

WHITE PAPER CONFERENCES:

Solution-Focused Answers For Employers

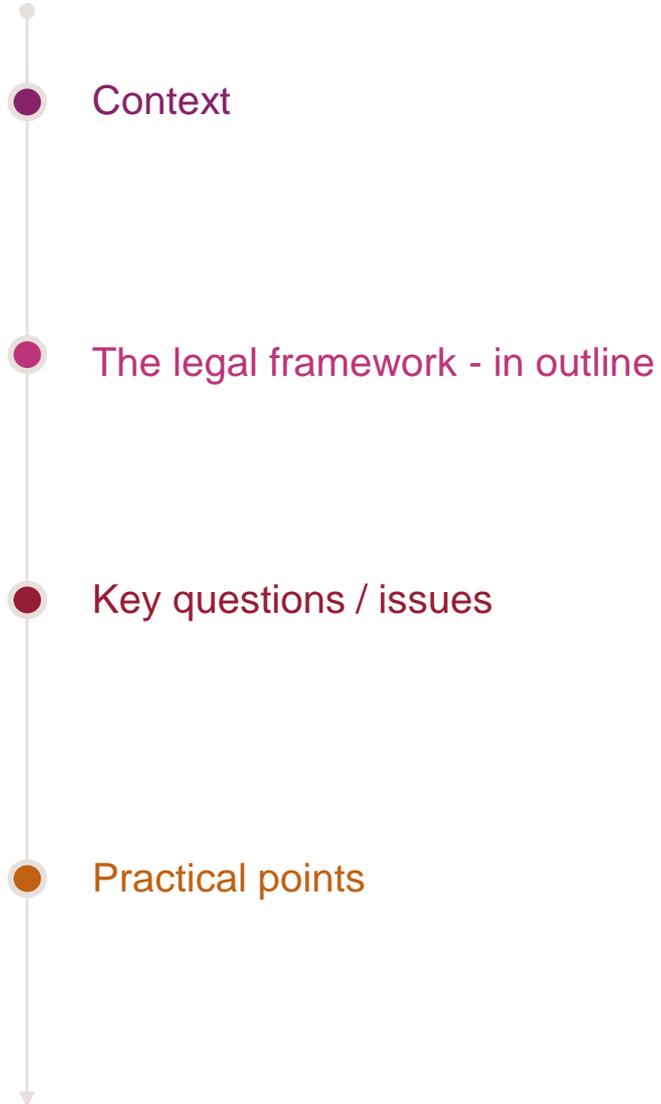
24 November 2022

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When and how do you start a capability process when all reasonable adjustments have been exhausted, but absence continues, or contractual obligations are only partially fulfilled?

Content



PART ONE:

Context

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Sickness absence rate¹, for all people in employment aged 16 years and over, UK, 1995 to 2020

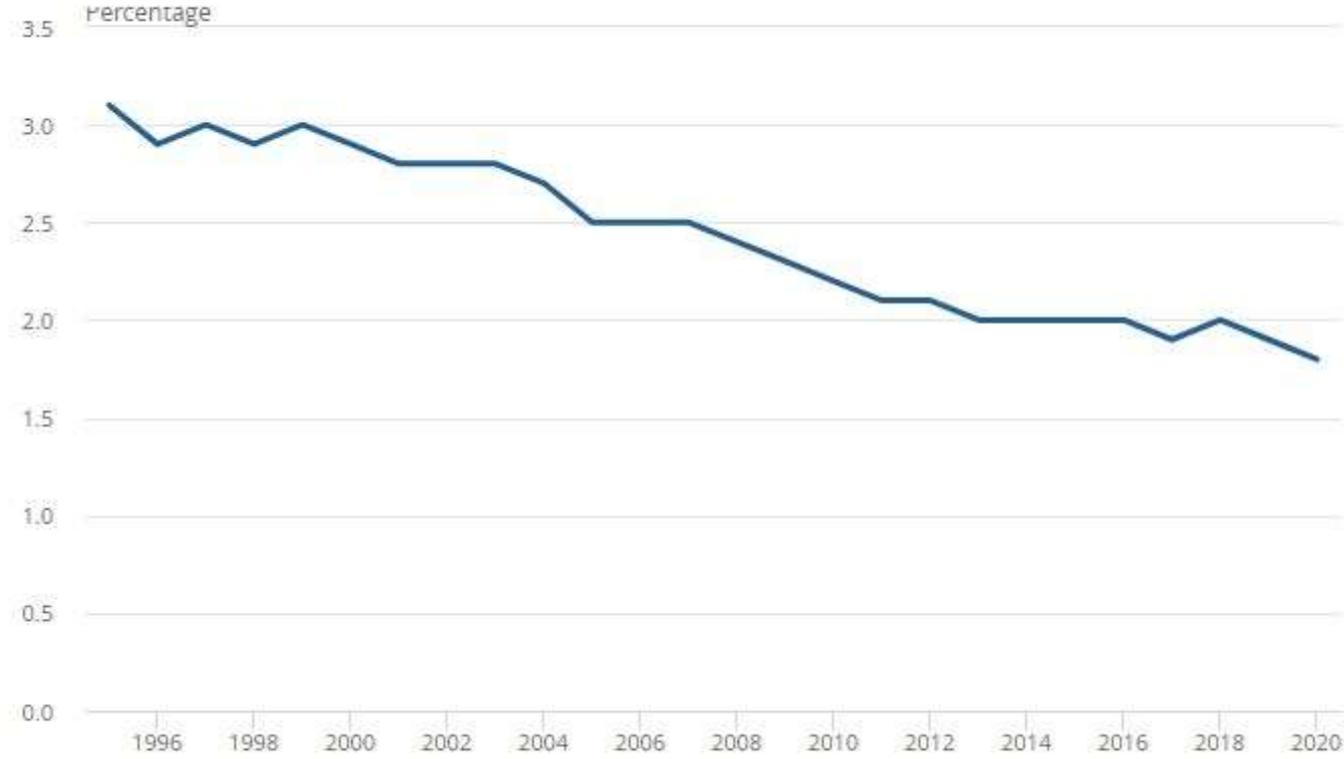


Figure 2: "Minor illnesses" account for over a quarter of all occurrences of sickness absence in 2020

Percentage of occurrences¹ of sickness absence, by reason, 2020, UK

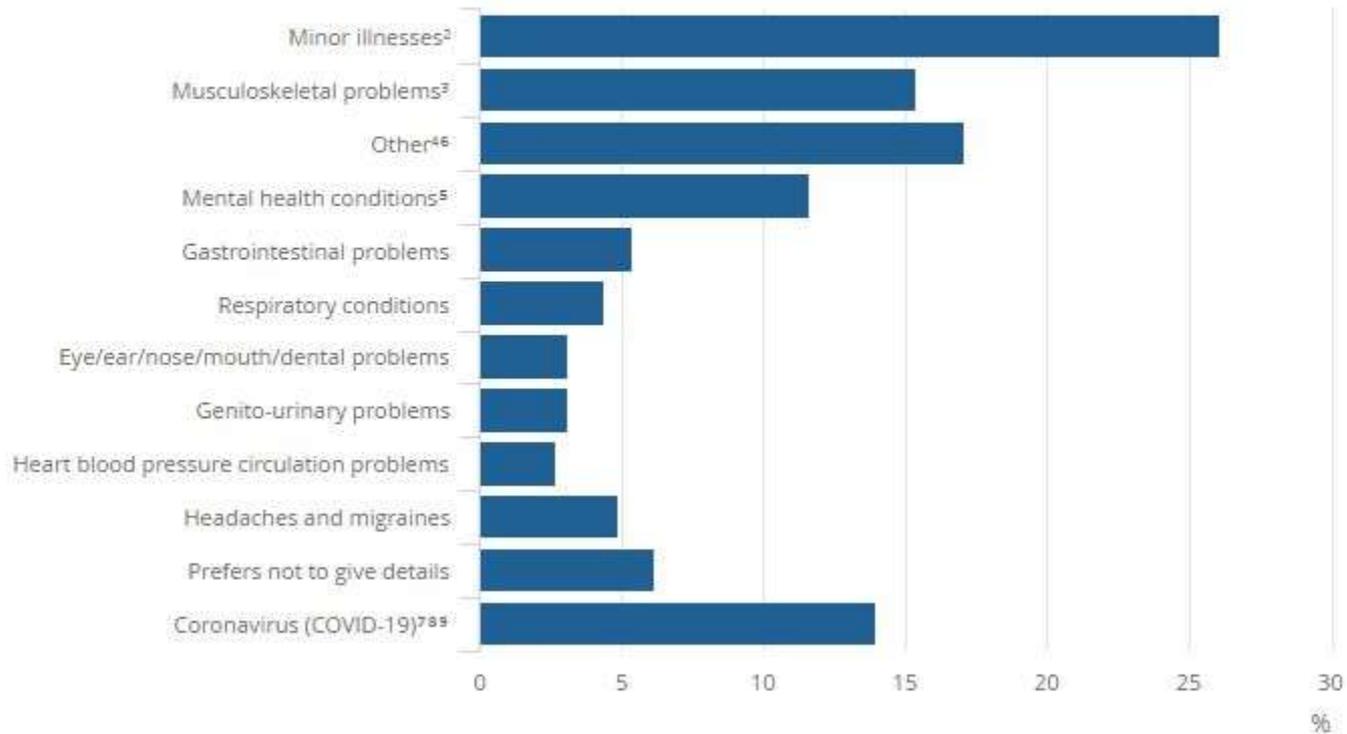
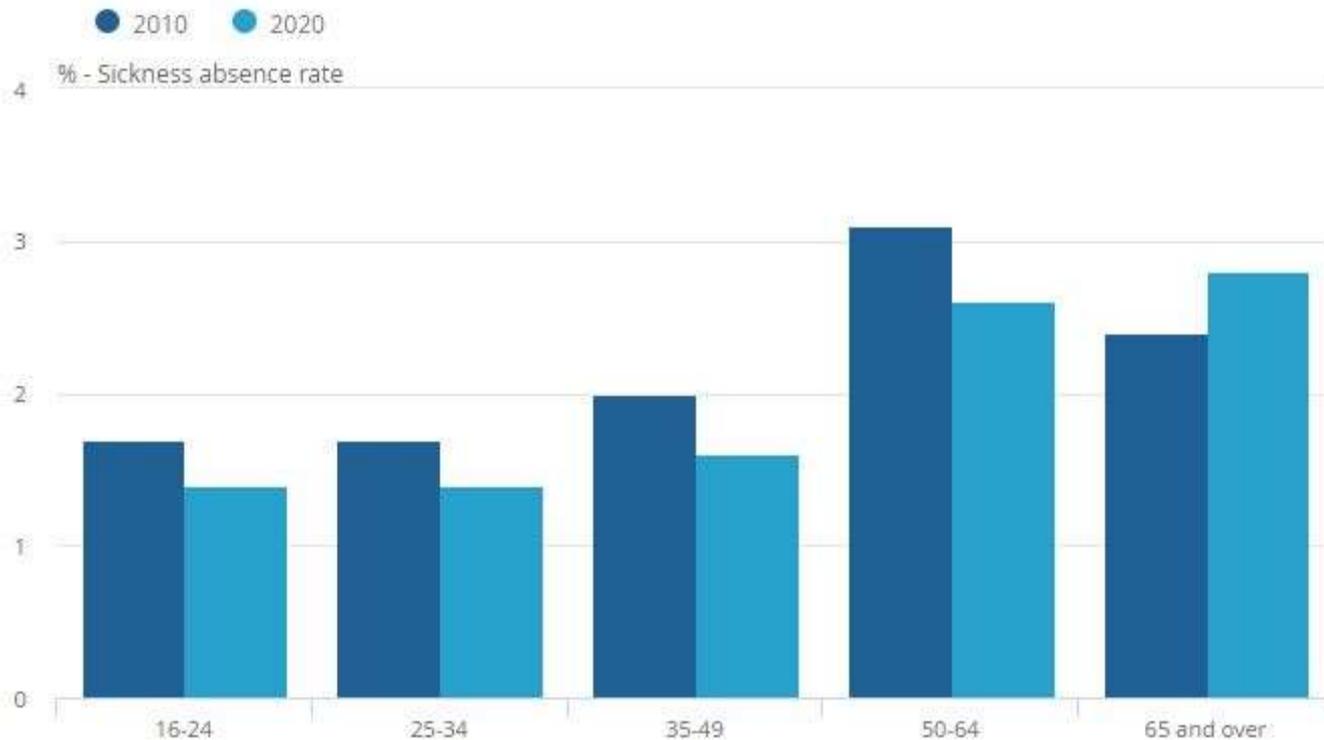


Figure 4: Those aged 65 years and over are the only group to see an increase in their sickness absence over the decade

Sickness absence rate¹, by age group, UK, 2010 and 2020



Context – statistics

- In 2021, an estimated 149.3 million working days were lost because of sickness or injury in the UK.
- This is equivalent to 4.6 days per worker.
- Long-term absence is invariably disability-related.
- One in five people in the UK (14.6 million) reported having a disability in 2020/21 (this represents 22% of the total population).
- 7,430 disability discrimination claims were brought in 2021/22 (compared to 6,919 in 2018/19 and 8,178 in 2020/21).
- In April 2021, in the case of Barrow v Kellog Brown & Root, an Employment Tribunal awarded the Claimant £2,567,831.91 for unfair dismissal and disability discrimination (this is the second largest disability discrimination award ever made).

PART TWO

The legal framework

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Legal framework



Unfair dismissal

Employment Rights Act 1996

- **Employees with two years' qualifying service** have the right not to be unfairly dismissed.
- A dismissal will be held to be fair if:
 - Employer shows that the reason (or principal reason) was one of the five potentially fair reasons for dismissal; and
 - The Tribunal finds that, in all the circumstances (including the employer's size and administrative resources), the employer acted reasonably in treating that reason as a sufficient reason for dismissal.

Potentially fair reasons

Unfair dismissal – fairness and reasonableness

Employment Rights Act 1996

Five potentially fair reasons for dismissal:

1. capability or qualifications
2. conduct
3. redundancy
4. statutory restriction
5. “some other substantial reason”

Potentially fair reasons

Broadly, “*capability or qualifications*” under section 98(2)(a) ERA 1996 covers three concepts:

Capability

Capability dismissals typically relate to an employee’s **poor performance** or **ill health**.

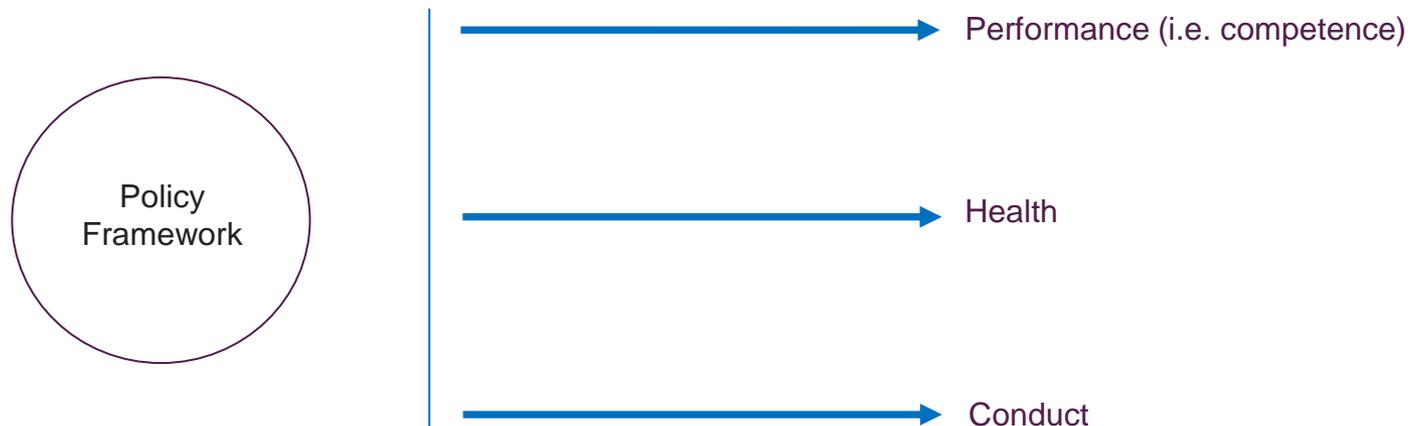
Particular care should be taken with dismissals related to an employee’s ill health, as the employee may have protection from discrimination under the Equality Act 2010 if their illness amounts to a disability.

Qualifications

A dismissal relates to an employee's qualifications if it relates to any "*degree, diploma or other academic, technical or professional qualification*". Common examples include where it becomes apparent that an employee does not have the qualifications needed to do their role or where the employee loses their relevant qualifications during their employment.

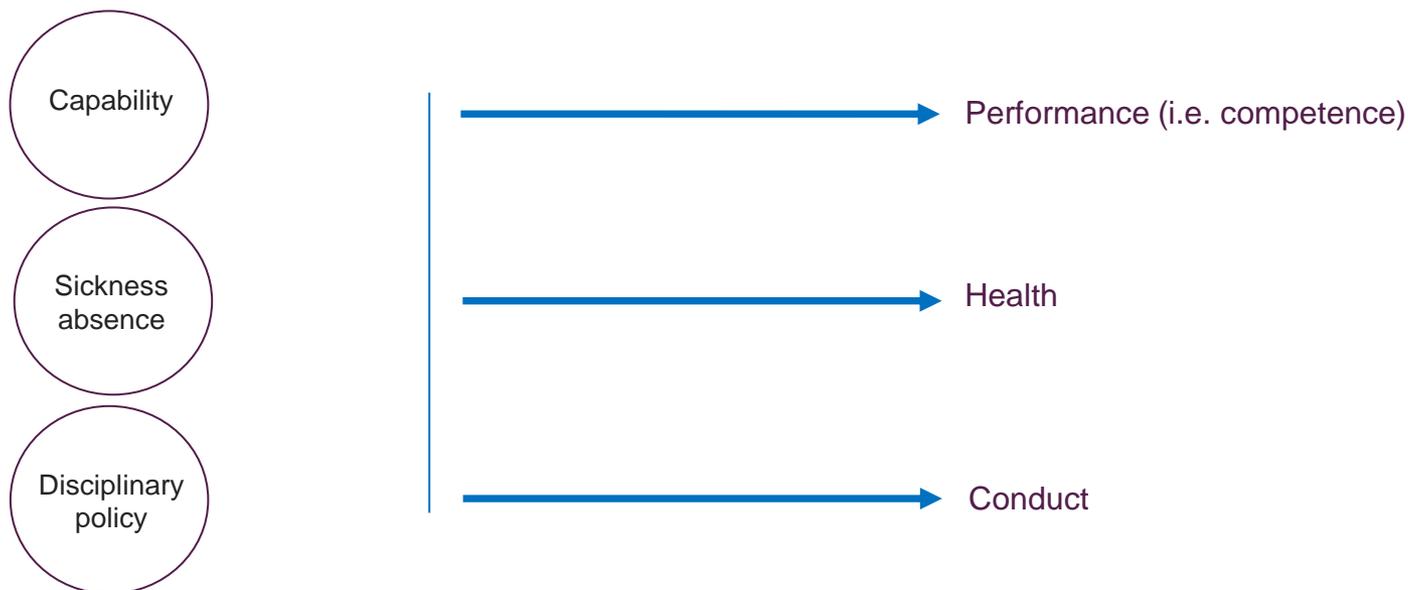
Policy framework

The appropriate approach to addressing performance, absence and misconduct are very different. It is problematic (legally and practically) to confuse these categories. Managers need to understand the underlying problem – and an organisation's policy framework needs to offer distinct processes for each situation.



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Reasonableness

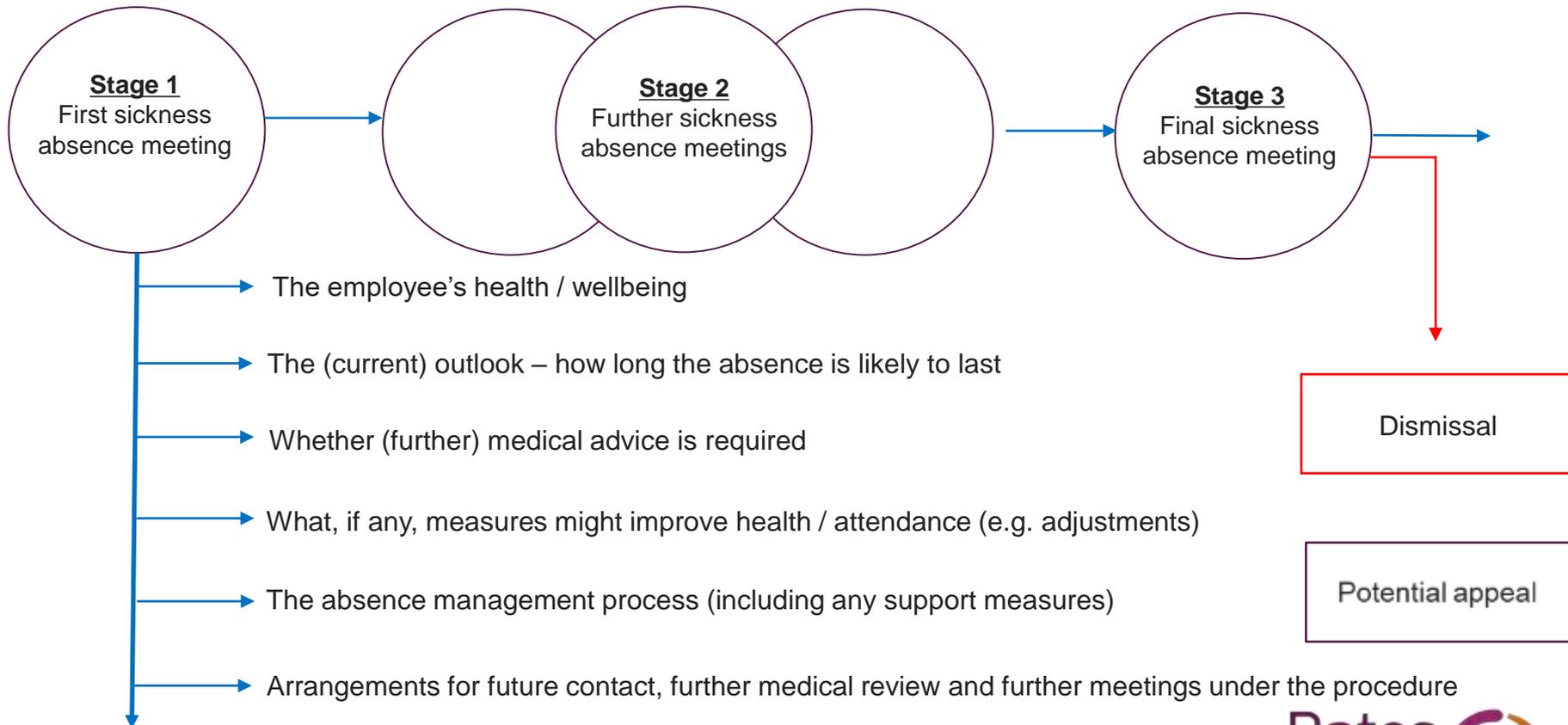
Did the employer act reasonably, when dismissing?

- Test for reasonableness (section 98(4) of the ERA 1996):
 - Did the employer follow a fair procedure?
 - Did the employer act reasonably in treating the reason as a sufficient reason for dismissal taking into account the employer's size and administrative resources?
- **Question:** Does the Acas Code of Practice on Disciplinary and Grievance Procedures apply to (genuine) ill health dismissals?

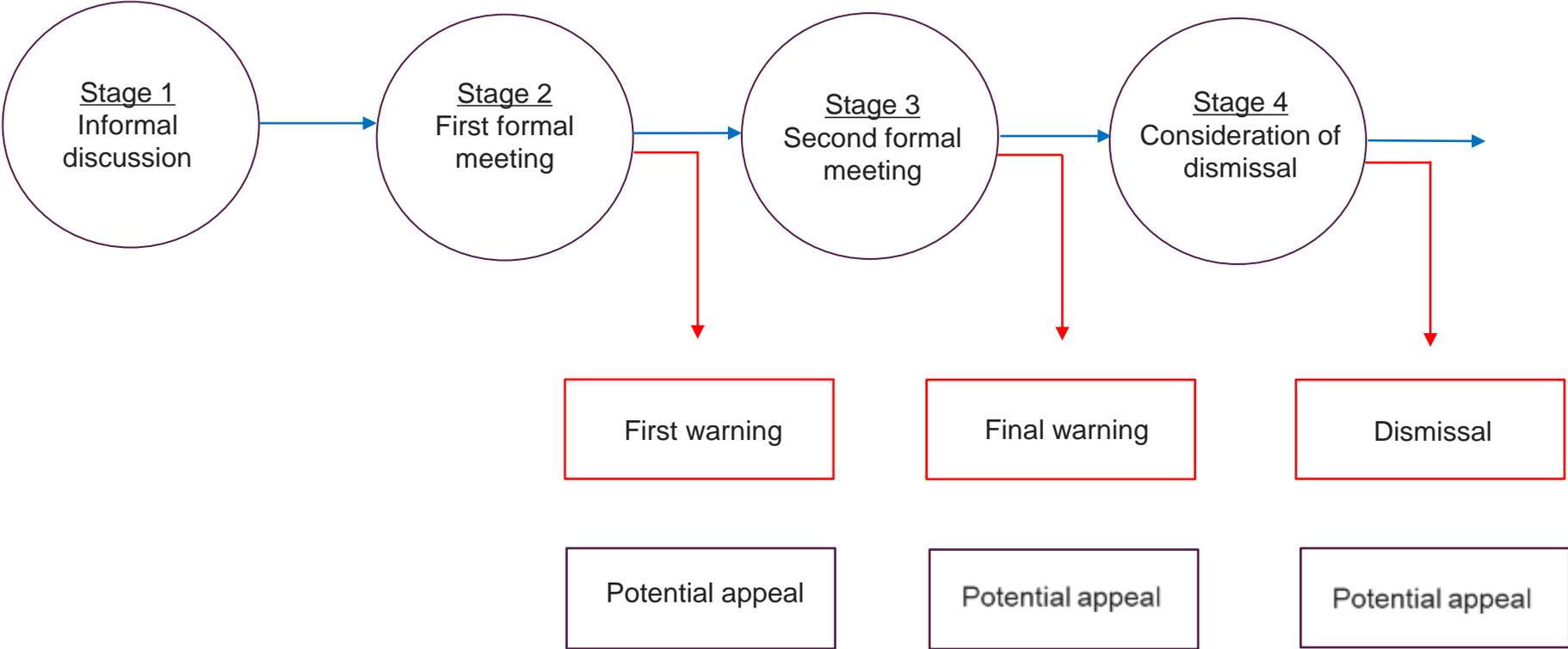
What does a fair process look like?

Sickness absence management

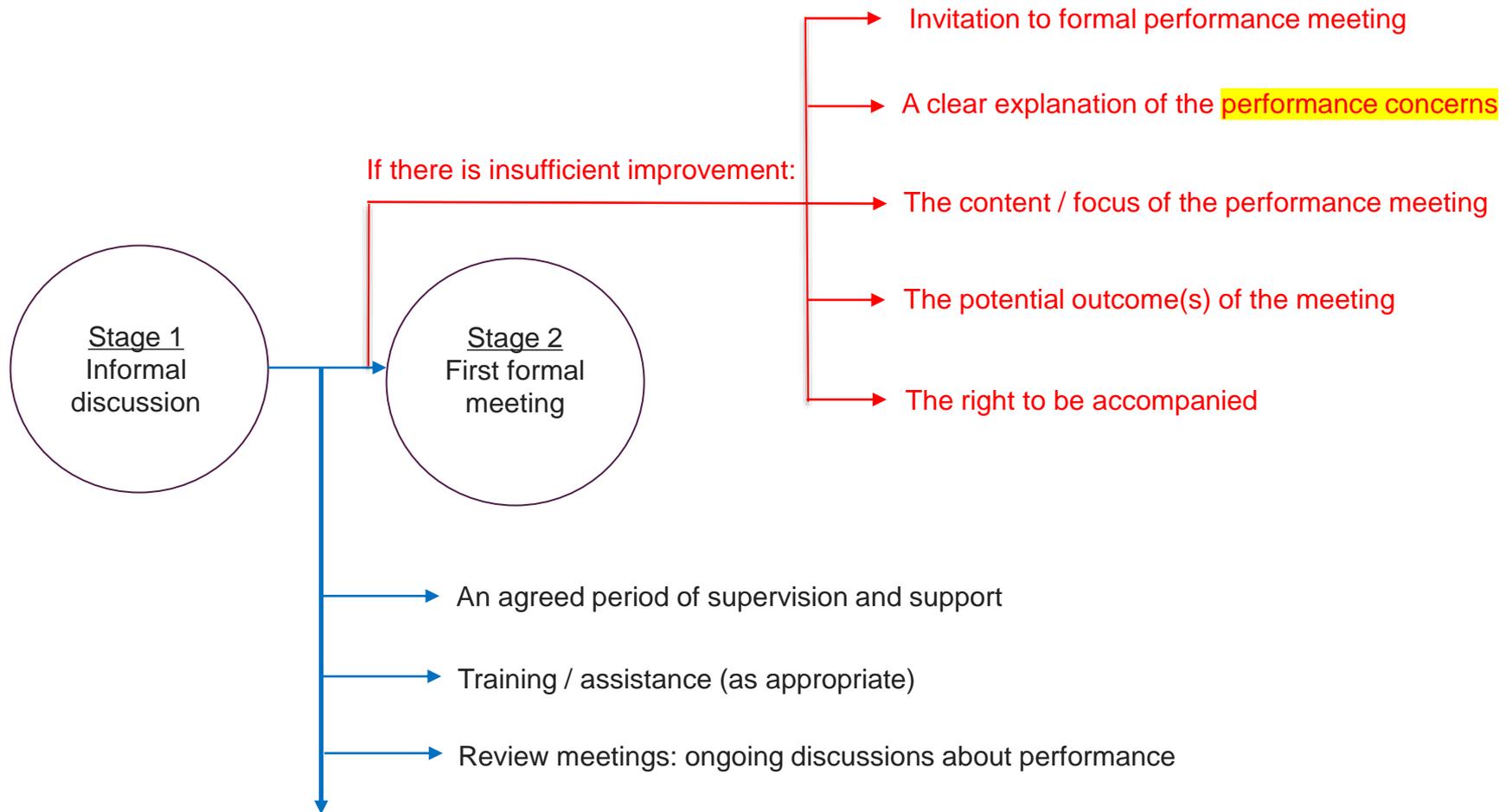
The precise sequence and duration of a performance management process will depend on a range of factors including: (i) the length of time an individual has been employed, (ii) the extent and impact of the underperformance, and (iii) the degree to which an individual is demonstrating consistent improvement. A typical process (for an employee with more than 2 years' service) will comprise:-



Performance management process



Performance management process



Did the employer act reasonably?

Reasonableness in ill-health dismissals

- Lyncock v Cereal Packaging Ltd [1998] ICR 670
 - Nature of the illness.
 - Prospects of returning to work and likelihood of the recurrence of the illness.
 - The need for the employer to have someone doing the work.
 - The effect of the absences on the rest of the workforce.
 - The extent to which the employee was made aware of the position.
 - The employee's length of service.
- Whether the employer:
 - Took steps to obtain the up-to-date medical position.
 - Consulted with the employee.
 - Considered the availability of alternative employment.

How long may an employer be expected to wait?

- Relevant factors:
 - The availability (and cost) of temporary cover.
 - Whether the employee has exhausted their sick pay.
 - The administrative costs associated with keeping the employee 'on the books'.
 - The size of the organisation.

See: [BS v Dundee City Council \[2013\] CSIH 91](#)

How long may an employer be expected to wait?

*“The argument “give me a little more time and I am sure I will recover” is easy to advance, but **a time comes when an employer is entitled to some finality.**” (Paragraph 36)*

*“In principle **the severity of the impact on the employer** of the continuing absence of an employee who is on long-term sickness absence **must be a significant element** in the balance that determines the point at which their dismissal becomes justified, and **it is not unreasonable for a tribunal to expect some evidence on that subject.** What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing.” (Paragraph 45)*

Protections under the Equality Act 2010

Types of discrimination:



The duty to make reasonable adjustments

The key concepts

01

Disability (the statutory definition)

02

Knowledge (actual and constructive)

03

Provision, Criterion or Practice (PCPs)

04

Substantial disadvantage

05

Reasonableness

Disability – the statutory definition (s.6 EqA 2010)



“1) A person (P) has a disability if –

- > (a) P has a (i) physical or mental impairment, and*
- > (b) the impairment has a (ii) substantial and (iii) long-term adverse effect on P’s ability to carry out normal (iv) day-to-day activities.”*



Disability – the statutory definition (cont.)

The definition poses four questions:

- Does the person have a physical or mental impairment?
- Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
- Is that effect substantial?
- Is that effect long-term?

A tribunal considering the question of disability should ensure that each step is considered (Goodwin v Patent Office [1999] IRLR 4 (EAT)).

Three types of knowledge

ACTUAL

The employer knows the person is disabled.

IMPUTED

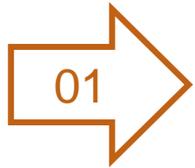
The employer's employee or agent knows that the person is disabled. This knowledge will usually be attributed to the employer.

CONSTRUCTIVE

The employer has neither actual or imputed knowledge of the disability, but ought to have known about it.

Elements of constructive knowledge

Failure to make reasonable adjustments



The employer would have to have known had they made appropriate enquiries.



The employer must have knowledge of facts relevant to the definition of disability.

Reasonableness

01

The extent to which the adjustment would have **ameliorated** the disadvantage.

02

The extent to which the adjustment was **practicable**.

03

The **financial and other costs** of making the adjustment, and the extent to which the step would have disrupted the employer's activities.

06

The financial and other **resources** available to the employer.

07

The nature of the employer's activities.

09

The **size** of the undertaking.

PART THREE

Key questions

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Key issues / questions



PART FOUR

Practical points

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Medical evidence / OH reports

01

No clear diagnosis / prognosis

02

A lack of appropriate expertise

03

No critical assessment of the employee's account

04

An unwillingness to give a decisive view

05

Risk adverse

Broad points

01

Clear focus on the predominant issue

02

Timeliness

03

Tone: patience, empathy, professionalism

04

Forward planning (not reactive management)

Practical steps

01

Identify an appropriate / experienced OH practitioner

02

Ensure that the referral is sufficiently detailed

03

Provide relevant context in the referral:-

- The requirements of the job
- The levels of sickness absence
- Areas of underperformance
- Any supportive measures considered / implemented
- Any adjustments the OH practitioner considers may assist

**With the benefit of a good OH report
the business can:**

- (1) plot the process
- (2) decide whether (further) adjustments are appropriate
- (3) work through the process in an appropriately considered and informed way



Get in touch

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