

How do you progress a disciplinary hearing when the employee is absent due to prolonged ill health, refuses to attend or counters with a series of grievances?

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A little bit about me:



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Jennifer is Head of Employment and is also a member of the firm's Healthcare and Cyber and Data Protection Teams. She is nationally regarded for her encyclopaedic knowledge of employment law and is the "go-to" advisor for corporate clients in both the public and private sectors.

Jennifer's key clients include scaling and established Irish companies in a variety of sectors, multinational companies in the technology, pharmaceutical, medical devices and diagnostics sectors and public authorities. Her focus is on working closely with her clients to provide commercial legal advice and practical, commercial solutions for their business.

Strengthening the Team's focus in the medical-technical sector, Jennifer is a member of RDJ's Healthcare Team, acting for clients including pharmaceutical companies, health insurers, numerous medical device companies, and nursing homes. Advice includes regulatory and employment healthcare-specific issues, in respect of which Jennifer represents her clients before the Courts and the WRC/Labour Court.

Jennifer is regularly invited to contribute as a key-note speaker at employment law and HR conferences, events and webinars for CIPD, Legal-Island and White Paper Conference Company Limited. She is a recognised thought-leader on various employment law and HR issues, in particular in the areas of retirement ages and age discrimination.

'Jennifer consistently delivers top-drawer expertise. She is hands-on, personable, and has a really good way of explaining things. Her advice has always been spot-on.' – **Chambers Europe (2023)**



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Reasons for Absence from Disciplinary Process

- Disciplinary Hearing arranged – employee refuses to attend
- **Ill Health**
- **Refusal to Attend**
- **Counters with a set of grievances**
- What are the next steps?



Overview

Legal Landscape for disciplinary processes

- **Legislation & Code of Practice**
- **Policies and Procedures**

Specifics

- ✓ Ill Health
- ✓ Refusal
- ✓ Grievances



Legal Landscape

Statutory Obligation

Unfair Dismissals Act 1977 as amended

Notice to employees of procedure for, and grounds of, dismissal

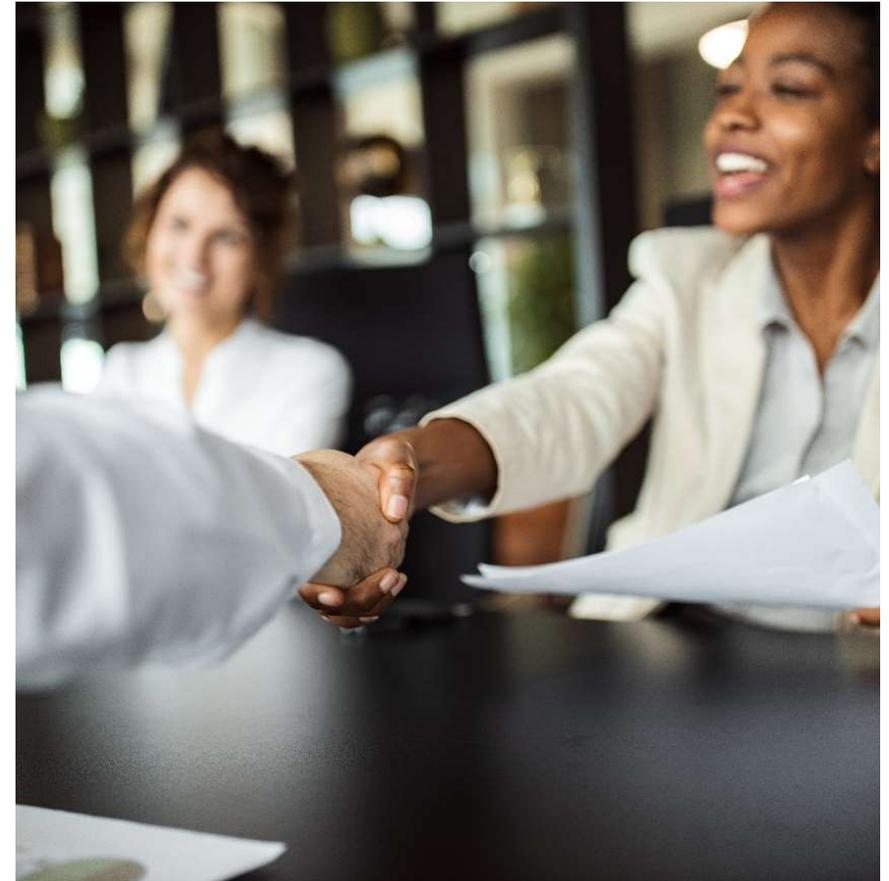
14.—(1) An employer shall, not later than 28 days after he enters into a contract of employment with an employee, give to the employee a notice in writing setting out the procedure which the employer will observe before and for the purpose of dismissing the employee

Statutory Obligation

- There is a legal obligation for all employers to have formal disciplinary procedures in place and to communicate these to employees. 14(1) Unfair Dismissal Acts 1977-2007
- SI 146/2000 Code of Practice on Grievance and Disciplinary Procedures
- Code of Practice – not legally binding but highly persuasive before the Courts and Tribunals as to best practice in a disciplinary situation

Code of Practice

- The Code of Practice on Grievance and Disciplinary Procedures (the Code) - https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/cop3/
- Defines best practice for the handling of grievance and disciplinary proceedings by employers
- The Code is designed to ensure that any disciplinary procedures are fair and rational;
- the basis for any disciplinary proceedings are made clear to the employee concerned
- as well as any possible penalties and the internal appeal procedure



The Code



That employee grievances are fairly examined and processed



That details of any allegations or complaints are put to the employee concerned



That the employee concerned is given the opportunity to respond fully to any such allegations or complaints



That the employee concerned is given the opportunity to avail of the right to be represented during the procedure



That the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors, circumstances

General Legal Principles

Fair Procedures

Section 6 (7) of the Unfair Dismissal Act states that in determining whether the dismissal is fair or unfair it has regard to:

- A. The reasonableness or otherwise of the conduct of the employer in relation to the dismissal, and
- B. The extent, if any, of the compliance or failure in comply with the employer in relation to the employee to the disciplinary procedures or the provisions of the Code of Practice on Disciplinary and Grievance Procedures (Industrial Relations Act 1990) (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000

Procedures

- Unfair to progress with disciplinary process in the absence of the employee
- Principles of natural justice and fair procedures
- Exploration of reasons for refusal to attend
- Proceeding in the absence of the employee would only be reasonable in exceptional circumstances
- The requirement that an employer who has published a disciplinary procedure should follow the procedures scrupulously when conducting a disciplinary process
- **Always consult your policies/procedures and the contract of employment**
- The absence of clear policies and procedures can result in serious implications for the employer
- Often the WRC may find that an employer had cause to discipline the employee but that the procedures used were unfair. This will result in the dismissal itself being found to be unfair
- Increasingly the focus of hearings has been on the procedural and not the substantive aspects of a case
- Standard of a “reasonable, prudent and wise employer”
- **TOP TIP!** Following procedures and good administration may limit an employer’s liability

Ill Health

Ill Health

Questions to be Considered

- Can we progress in their absence? Not immediately
- What does their contract state?
- What do our policies and procedures state –
Absence Policy/ Disciplinary Policy
- Is stress cited – notify insurers if not already notified
- Is the absence genuine – what does the medical certificate state?
- Is an occupational medical examination appropriate?
- Fit to engage in the disciplinary process verses fit for work
- Are they suspended on full pay? Change nature of the leave?



Fit to Attend Meeting?

- May not be fit to attend work
- But may be fit to participate in process
- Unresolved disciplinary issue may be damaging to their health – stress/anxiety
- Careful instruction of Occupational Health
- Consider GDPR/Data Protection Issues



Illness or Disability?

Employment Equality Act, 1998 Section 16 (3)

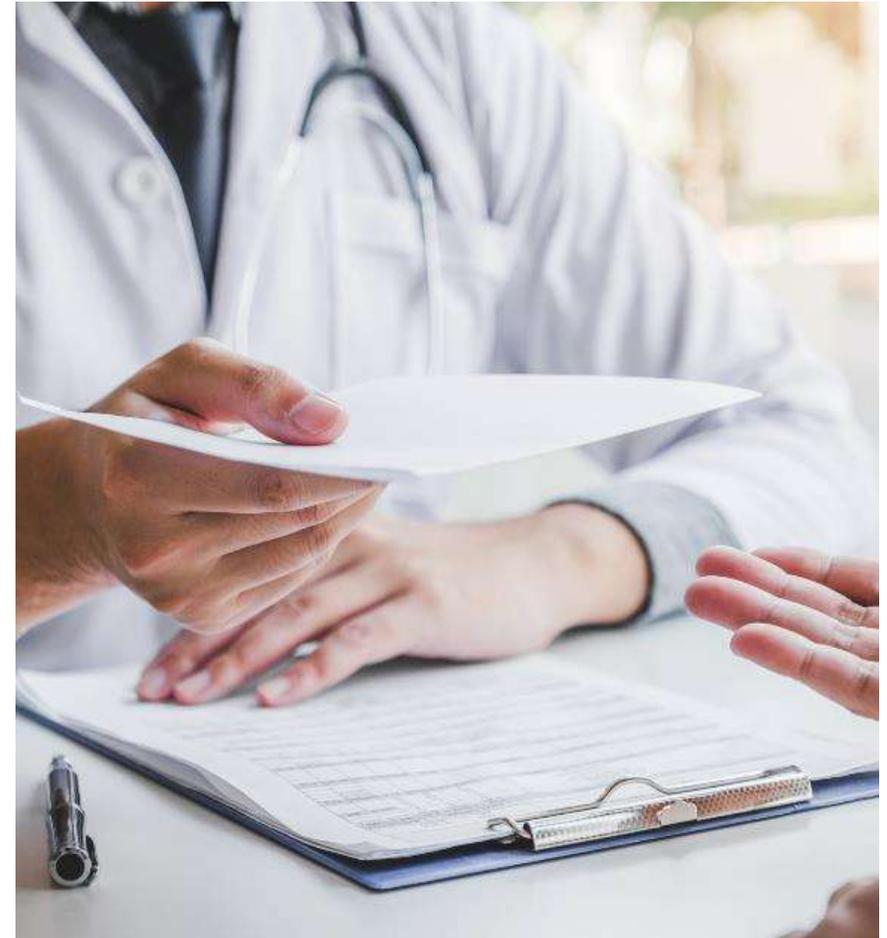
- a) “A person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable on reasonable accommodation being provided by the person’s employer.”
- b) “The employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability—
 - i. To have access to employment,
 - ii. To participate or advance in employment, or
 - iii. To undergo training, unless the measures would impose a disproportionate burden on the employer

Employer may absolve themselves of providing such accommodation where such accommodations would constitute a disproportionate burden on the employer. Such burdens may include undue financial costs with reference to the scale and financial resources of the employer and the possibility of obtaining public funding

Unfit for Work v Unfit for Meeting

What is the Law?

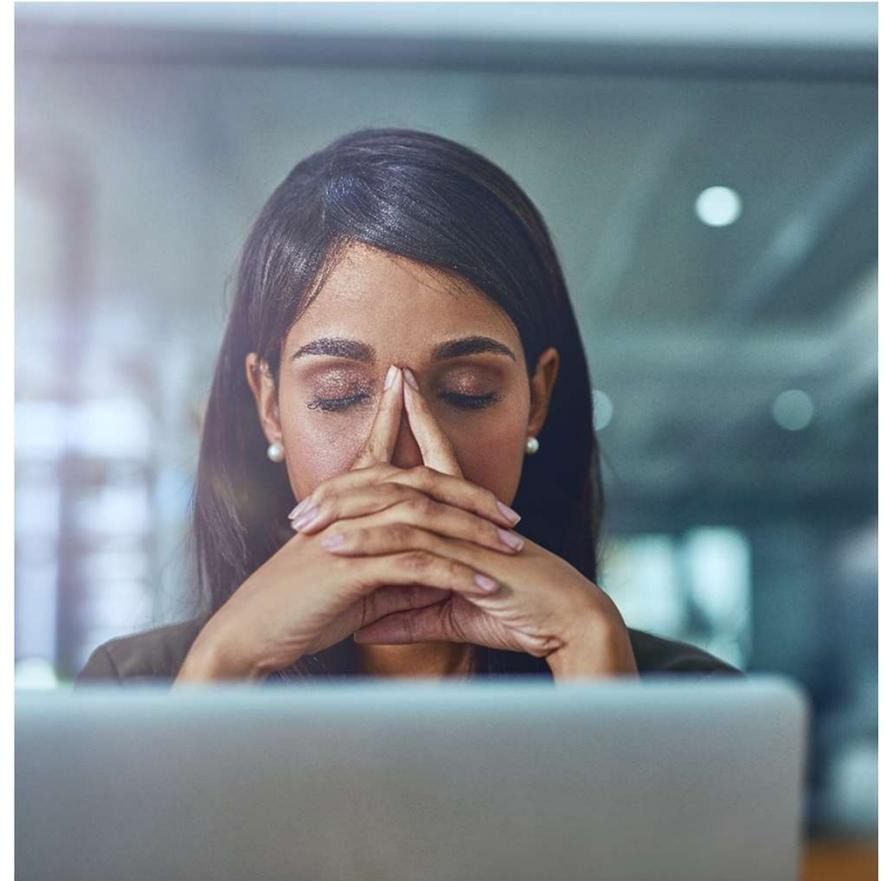
- Medical Certificate
- Occupation Health Report
- The employer should then be guided by the opinion of the Occupational Health advisor, when assessing whether the employee can engage with the process
- Throughout this process, the employee should be given meaningful participation including being given a copy of the medical reports and given an opportunity to challenge them and present their own medical evidence



Refusal to Attend

Process Refusal

- No response or attendance
- Must look at **REASON** for refusal
- Invite to disciplinary should state that failure to attend without reasonable notice/excuse will itself constitute a disciplinary issue
- Need to warn employee that decision may be made in their absence in the event of refusal to participate
- Occupational medical referral may also need to be considered here



Decision in Employees Absence

- Generally deemed unfair to continue with a disciplinary hearing in the absence of an employee
- Repeated requests and warnings should be afforded to the employee before continuing in absence
- If refusal is for a specific reason the employer should explore and attempt to resolve the issue(s)
- Employee should be again advised refusal to engage could be a disciplinary matter in itself
- Employer will need to consult an occupational health report if the employee is ill at the time of the hearing



Counters with Grievance(s)

Grievances

- Grievance Policy & Procedure should be set out for all employees within the Business
- The Code of Practice - S.I. no 146 of 2000 sets out the best practice guidelines for grievance procedures
- Apply fairly and consistently to all staff. Can be informal initially but should progress to formal if issue is not resolved quickly and easily or turns out to be complex.
- Informal (e.g. Mediation)
- Formal (e.g. Investigation & Appeal process)

Interpersonal Grievances

Protected Disclosure (Amendment) Act, 2022

Provides for a stronger exclusion of interpersonal grievances where they;

- Exclusively affect the worker making the complaint and they relate to interpersonal conflicts between them and another worker
- New Act provides that these types of complaints may be properly dealt with through existing grievance or dignity at work procedures in place

How is a Protected Disclosure different from a grievance or a complaint?

- A grievance can be a complaint by an employee to their employer. Sometimes a grievance is a protected disclosure but this is not always the case. A grievance that is exclusively personal to the employee is unlikely to be a protected disclosure
- It is important to get advice on your circumstances to help you assess whether your report is an exclusively personal grievance
- Office of the Protected Disclosures Commissioner - <https://www.opdc.ie/>

Interplay between Disciplinary Process & Grievances

Are disciplinary and Grievances related?

Non-Related

- Where the Grievance and Disciplinary Procedure is silent on this point, the processes can run separately and concurrently, and in the absence of any other relevant factors, neither process should take precedence
- Employee should be informed that the grievance will be dealt with in the normal manner under the established grievance procedures

Related

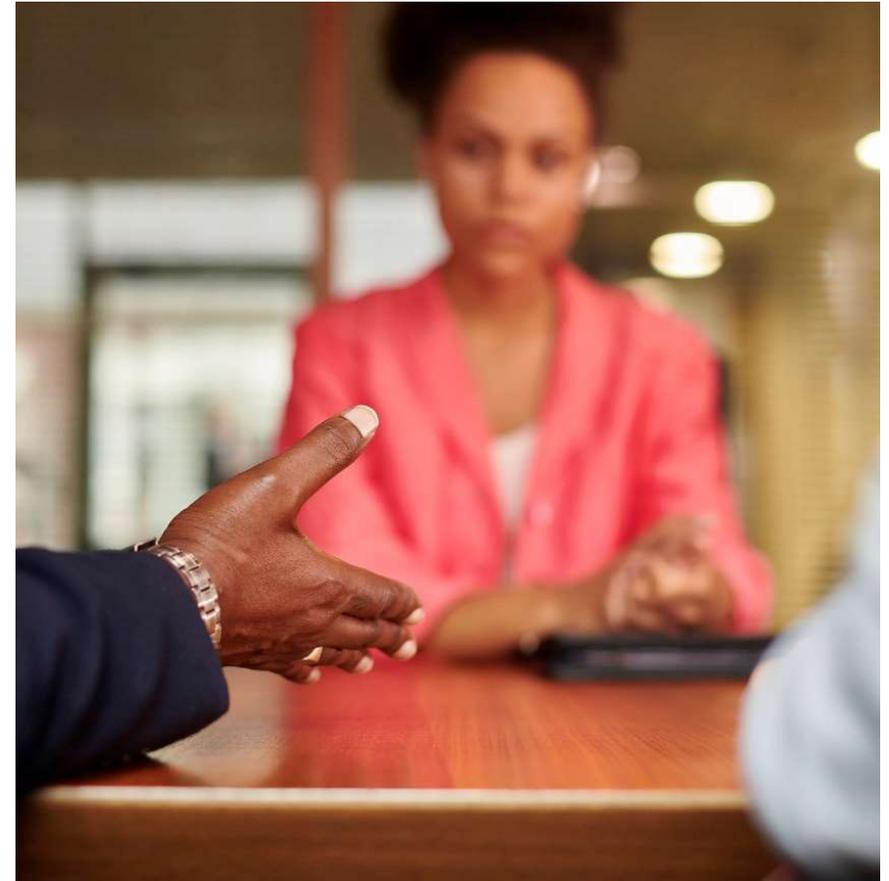
Temporary suspension of disciplinary process pending resolution of grievance(s)

A standstill clause which requires an employer to adjourn any disciplinary proceedings until the outcome of the grievance and, if necessary, the appeal from the grievance decision

Appeals

What are Employee entitlements?

- Employee has a Right of Appeal
- Any appeal should be dealt with by an independent party (person can be from within the organisation)
- Generally, to a higher level within the organisation



Case Example

Terence Slattery v Health Services Executive (WRC, May 2023)

High level of absenteeism – 2017 – 2019.
Progressed through HSE disciplinary procedure.
Failure to attend work regularly over an extended period.
Dismissed – appealed – appeal failed.

Obligation on an employer to provide an employee with a written copy of the procedure that will be used “before and for the purpose of dismissing the employee”.

Dis HSE follow the standard of fairness set out in the Code of Practice on Disciplinary and Grievance Procedures which is documented in Statutory Instrument 146 of 2000?

Terence Slattery v Health Services Executive (WRC, May 2023)



Employee did not attend the disciplinary hearing (final stage 4 meeting) – expected to be dismissed and could not face the prospect.



Did not result in any unfairness, because he had presented his case adequately at the first stage 4 meeting in October 2019.

Any failure to allow him an opportunity to state his case was remedied by the comprehensiveness of the appeal hearing which took place remotely on March 29th and in-person on May 11th 2021.

Fair process.

Other Issues

Right to Legal Representation during Grievance and Disciplinary Process

Irish Rail & Barry McKelvey [2018]
IECA 346

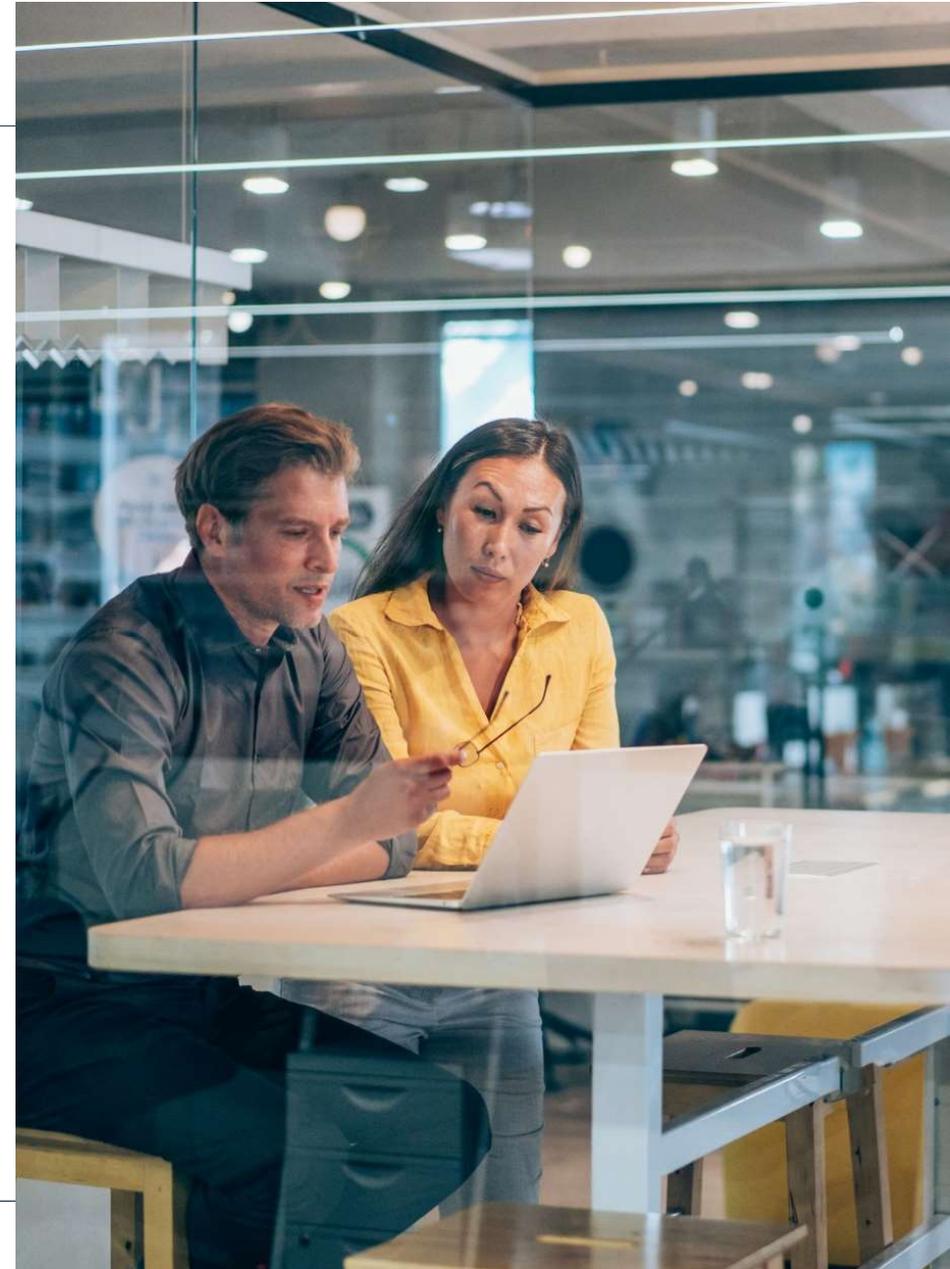
Factors to consider;

- the seriousness of the charge and of the potential penalty;
- whether any points of law are likely to arise;
- the capacity of the employee to present their own case;
- procedural difficulties to be encountered;
- the need for reasonable speed in making the adjudication; and
- the need for fairness as between the employer and employee



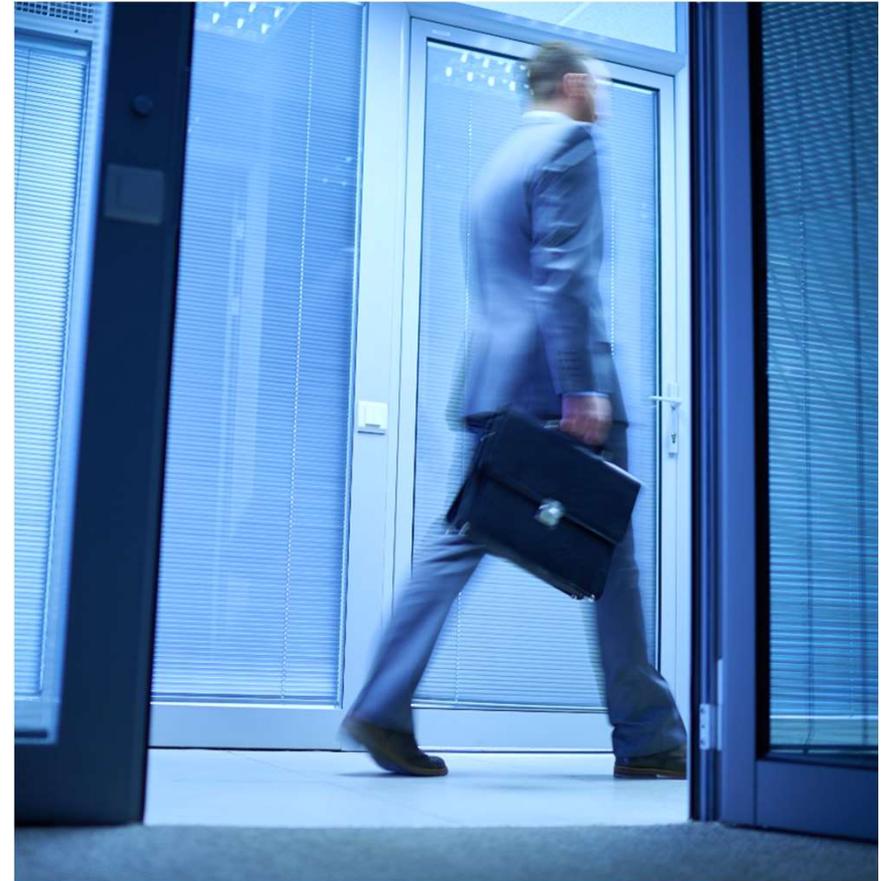
Controlling the Risks

- Comprehensive employee handbook complete with Disciplinary, Grievance and Bullying policies
- Fair and efficient procedures when dealing with issues & grievances
- Detailed records kept & ensuring policies and obligations are followed



Unfair Dismissal Claim

- 12 Months Continuous Service
- Notice given? Substantial Reason for Dismissal
- Constructive Dismissal burden of proof is on the applicant
- 6 Month window after dismissal to bring claim
- Compensation capped at 2 years wages
- Accepted reasons for dismissal; Conduct, Performance, Redundancy, Employee being in breach of the law (e.g. driving license revoked)



Equality Claim

- The Employment Equality Acts 1998 – 2015
- Act covers Public & Private, Full & Part-time, Agency & Apprentice workers
- No Minimum service requirement
- Act prohibits discrimination on: Access to Employment, Conditions, Pay, Training, Promotions, Dismissal, Advertising
- Plus prohibits under the 9 normal grounds: Gender, Civil Status, Family Status, Sexual Orientation, Religion, Age, Disability, Race, Membership of Traveler Community



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**Thank you for your time.
Any questions?**

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