



Disciplinary hearings and absent employees

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When is it reasonable to proceed with a disciplinary hearing and dismiss an employee in their absence?

Legal considerations

- ▶ Common Law Rights:
 - ▶ Negligence
 - ▶ Personal Injury
 - ▶ Health & Safety
- ▶ Contractual Rights
 - ▶ Express and Implied terms
 - ▶ Policies and Procedures
- ▶ Statutory Rights
 - ▶ Unfair Dismissal
 - ▶ Discrimination
 - ▶ Detriment
 - ▶ Whistleblowing
 - ▶ Right to be accompanied

Context is Everything!

Disciplinary Process

- ▶ Reason for disciplining
- ▶ Stage in process
- ▶ Length of Time already involved
- ▶ Length of Delay being sought
- ▶ Impact of Delay on employee and others (?)
- ▶ Policies and Procedures
- ▶ ACAS Code and Guidance
- ▶ Section 98(4) Employment Rights Act 1996

Absence

- ▶ Reason for Non-Attendance:
 - ▶ Ongoing ill-health issues/disability
 - ▶ Pre-existing Condition
 - ▶ Reaction to proceedings
 - ▶ Other reasons e.g. maternity/non cooperation/ companion
- ▶ Length of Non-Attendance:
 - ▶ Current
 - ▶ Projected

Particular Considerations: Disability

- ▶ Is disability a potential cause of the misconduct?
- ▶ If so, may impact on whether appropriate to go down disciplinary route
- ▶ Are reasonable adjustments required to the process?
- ▶ Has disability been factored into how to conduct the process?
- ▶ Duty to make reasonable adjustments
- ▶ Discrimination arising from a disability

Other Considerations

- ▶ Equality Act 2010: Are there other protected characteristics at play?
 - ▶ E.g. is a delay being sought to have an interpreter present
- ▶ Statutory Right to be Accompanied
- ▶ Whistleblowing
- ▶ Detriment Claims
- ▶ Health & Safety implications

Procedural Fairness

ACAS Code of Practice

Paragraph 25:

“Where an employee is **persistently** unable or unwilling to attend a disciplinary hearing **without good cause** the employer should make a decision based on the evidence available.”

ACAS Guide (2019)

- ▶ Considerations include:
 - ▶ Organisations rules on failure to attend.
 - ▶ Seriousness of disciplinary issue
 - ▶ Disciplinary, general work records, experience, position and length of service
 - ▶ Medical opinion
 - ▶ Consistency with previous cases

Case Examples

- ▶ **Bashir v Sheffield Teaching Hospital NHS Foundation Trust 2010**
- ▶ **Talon Engineering Ltd v Smith**
- ▶ **Bridgeman v Family Mosaic Housing Association**

Conclusion

- ▶ Exception rather than the rule!
- ▶ Numerous opportunities to attend
- ▶ Need a pattern of non-attendance or non-cooperation
- ▶ Detailed medical and OH advice usually a fundamental requirement
- ▶ Risk assessment on impact on employee's and others mental health in proceeding vs delaying.
- ▶ Before proceeding show that taken into account factors set out in ACAS Guide.
- ▶ Lower risk if less than 103 weeks service and no other "red flags"

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