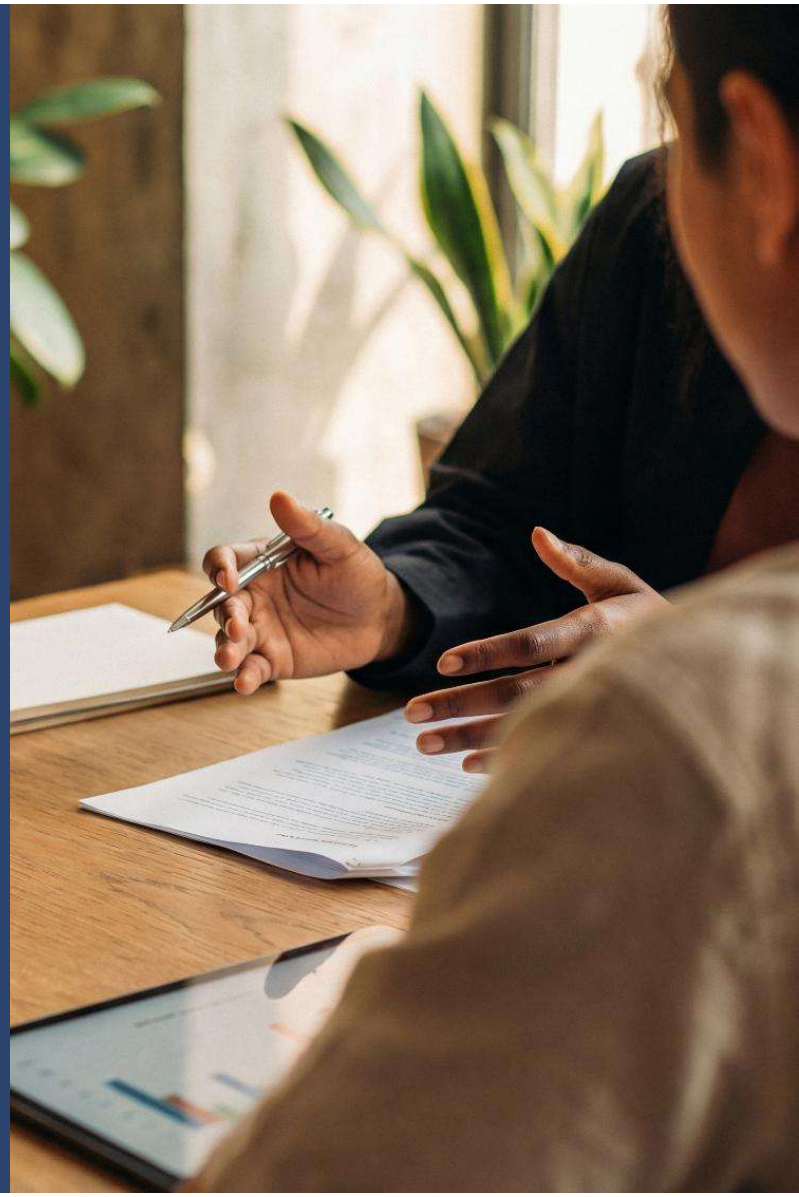
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White Paper Conference:
Performance Management Process

Presented by Noele McClelland, Partner

05/11/26



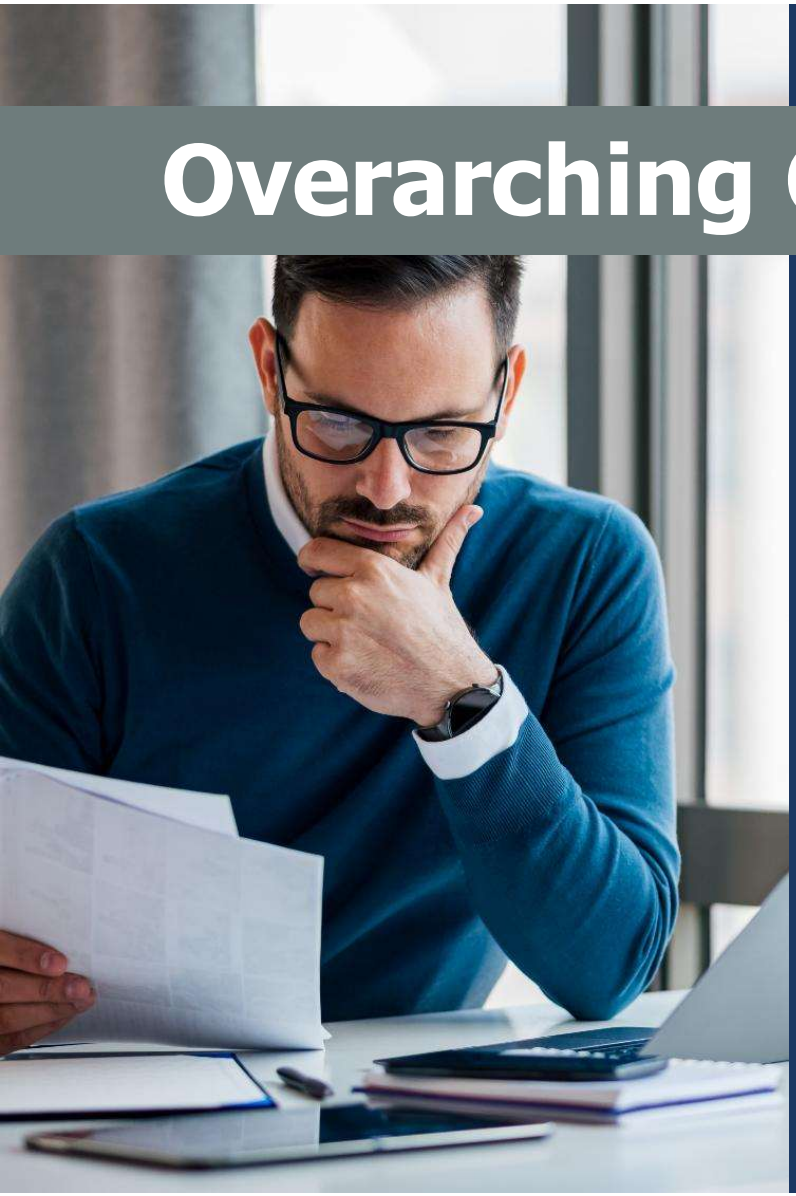
How do you keep control of a Performance Management Process where the employee actively resists by:

- Going off sick
- Alleging Bullying
- Raising a complaint against HR?

Initial Considerations

- Performance Management – part of day to day line management
- Assessment of why PM is considered necessary
- Review steps already taken i.e. informal process.
- Is employee aware of issues?
- Are you aware of any underlying causes of poor performance?
- Assess support or other training prior to commencement of process.
- Has manager been trained on conducting PM process?

Overarching Considerations



- Fairness
- Band of reasonableness
- Duty of Trust and Confidence
- ACAS Code of Practice on Disciplinary and Grievance Procedures
- Equality Act 2010

Fundamentals of a Performance Management Process



Proper Assessment – objective



Clear communication of requirement of role and expectations



Appropriate support and training



Opportunity to Improve



Reasonable timescales



Regular reviews



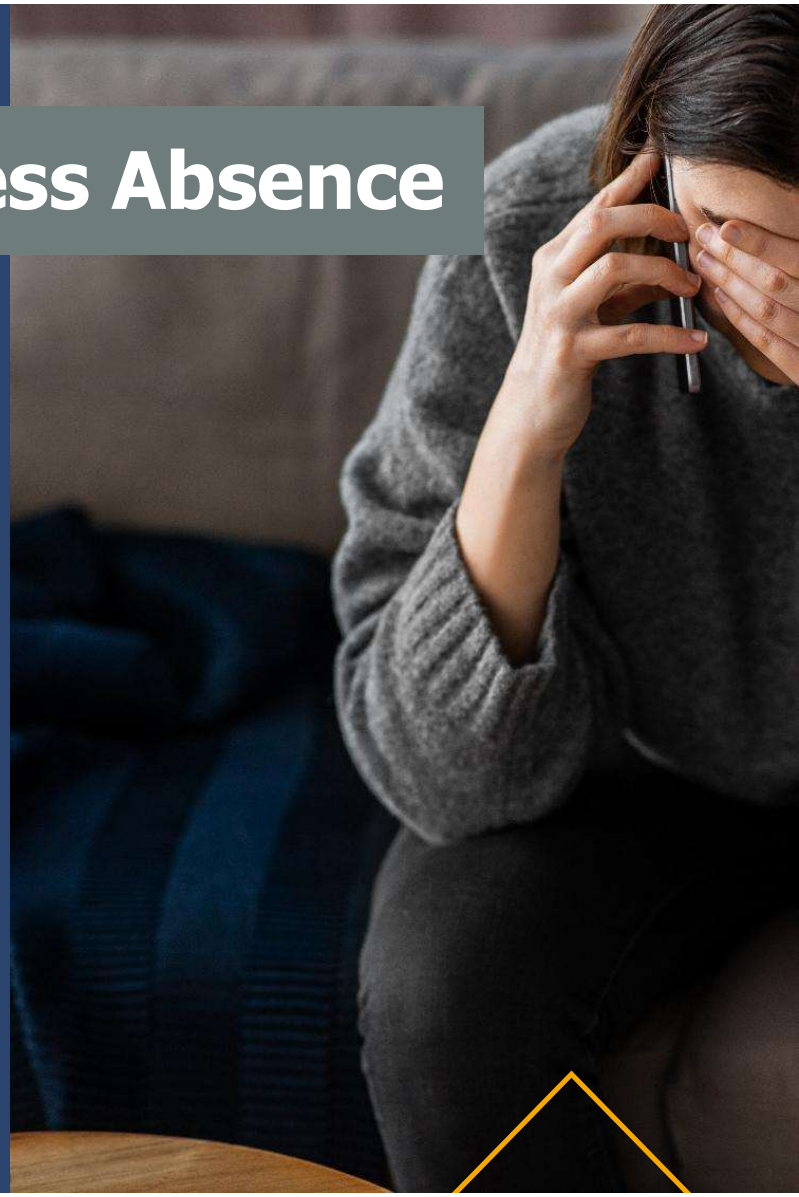
Right of Appeal

Scenario 1:

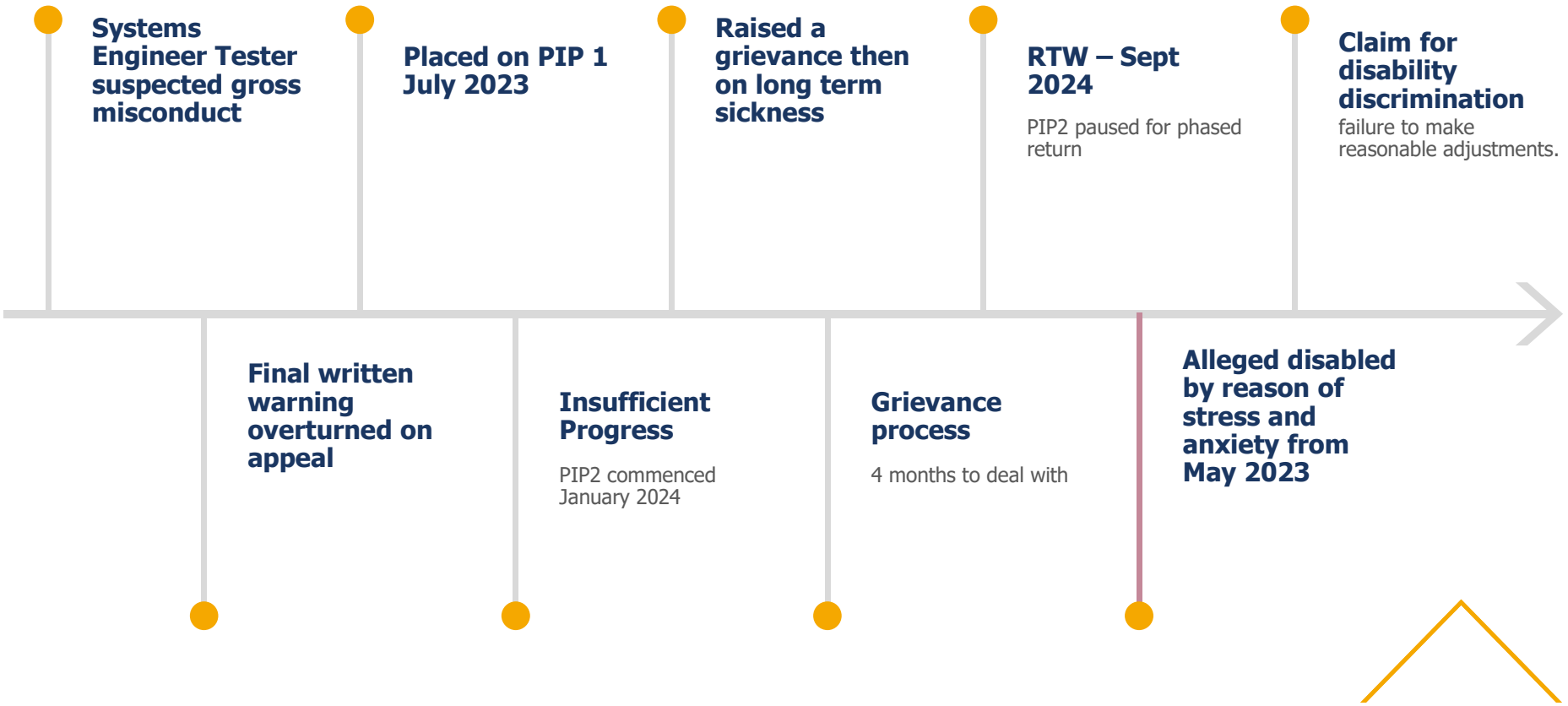
"Active Resistance by going off sick"

Initial considerations: Sickness Absence

- **Cause of concerns:**
  Performance capability vs ill-health capability
- Out of the blue vs Indicated
- Past history during performance process
- Previous OH or other reports



Gogawale v Elekta Ltd (ET Dec 2025)



Gogawale v Elekta Ltd (ET Dec 2025) (cont)

Mental Health impacts included:

- Loss of confidence
- Overwhelmed by small tasks
- Excessive hours preparing unnecessarily for meetings
- Social isolation and withdrawal from friends

Employment Tribunal found:

- Disciplinary proceedings and PIP would be stressful
- Being stressed is "not automatically a disability"
- GP records "experienced significant stress and anxiety due to work environment"
- 2 x OH referrals – moderate depression and moderately severe anxiety
- ET held by Feb 24 that would be disabled.

Reasonable Adjustments:

- "More support during PIP process" – "nebulous"
- Objectives to be rewritten in a more SMART format
- Be provided with a mentor.
- Objectives to include "success criteria", "quantifiable objectives"
- "Where there is a degree of subjectivity in a PIP…..likely to be a disadvantage to a person with a disability caused by work related stress."

Gogawale v Elekta Ltd (ET Dec 2025) – Grievance Process

4 months to deal with it

Proceeded to formal at G's request.

Failed to keep G updated

Refusal to allow external person (NHS) to attend grievance and RTW meeting

Informal meeting Feb 24

recommended mediation G rejected

Paused during initial sick leave but became extended

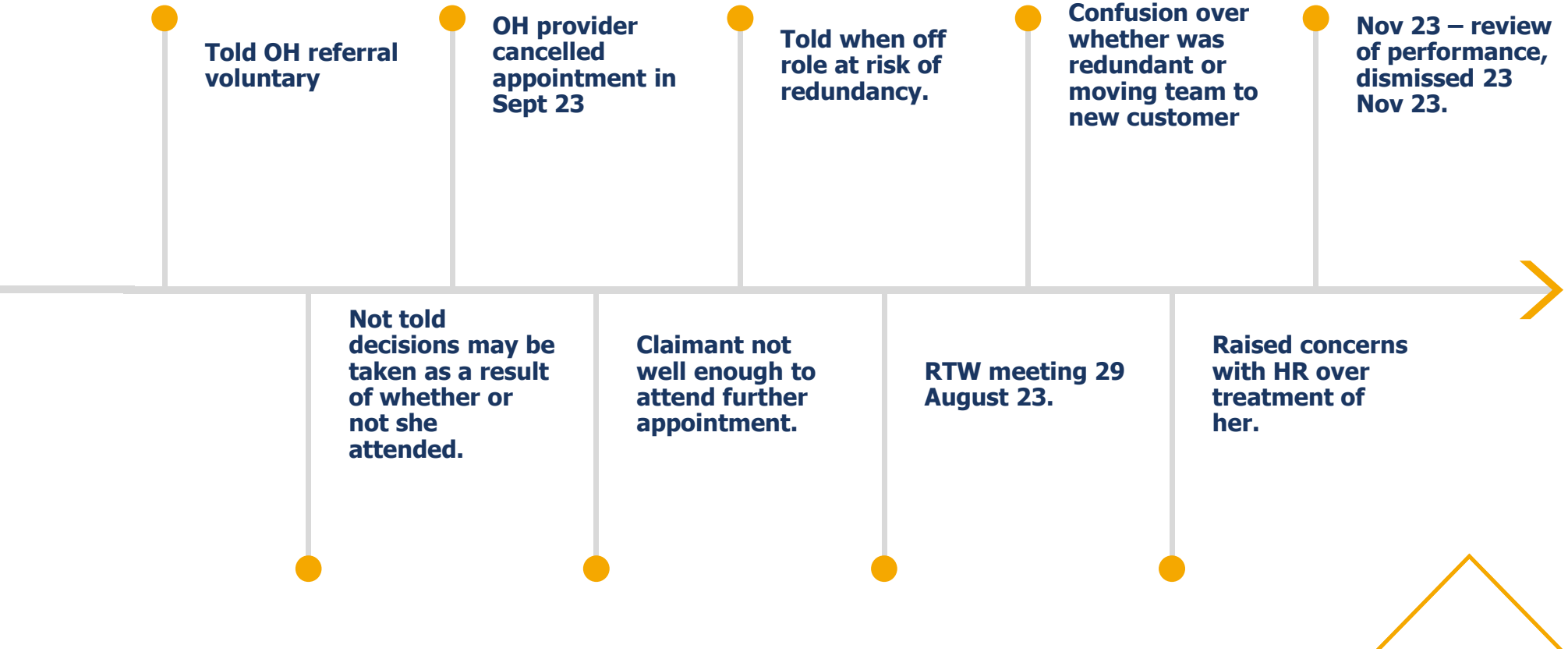
No PCP to delay grievance when someone off sick.

Only failure to make reasonable adjustments was refusal to allow external companion at meeting on 20 Aug 24 for moral support.

Baillie v McCurrach Ltd (Scotland July 24)

- Performance matters raised with B in Nov 2022
- Claim for unfair dismissal and disability discrimination
- Online meeting Feb 23 told placed on PIP
- In person Jan 23 meeting to discuss performance issues
- Given final written warning March 23 after 2 weeks to improve.
- No policy underlying PIP and no additional support or training
- Stress, anxiety and stomach issues
- Off sick 22 March 23 to end of August
- Consented to OH referral

Baillie v McCurrach Ltd (Scotland July 24) (cont)



Baillie v McCurrach Ltd (Scotland July 24) (cont)



- ET found

Dismissal unfair:

- FWW at first stage when only in role a few months.
- Hadn't applied any particular policy or procedure.
- Had previously carried out other campaigns without any issue.
- Extent of PIP was reiteration of targets
- No additional training
- No support or assistance to allow her to meet targets
- No account of her condition taking into account.
- Disability discrimination claim failed as could not prove disabled at the relevant time.

Legal Considerations if goes off sick

- Sickness does NOT cancel out performance issues BUT:
  - Is sickness is cause of performance issues?
  - Is there a disability at play?
  - Are they fit to engage in the process?

- Obtain OH advice promptly.
- Consider adjustments to engage in process regardless of disability status
- Ensure support measures are documented.
- Consider alternatives to process.

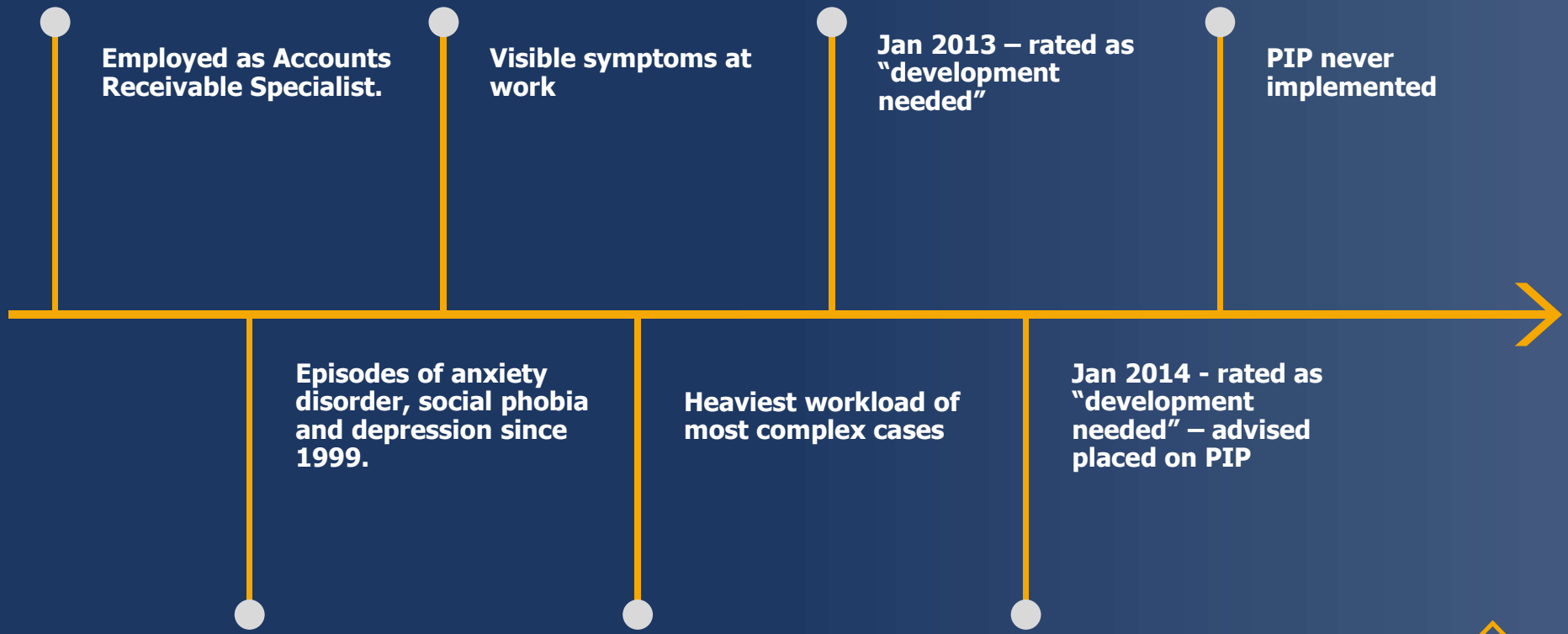


Scenario 2:

“Active Resistance by alleging bullying”

- The question assumes that alleging bullying is a defensive tactic, but may be genuine.
- ACAS Code on Disciplinary and Grievance Procedures.
- Legitimate performance management carried out reasonably vs PIPs being used as a threat.

Evans v GE Capital (ET 2021)



Problematic Comments

"We're all feeling the pressure"

"Needed to cope better with anxiety"

"When you were off sick others had to deal with your workload"

"Demonstrated some resistance and anxiety to change"



Bullying Allegations

- Performance had been used as a threat.
- Repeatedly pressed reconciliation with manager who had bullied her.
- Started formal absence/capability proceedings when mentioned she had taken legal advice

What you can do to deal with allegations of bullying raised during a performance management process?

- Separate the allegation from the PIP process?
- Gather preliminary information to determine whether you need to pause the PIP.
- Is it relevant to the performance management issues or completely separate?
- Does it involve a cross over of personnel?
- Identify the timescales – do performance concerns predate the alleged bullying incidents.
- If it is against manager carrying out the PIP consider:
  - Pausing PIP to allow for investigation into bullying
  - Assigning PIP process to another manager (if possible).
- Document decision making process around proceeding or pausing processes.

Don't

- Dismiss the allegation without investigation
- Intensify the PIP process
- Involve the same manager in both processes

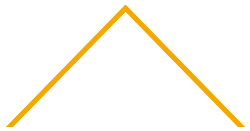
Scenario 3:

"Active Resistance by raising a complaint against HR"

1. Identify what role HR is taking in the performance management process?
2. Is the complaint related to the process or not?
3. Consider whether to pause PM process pending complaint?
4. Consider nature of complaint – discrimination, whistleblowing etc?
5. Involve another HR colleague in process to avoid delay
6. Appoint a separate complaint investigator.

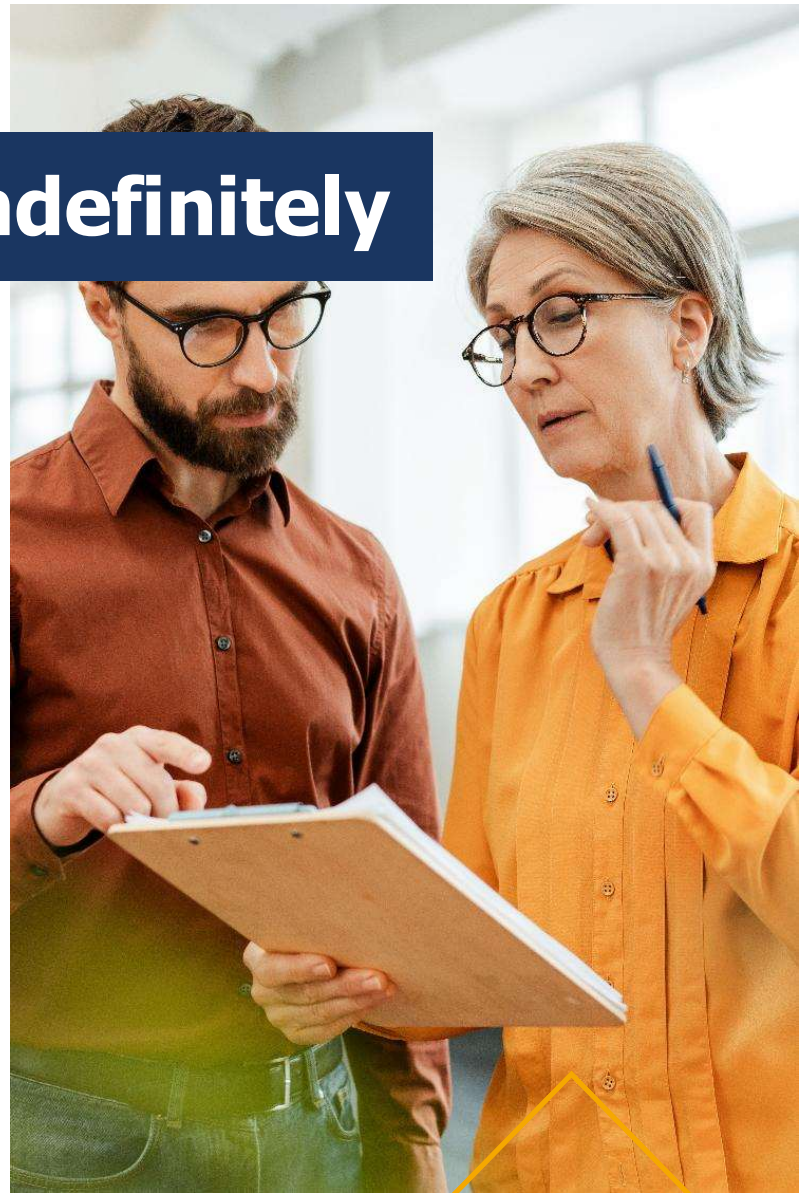
Overall Considerations in terms of Active Resistance

Factor	Points toward pausing	Points toward proceeding
Medical evidence	OH says unfit to engage	OH says fit with adjustments
Grievance scope	Directly challenges legitimacy of the process itself	Relates to a separate matter
Timing pattern	First and only complaint	Third complaint in succession, each at a critical juncture
Prejudice to employer	Short delay, performance issues recent	Long delay, evidence becoming stale, other staff affected
ACAS Code	Grievance and process closely linked	Grievance is separate or can be dealt with concurrently

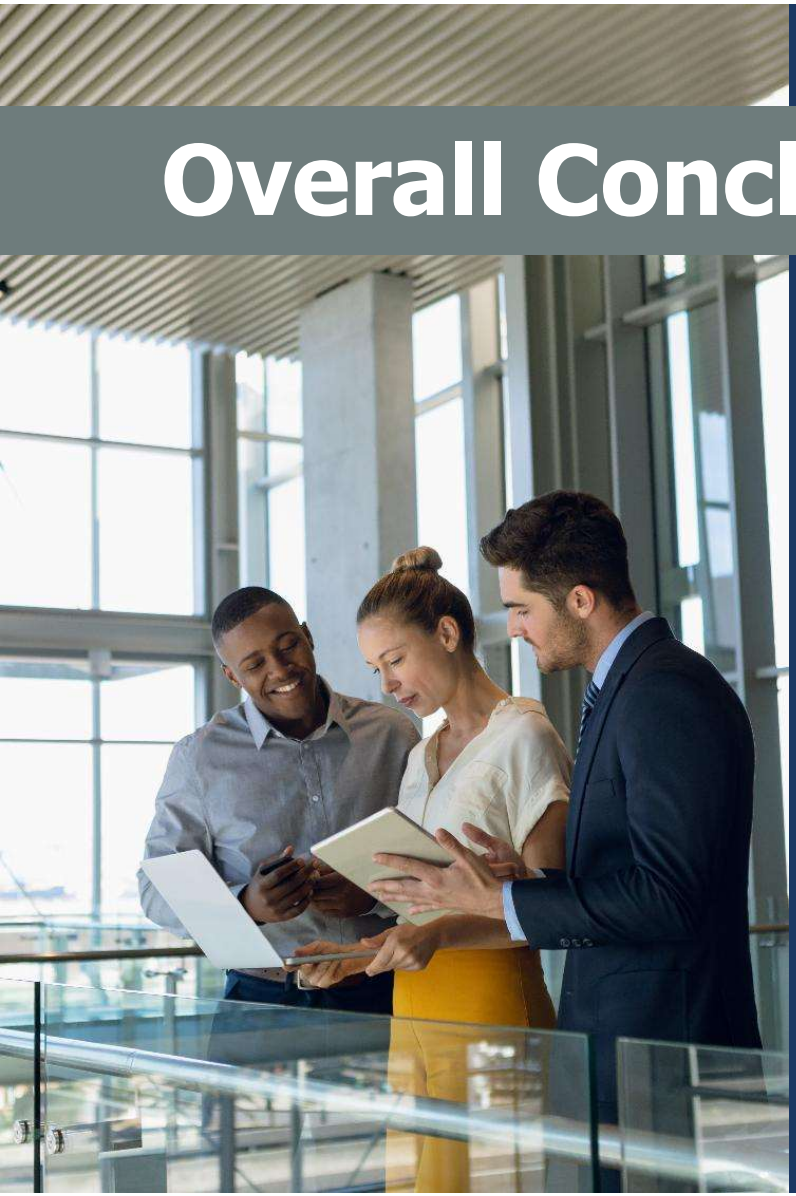


Don’t let things be paused indefinitely

- Involve different people if possible
- Offering adjustments isn’t “giving in” it is keeping things moving forward
- Run processes concurrently if possible
- Don’t lose track of timescales – communicate progress and keep employee updated.
- Ensure you have up to date medical advice – don’t rely on old reports
- Record and communicate rationale for (a) continuing or (b) pausing, including impact of making progress.



Overall Conclusions



- Don’t’ become entrenched in **“they are just at it”** viewpoint.
- Stand back and assess are your processes **“reasonable”**
- Giving **“one more chance”** to engage/attend meetings unlikely ever to be unreasonable!
- Consider **adjustments to process**, regardless of whether person has a disability.
- If end up in dismissal, ET will always consider **reasonableness of process**.
- Separating out processes to different people does not mean you are accepting **“fault”**

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Questions?



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