

Forward thinking
Straight talking

Disciplinaries:

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?

Your speaker

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Introduction

- › As soon as a disciplinary hearing is arranged the employee
 - › Calls in sick
 - › Refuses to respond
 - › Raises allegations about everyone else
- › Do we have to wait?
- › What are the risks?



Unfair Dismissal

- Section 98 Employment Rights Act 1996
- *Did the employer act reasonably?*
- *Substance and process – band of reasonable responses*
- Key part of fair procedure is that the employee has an opportunity to present their side at a hearing
- ACAS Code reinforces that principle

ACAS Code

- Basic steps in fair disciplinary procedure
- Expectation that all steps will be followed
- BUT can still be fair if not practicable
- Hearing to be held '*without unreasonable delay*' and employees should make every effort to attend
- Consider employer disciplinary policy wording

Assessing risks

- Employees usually need two years' service to claim unfair dismissal
- Exceptions exist e.g. dismissal for whistleblowing
- Avoid delays that will allow unfair dismissal protection to apply
- Is there risk of a discrimination complaint?
- A horror movie - *Grosset v City of York Council*

The employee claims to be ill

- May be genuine but might be delaying tactic
- Suggest alternative hearing arrangements to avoid delay
- Consider whether medical report may assist to establish when employee will be fit to attend
- Will require employee's consent for medical evidence

Fit or unfit to attend a meeting?

- Stress and anxiety most common reason cited
- Fitness to work not same as fit to attend meeting
- Unresolved dispute may be damaging to employee's mental health

Fit or unfit to attend a meeting?

- Key questions:
- Does the employee have the ability to understand the allegations made against them?
- Does the employee have the ability to distinguish right from wrong?
- Is the employee able to instruct a friend or representative to represent their interests?
- Does the employee have the ability to understand and follow the proceedings, if necessary with extra time and a written explanation?

Refusal to take part in process

- No response or attendance
- Still need to allow second opportunity to attend
- *Bridgeman v Family Mosaic Housing Association*
- Invite needs to warn decision may be made in their absence
- ‘*Persistent*’ non-attendance ‘*employer should make a decision on the evidence available*’ – ACAS Code
- Caution where medical evidence clearly states unable to attend
- *William Hicks v Nadal*

When to decide in the employee's absence?

- ACAS Guide: Factors to consider before making decision
- Any rules the organisation has for dealing with failure to attend disciplinary meetings
- The seriousness of the disciplinary issue under consideration
- The employee's disciplinary record, general work record, work experience, position and length of service
- Medical opinion on whether the employee is fit to attend the meeting
- How similar cases in the past have been dealt with

Disciplinary and grievances

- Raising counter issues when faced with disciplinary action
- Will this delay the disciplinary outcome?
- Not necessarily – no rule that disciplinary process will have to stop in every case
- May '*temporarily*' suspend or deal '*concurrently*' – ACAS Code
- Depends on circumstances and whether the disciplinary and grievance are related

Disciplinaries and grievances

- Temporary suspension of disciplinary procedure where:
- The grievance relates to a conflict of interest that the manager holding the disciplinary hearing is alleged to have
- Bias is alleged in the conduct of the disciplinary hearing
- Management has been selective with the evidence it has supplied to the manager holding the disciplinary hearing
- There is possible discrimination
- *ACAS Guide*

Disciplinary and grievances

- Case examples
- *Samuel Smith Old Brewery (Tadcaster) v Marshall*
- No requirement to complete the entire grievance procedure before a disciplinary hearing could take place
- *Jinadu v Docklands Buses*
- No obligation to put disciplinary on hold to deal with grievance
- Key point - will continuing cause clear prejudice to the employee?

The appeal

- Chance to correct earlier errors in procedure
- Is it sufficiently thorough to remedy earlier defects?
- How appeal is conducted may make dismissal fair even if employee denied chance to make representations in first hearing
- *Khan v Stripestar Ltd*
- Contrast where onus placed on employee to show dismissal was wrong
- *Bridgeman v Family Mosaic Housing Association*

Questions?

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