

BYRNE
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Employment: Active Resistance

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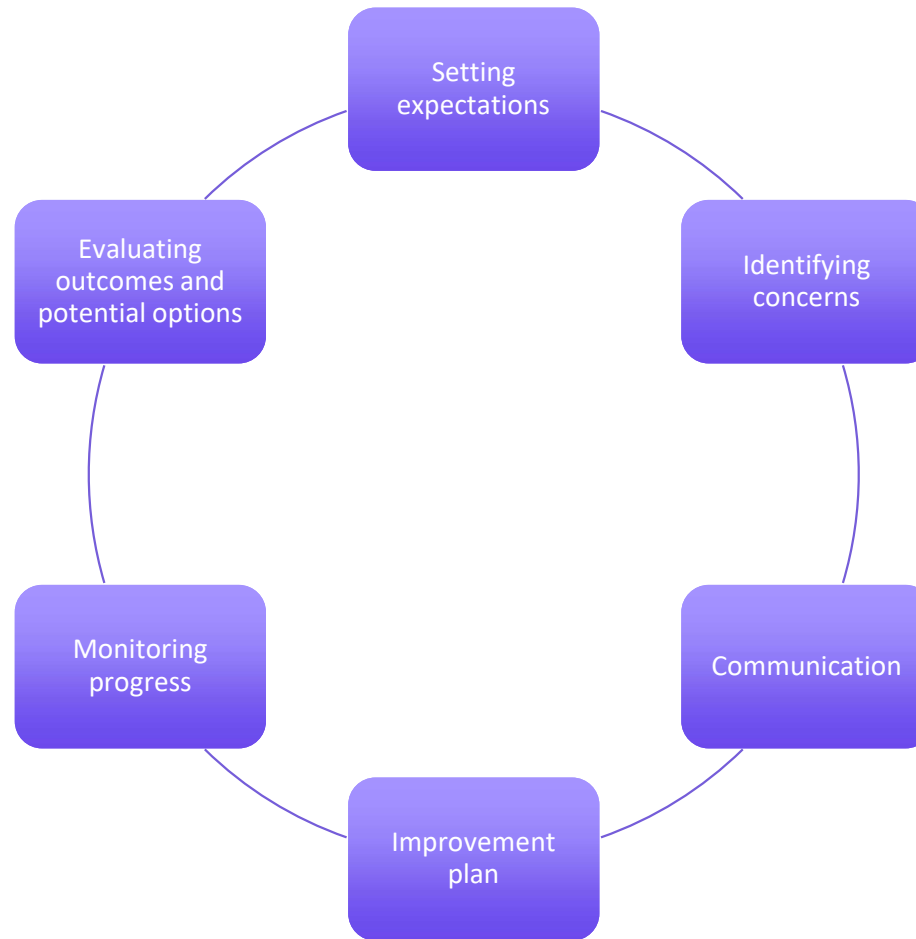
Active Resistance:

“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 can employers do in these circumstances?

Managing the Performance Process

Policy considerations and Key Stages



Effective Performance Process



CLEAR
COMMUNICATION



FAIRNESS AND
CONSISTENCY



EMPLOYEE
INVOLVEMENT



SUPPORT



ACCOUNTABILITY



OUTCOMES



RECORD AND
DOCUMENT

Active Resistance: Common Resistance Issues

Internal
Complaints/
Grievances

Bullying
allegations against
Management

Protected
Disclosures

Sickness Absence

Refusal to Engage

Employer Response

- Check policy and procedures.
- Separate the issues.
- Maintain fairness.
- Keep evidence focused on performance.
- Record all support offered.
- The objective is not to “win” against resistance but to ensure a fair process while avoiding delays and maintaining managerial control.

Complaints and Disclosures

Alleged breach of policy or procedure

Inconsistent or unfair treatment

Grievance

Bullying by management

Protected disclosure

Penalisation/ Victimisation

Discrimination or Equality Complaint

Dealing with Complaints

- Raising a grievance, allegations of bullying, making a protected disclosure or challenging a performance process does not automatically require an employer to stop a performance management process.
- Certain circumstances may require or justify a pause or change in how the process is managed.

Dealing with Complaints

- Follow policies and procedures.
- Generally run parallel and separate processes.
- Maintain fairness.
- Keep under review.
- Additional requirements for Protected Disclosures.

Pausing a Performance Process

The key distinction is an employee raising a concern and whether that concern creates an issue that requires the process to be paused.

Any pause should be proportionate, well documented, reviewed and not be indefinite.

Consider other proportionate measures to take rather than pausing the performance process.

It is important not to treat an employee raising a complaint as an automatic reason to pause or stop the process.

It is important to consider the substance of the concern or complaint, the relevant policies and procedures and whether continuing with the performance process would compromise fairness.

Objective Bias and Impartiality

- Employers should consider whether serious questions may be raised about the impartiality of management or individuals overseeing a performance process.
- Potential issues may include: conflict of interest, possible predetermination or failure to be objective in the process.
- Where concerns arise the process should be reviewed to see if any other measures should be implemented to maintain the fairness and integrity of the process.

Document Decisions

- Maintain accurate records.
- Record any decisions and reasons.
- Track complaints and responses.
- Ensure fairness.
- Consistency and transparency.
- Confidentiality.

Complaints and Disclosures

- Follow policies and procedures.
- Consider whether a temporary pause is necessary.
- Consider alternative options.
- Ensure complaint/disclosure is addressed appropriately by impartial person where the complaint/ disclosure relates to performance process.
- Extra requirements for protected disclosures - beware offences.

Sickness Absence

- Manage through policy and procedure.
- Consistent application while considering individual circumstances where necessary.
- Consider occupational health referral where appropriate. Ensure referral includes all requirements including fitness to participate.
- Consider whether the employee can participate or whether accommodations may be needed.
- Consider sick pay and absence management procedures.
- Ensure decisions about performance process are distinct from sick pay and sickness absence.

Refusing to Engage

- Attempt to establish reasons why an employee may be unwilling or unable to participate.
- Maintain a record of communication and support offered.
- Provide opportunity to engage.
- Communicate gravity of non-engagement and potential consequences.
- Continued non-engagement may lead to disciplinary process for conduct.

Key Takeaways

- Keep the process moving forward as far as possible
- Separate parallel issues
- Document decisions and rationale
- Maintain engagement efforts
- Follow a fair and consistent process



Thank you!
Questions?

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