

Difficult disciplinaries



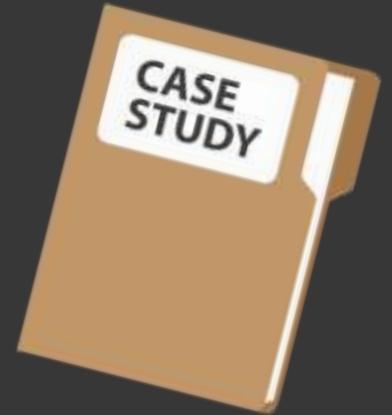
Mishcon de Reya

It's business. But it's personal.

Case Study

How do you handle a disciplinary hearing when the employee:

- (1) is absent due to prolonged ill health
- (2) refuses to attend
- (3) counters with a series of grievances?



Case Study I

Absence due to ill health

- You are a HR representative at a well-known global company.
- An employee, Patricia, has been accused of using racist language at work. She denies the allegation. You have investigated and she has been called to a grievance hearing to be heard today by her manager.
- This morning you receive an email from Patricia: she is unwell and will be off work for 3 weeks due to stress. She provides a fit note.
- In Patricia's email she asks for confirmation that she will still receive her full pay as usual.

Statement of Fitness for Work
For social security or Statutory Sick Pay

Patient's name: Ms Patricia Green

I attend your care on: 15 / 05 / 2022
and, because of the following condition(s):
Stress at work
Anxiety
Depression and dyspepsia

I advise you that:
 you are not fit for work.
 you may be fit for work taking account of the following advice:

If available, and with your employer's agreement, you may benefit from:
 a phased return to work
 altered hours
 amended duties
 workplace adaptations

Comments, including functional effects of your condition(s):

This will be the case for:
from 15 / 05 / 2022 to 15 / 09 / 2022

I will still not need to attend your clinic for work again at the end of this period.
(Please delete as applicable)

Doctor's signature: [Signature]

State of statement: 15 / 05 / 2022

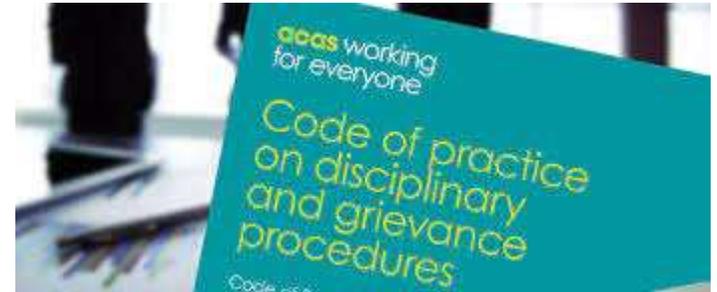
Doctor's address: White Medical Centre
20 London Avenue
London W1C 6BT

Sheet 3 04/19



The starting point

- Check the employee's contract
 - What do your contracts say about sick leave and pay if the employee is subject to a disciplinary process?
- Consider the ACAS Code and the uplift.
 - Relevant principles:
 - Employers should give employees an opportunity to put their case in response
 - Employers and employees should make every effort to attend a disciplinary hearing



Case Study I

Absence due to prolonged ill health

- At the end of the three weeks, Patricia says that she is still unwell and expects to be unwell for a further two weeks.

Statement of Fitness for Work
For social security or Statutory Sick Pay

Patient's name: Middleton, Ms Patricia Carson

I assessed your case on: 15 / 05 / 2022
and, because of the following condition(s):
Stress at work, anxiety, Postnatal depression

I advise you that:
 you are not fit for work.
 you may be fit for work taking account of the following advice:

If available, and with your employer's agreement, you may benefit from:
 a phased return to work
 amended duties
 altered hours
 workplace adaptations

Comments, including functional effects of your condition(s):

This will be the case for []
or from: 15 / 05 / 2022 to: 15 / 09 / 2022

I will/will not need to assess your fitness for work again at the end of this period.
(Please delete as applicable)

Doctor's signature: [Signature]

Date of statement: 15 / 05 / 2022

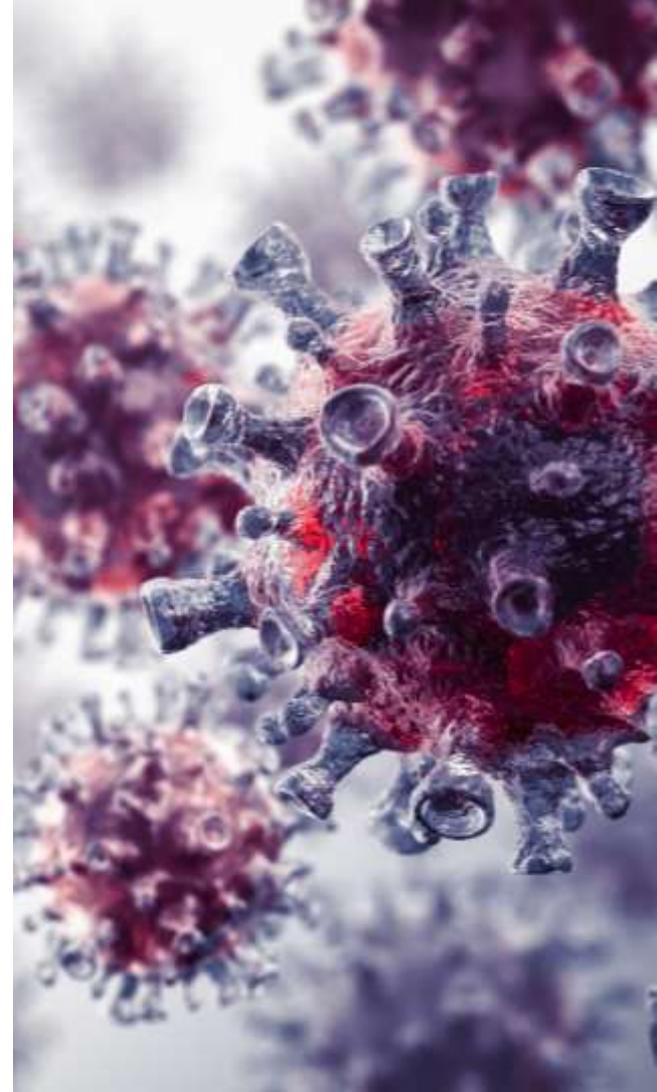
Doctor's address: White Medical Centre
92 Lutterell Avenue
London W12 6BT

MSF 1 04/19



Absences due to prolonged ill-health

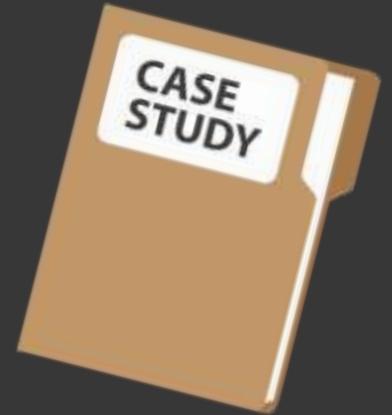
- Balancing act: ensuring matter is dealt with speedily and fairly versus affording employee a genuine opportunity to participate
- Fitness to perform role versus fitness to attend disciplinary process - the difference
- Occupational Health: consider the following when assessing fitness to attend:
 - does the employee have the ability to understand the allegation?
 - is the employee well enough to respond to the allegation?
 - is the employee able to instruct a representative to assist them?
 - does the employee have the ability to provide their explanation in writing?
 - are there any adjustments to the disciplinary process which could be made to enable the employee to participate?



Case Study I

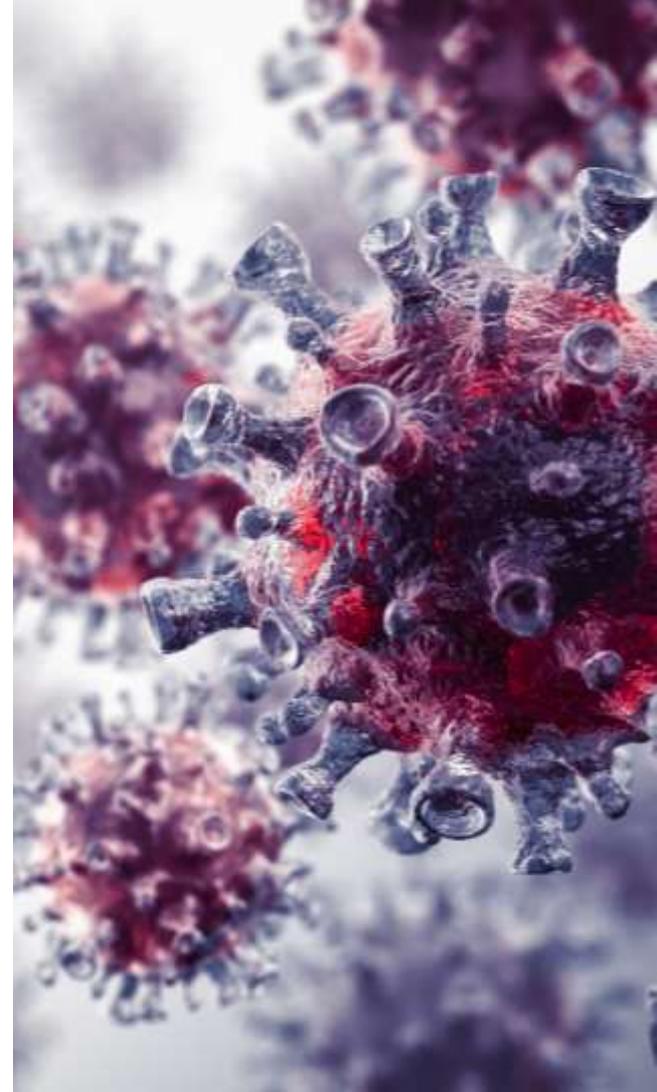
Absence due to prolonged ill health

- At the end of the five weeks, Patricia confirms that she is able to attend a hearing.
- Patricia asks:
 - Can she bring a friend with her? She says this should be fine as she knows that Sarah from another department took a friend to her meeting when she had one.
 - Patricia still feels stressed about coming into the building and would like to avoid doing so.



Adapting the procedure to accommodate ill-health

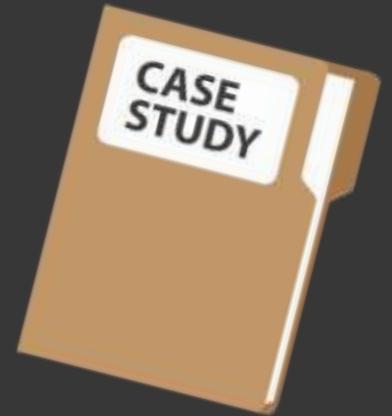
- Alternatives/adjusting normal procedure (consider all available options):
 - virtual/telephone hearing
 - neutral location/near employee's home (reduce stress/accommodate physical needs)
 - written representations
 - third party on employee's behalf
- The limitations on the right to be accompanied



Case Study II

The employee refuses to attend

- You arrange the disciplinary at a neutral location.
- Patricia does not turn up to the disciplinary hearing.
- Her tone in communications is increasingly rude and unprofessional.



Failure to attend

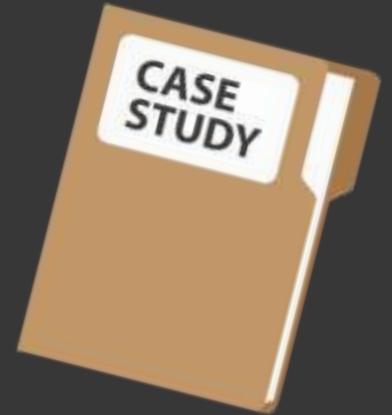
- Contact the employee to find out their reasons for refusing or failing to attend
- Rearrange the meeting
- Duty to reschedule if an employee's companion is unavailable
- Acting reasonably/flexibly is key



Case Study II

The employee refuses to attend

- You re-arrange the hearing to take place the following Tuesday at 11:30 at the same location.
- Patricia's manager is becoming increasingly frustrated, and asks what she can do if she does not show up to the next scheduled date.



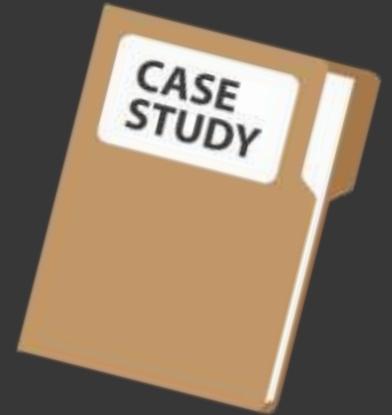
Going ahead without the employee...

- Communicate that the meeting may go ahead and a decision taken in their absence if they fail to attend
- Offer the employee the opportunity to make written submissions in the alternative.
- Non-statutory Acas guide: employers will need to consider ***all the facts and come to a reasonable decision on how to proceed***
- Where there is no good cause, the “***employer should make a decision on the evidence available***”.
- Allegations/evidence must still be fully canvassed in disciplinary meeting

Case Study III

The employee raises grievances

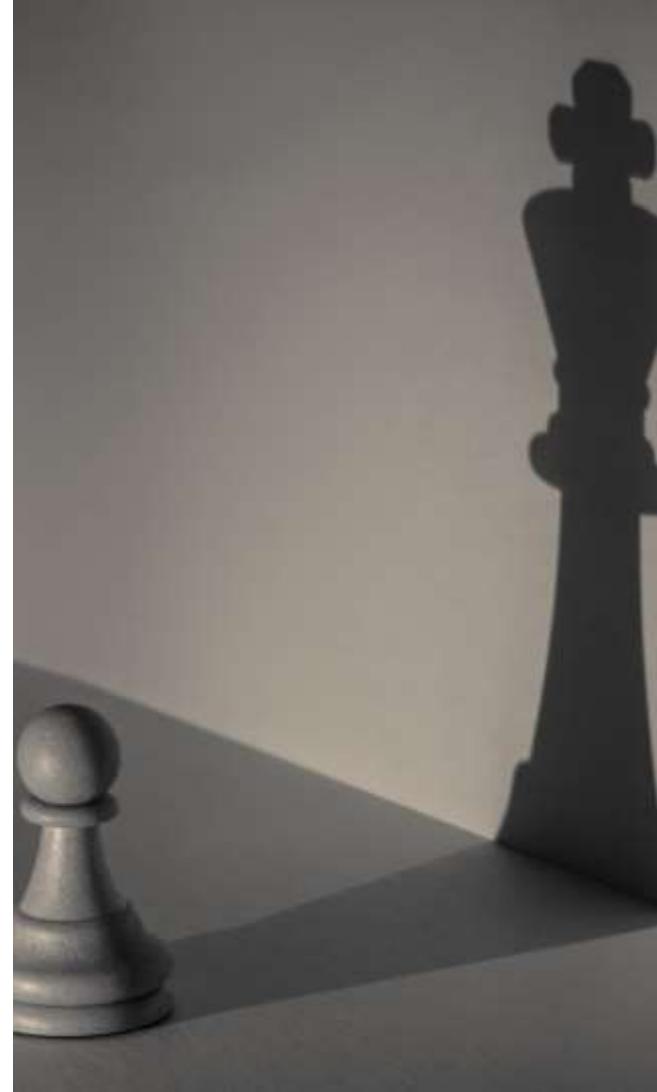
- Patricia does not attend the rescheduled disciplinary hearing.
- Her manager has had enough and would like to dismiss her.
- The following day you receive an email from Patricia listing a series of grievances against you and her manager.
- In the email Patricia says she understands that this means the disciplinary process must be suspended while you deal with the grievance.



Countering with a grievance

- Always acknowledge the grievance.
- Subject to your contracts and company policies, you do not need to suspend a disciplinary to deal with a grievance.
- The Acas Code does give the employer the option to suspend a disciplinary process to deal with a grievance, but this is at the employer's discretion.

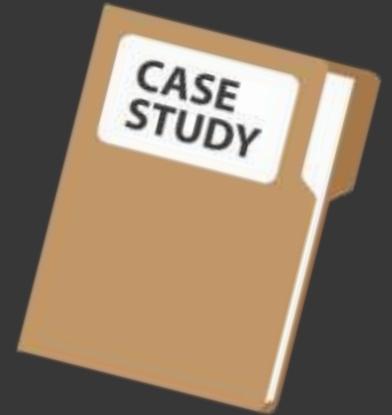
“Where an employee raises a grievance during a disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.”



Case Study III

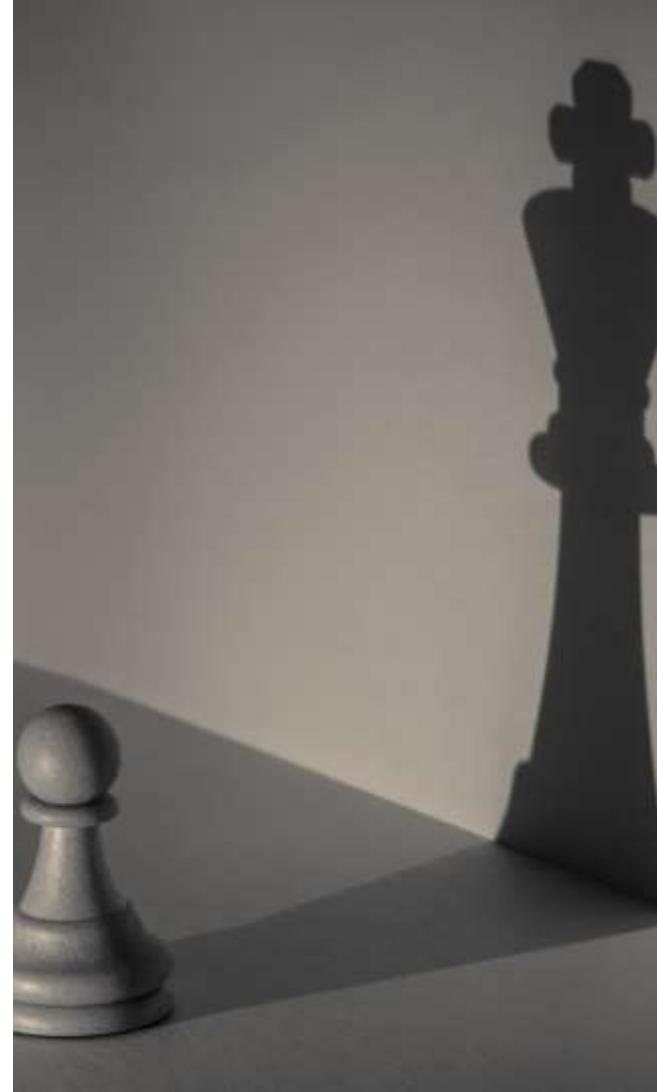
The employee raises grievances

- Patricia's grievances include allegations that she has been bullied by her manager and the colleague about whom she is alleged to have made racist comments.



How to approach simultaneous disciplinary and grievance processes

- Are the issues interlinked? If so, you may want to deal with the issues at the same time where it is appropriate.
- Assess the facts on a case by case basis.
- Procedural fairness



Dealing with grievances after dismissal

- No obligation to deal with the grievance under the formal procedure BUT a stronger argument for the employer to deal with the grievance.
- Not dealing with an employee's grievance could be risky and could lead to claims.



Any questions?



CONTACT US



JENNIFER MILLINS

Jennifer.millins@mishcon.com

[+44 20 3321 7137](tel:+442033217137)

Thank
you.