



REDUNDANCY AND DISMISSAL: Stress & anxiety
CONFERENCE 22 NOVEMBER 2018

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In a grievance, disciplinary or under-performance situation what can you do – practically and legally - if the employee responds by taking long-term sick leave, for reasons of stress or anxiety?

Stress as a cause of absence – CIPD's latest figures...

39%

In the top 3
causes of short-
term absence

8%

The no.1 cause of
short-term
absence

50%

In the top 3
causes of long-
term absence

22%

The no.1 cause of
long-term
absence

37%

reported a rise in
sickness absence
due to stress

Mental ill-health as a cause of absence – CIPD's latest figures...

27%

In the top 3 causes of short-term absence

2%

The no.1 cause of short-term absence

56%

In the top 3 causes of long-term absence

22%

The no.1 cause of long-term absence

55%

reported a rise in sickness absence due to anxiety and depression

Understanding the legal risks

What is the starting point?

- ▶ Statutory **ACAS Code of Practice** on Disciplinary and Grievance Procedures
- ▶ Non-statutory **ACAS Guide** to Discipline and Grievances at Work
- ▶ Applies to:
 - Disciplinary
 - Performance management
 - Grievance
- ▶ Non-compliance with the Code could result in:
 - 25% uplift to compensation
 - Dismissal being found to be procedurally unfair

What does the ACAS Code require?

▶ Employers and employees should:

- raise and deal with issues **promptly**; and
- not **unreasonably delay** meetings, decisions or confirmation of these decisions

▶ Employees should be:

- given an opportunity to **put their case** in response to a disciplinary matter before any decisions are made; and
- allowed to **explain their grievance** and how they think it should be resolved



TENSION ARISES WHERE YOU HAVE A SICK EMPLOYEE WHO CANNOT ATTEND THE HEARING TO STATE THEIR CASE

What about your internal policies?

- ▶ Don't forget to consider your **internal policies** on disciplinary, grievance, performance management (plus any relevant policies on sickness, stress and disability)
- ▶ Non-compliance could mean:
 - Breach of implied term of trust and confidence / breach of express term of contract (if contractual)
 - Resultant dismissal is procedurally unfair

Could the employee be disabled?

▶ Is “anxiety” a disability?

- ▶ Mental impairment
- ▶ Would need to meet other requirements of the disability test

▶ Is “stress” a disability?

- ▶ Not a mental impairment but may indicate an underlying condition
- ▶ Would need to meet other requirements of the disability test

▶ Key risks:

- Failure to make reasonable adjustments
- Discrimination arising from a disability

**What should the employer do in
response?**

Step 1: Talk to the employee

- ▶ **Adopt Mind/CIPD’s “Twin track” approach:** person dealing with the absence should not be involved in the G/DP process
- ▶ Allow the employee to be accompanied by TU rep, colleague, mental health advocate or someone else who understands their condition

- ▶ **Points for discussion:**
 - What will happen to the G/DP process in their absence
 - Your obligations to progress that process promptly
 - Measures that might facilitate their attendance at the hearing
 - Their view of their health / prognosis
 - Consent to obtain medical evidence from their GP and Occupational Health
- ▶ Keep records of what is discussed

Step 2: Obtain medical advice

▶ From the employee's GP and/or Occupational Health – seek advice on:

- Condition and prognosis
- Is the employee disabled? If yes, what reasonable adjustments might help them return to work?
- Is the employee fit enough to attend the hearing?
- If not, would any adjustments enable them to attend?

▶ But remember the final decision on disability status is yours

Step 3: Postponement: (1) the right to a fair hearing and whether to postpone

1. What do your internal policies say?
2. How serious is the matter in question?
3. How good or bad is the employee's "track record"?
4. What is the medical advice on the employee's fitness to attend the hearing?
5. How have you dealt with similar cases in the past?

Step 3: Postponement: (2) how long for?

Short-term absence (e.g. up to 4 weeks)?

- Usually until the employee returns to work

Long-term absence (4 weeks +)?

- A “reasonable” period of time

Step 3: Postponement: (3) “reasonable”??

 See the ACAS Code:

*“It is important to carry out **investigations** of potential disciplinary matters without unreasonable delay to establish the facts of the case” (para.5)*

*“The **meeting** should be held without unreasonable delay” (paras. 11 and 33)*

“Appeals should be heard without unreasonable delay” (paras. 26 and 42)

Step 3: Postponement: (4) what is “reasonable”?

 **Will vary from case to case, but in all cases consider (again):**

- Internal policies
- Seriousness of the matter in question
- The employee’s “track record”
- Medical advice on the employee’s fitness to attend the hearing
- Similar past cases

and

- Whether possible to proceed with the hearing in a “modified” way

Step 4: Modify the way the hearing is held

- ▶ Hold the hearing at the employee's home or a neutral place
- ▶ Allow the hearing to be conducted by telephone or video conference
- ▶ Allow the employee to be accompanied by a non-statutory companion
- ▶ Allow the companion to take a more active role at the hearing
- ▶ Take frequent breaks when needed
- ▶ Allow the employee additional time to present their case
- ▶ Adjourn the hearing if needed and reconvene at a later date
- ▶ Allow the employee to make written submissions

Step 5: Proceed without the employee (1)?

See the Acas Code and Acas Guide:

“Where an employee is persistently unable....to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available” (para. 25 of the Acas Code)

*“There may be occasions when an employee is repeatedly unable to ...to attend a meeting. Employers will need to consider all the facts and come to a **reasonable** decision on how to proceed” (page 20 of the Acas Guide)*

“...the employer may conclude that a decision will be made on the evidence available” (page 21 of the Acas Guide)

Step 5: Proceed without the employee (2)?

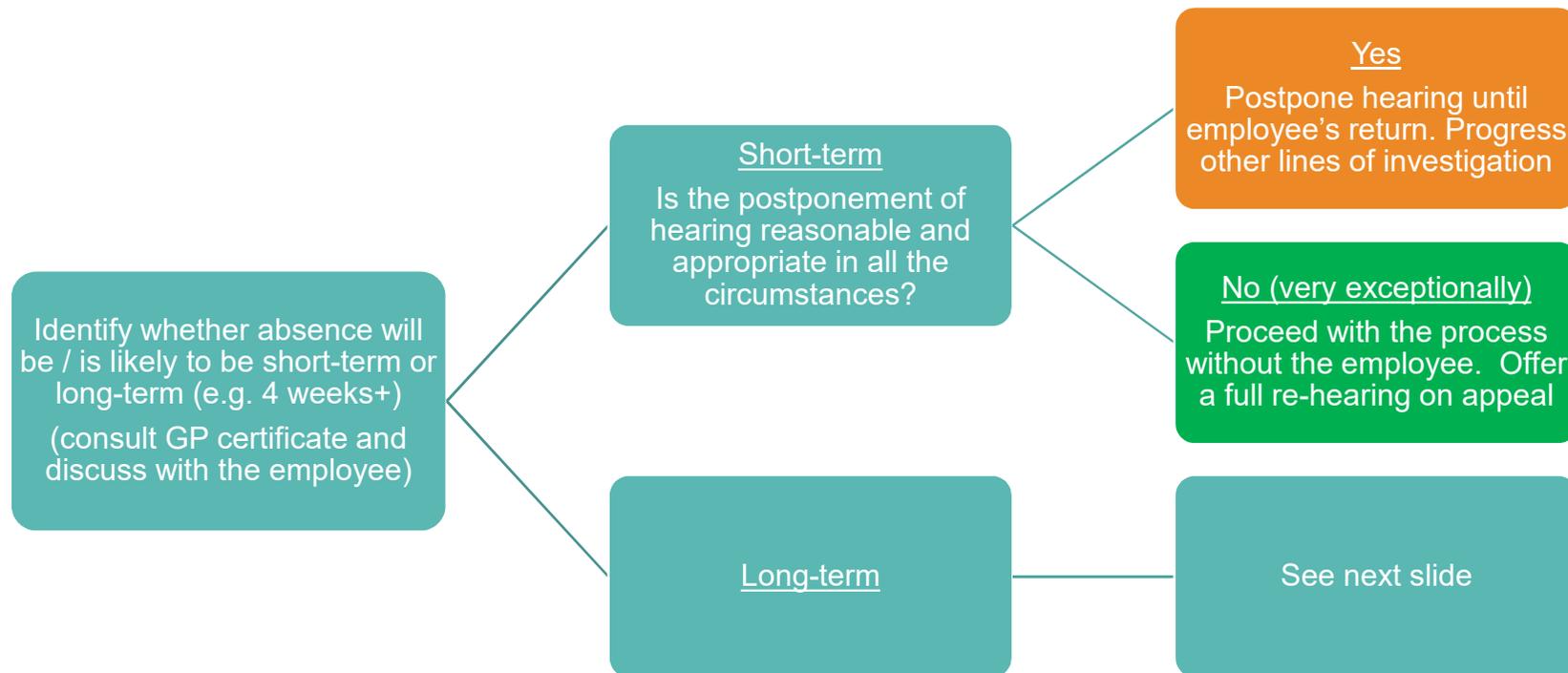
- ▶ **Having taken into account all factors (including medical evidence):**
 - ▶ Refusal to attend (contrary to medical evidence)?
 - ▶ Exceptional cases:
 - ▶ Opportunity to state case could make no difference?
 - ▶ Others?
 - ▶ Reasonable postponement, modified hearing not possible, attendance prognosis still poor?

Step 5: Proceed without the employee (3)?

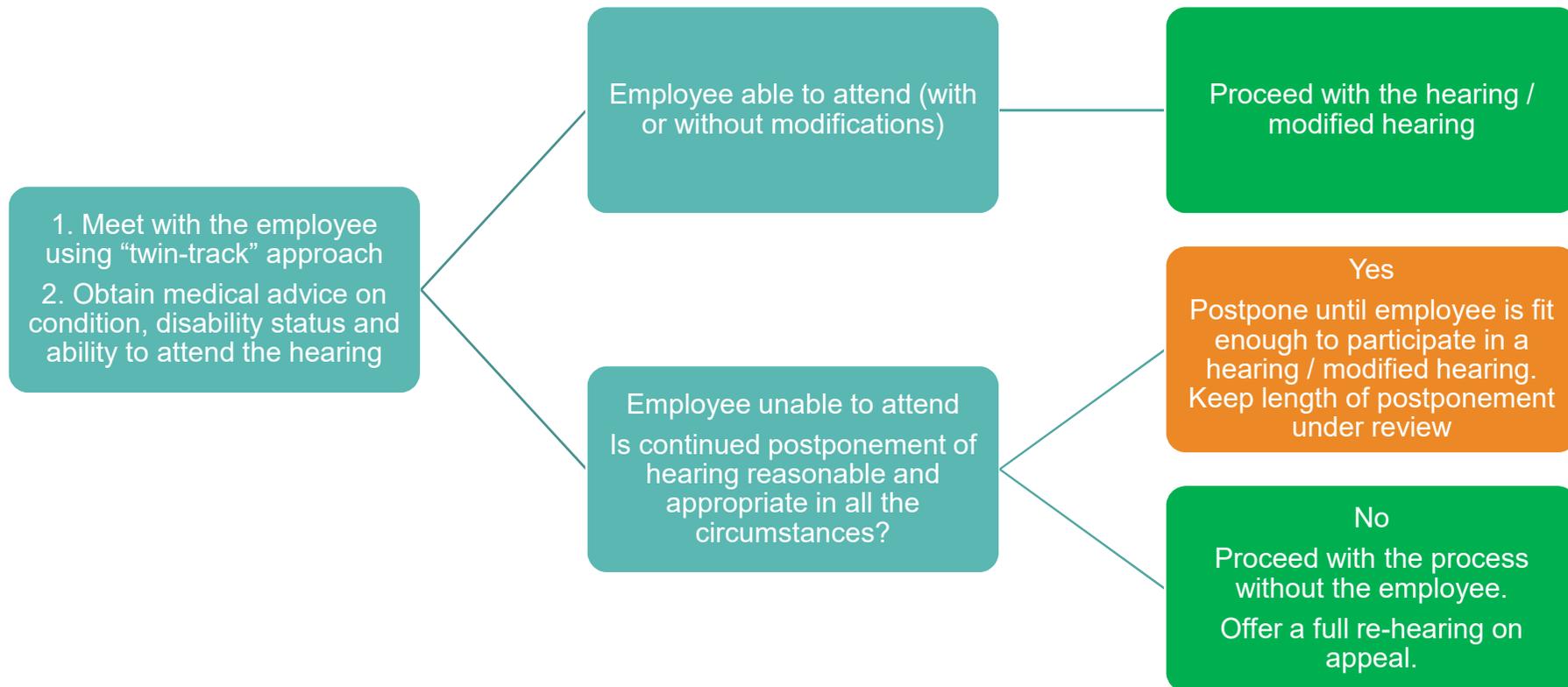
▶ **Proceed with caution:**

- ▶ Notify the employee in advance of doing so
- ▶ Always invite / allow the employee to make written submissions
- ▶ If you have discovered the employee has a disability as a result of the process, consider whether this has an impact on the proposed sanction
- ▶ Always offer a full rehearing on appeal to correct the procedural deficiency

Summary: short-term absence



Summary: long-term absence



Contact details



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