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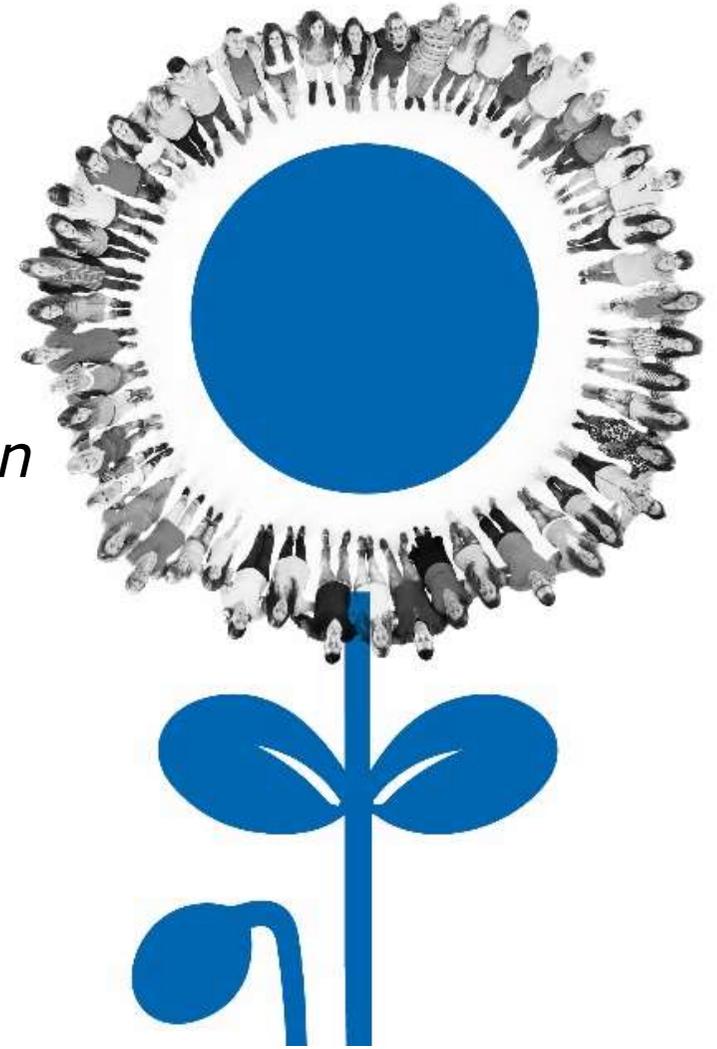
White Paper Conference on Law for HR

Negative attitudes in the workplace

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The Question

When does an employee expressing negative personal opinions or attitudes about the workplace, in the workplace, justify intervention from the employer?

Agenda

Negative attitudes: what to expect and what are the risks?

Negative attitudes: conduct or capability?

Negative attitudes: case law

When to intervene?

Managing conversations about negative attitudes

Case study

Negative attitudes

What to expect and what are the risks?

What to expect from negative attitude employees?

Negative attitude behaviour may take a number of forms:

Expressing negative opinions about employer or the workforce generally

Expressing negative opinions about individual colleagues, particularly management

Expressing negative opinions about work, clients, systems or processes

Poor output or productivity

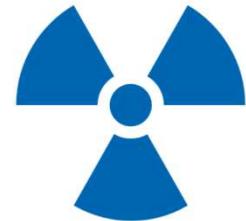
Resistance to change, following internal processes or carrying out reasonable instructions (insubordination)



What are the risks of leaving negative attitudes unchecked?

Typical risks for the business

- Damage to the reputation of the business
- Damage to client relationships
- Impact on productivity and output
- Impact on morale:
 - effect on colleagues who work with the employee
 - stirring up negative feelings amongst other employees
- Grievances – both from the employee themselves and those affected by them



What are the issues that may be underlying the employee's attitude?

An employee's attitude towards their workplace may become negative if they are struggling with their personal circumstances, e.g.:

Mental health concerns

Difficult family circumstances, such as bereavement or sickness

Work-related stress

Issues with colleagues, such as bullying and harassment

When addressing negative employee attitudes, try to identify any underlying cause and give the employee the opportunity to explain themselves



What are the legal risks of dealing with employees with negative attitudes?

Typical legal risks

- Wrongful dismissal
- Unfair dismissal
- Discrimination
- Whistleblowing
- Personal injury



Negative attitudes

Conduct or capability?

Conduct or capability?

- Negative attitudes at work can constitute a conduct or a capability issue, or both.

- **Conduct:** disobeying instructions, behaving in a disrespectful or antagonistic manner

- **Capability:** employee is failing to perform to the required standard or meet targets

Miscategorising

Miscategorising the reason as capability/conduct will not always render dismissal unfair if:

- the allegations and evidence are made clear to the employee
- they are given an opportunity to respond (and right of appeal)
- they are warned that continuation of the behaviour may lead to dismissal
- they are given the opportunity to address the issues

Negative attitudes

Case law



Adeshina v St George's Hospital: the facts

- A was head of pharmacy services in the Prison Service (part of St George's NHS Trust)
- A was resistant to a project to change provision of prison pharmacy services
- Allegations of misconduct (unprofessional/inappropriate behaviour, failure to co-operate and lead change)
- A dismissed after disciplinary proceedings
- Appeal panel of 3 senior managers upheld decision of gross misconduct on rehearing
- A brought claims for unfair dismissal, wrongful dismissal, whistleblowing and race discrimination
- ET dismissed claims finding that flaws in the original procedure were corrected by the appeal process





Adeshina v St George's Hospital: the decision

- A appealed to Court of Appeal arguing:
 - her conduct was incapable of justifying dismissal
 - appeal panel had gone further than original panel in finding deliberate insubordination
- Court of Appeal held that:
 - poor attitude to organisational change could constitute gross misconduct
 - there was a clear picture of A's "deliberate disengagement" and of her "expressing a mutinous attitude"
 - appeal panel had not gone further than the original panel – its findings were not substantively more serious and there was no increase in sanction





Ms O D Hill v Arriva Southern Counties: the facts

- H employed as a “store person” at a bus depot and used Arriva’s software system in her role
- Software was updated and training was provided
- H refused to carry out what she saw as additional tasks following changes to the system. H claimed they were outside her job description
- Company believed it was simply a minor change in process
- H was dismissed following investigation, disciplinary hearing and appeal





Ms O D Hill v Arriva Southern Counties: the decision

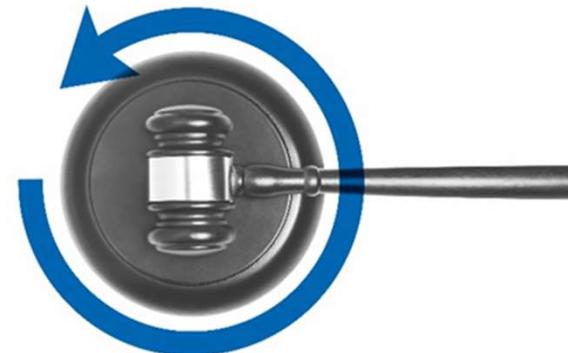
- ET found that:
 - dismissal was substantively and procedurally fair
 - H dismissed for gross misconduct for refusing to carry out reasonable instruction
 - Arriva had gone to considerable lengths to explain the changes and avoid dismissal
- The EAT held that the instruction was clear and reasonable and that failure to comply was gross misconduct





Ms C Eboh v Immaculate Healthcare Services

- The alleged misconduct related to the employee's attitude and behaviour at work, including verbal abuse and objecting when asked to complete tasks
- Employee was dismissed for gross misconduct following suspension without pay
- Respondent failed to follow ACAS Code and its disciplinary policy
- ET held that Respondent failed to prove the claimant was guilty of misconduct and the dismissal was held to be unfair



Case law

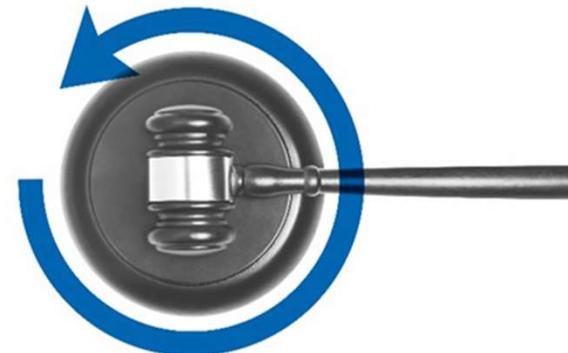


Ms C Eboh v Immaculate Healthcare Services: ET's findings

- Allegations were “vague and unparticularised”
- Respondent did not show what standards Claimant needed to meet
- Some allegations not supported by evidence
- Previous warnings not in line with ACAS Code (no investigation, hearing, right of appeal)
- Reliance on warnings which had been given about a year earlier
- Certain allegations were relatively trivial (e.g. failure to answer phone promptly, lack of punctuality)
- Respondent’s approach was “overbearing and unreasonable”

Comment

Available case law concerns the more extreme examples of insubordination amounting to gross misconduct and resulting in dismissal. Most issues with negative attitudes can be dealt with by intervening early and supporting positive change.



Negative attitudes

When to intervene

When to intervene

ACAS guide to managing challenging conversations

- ACAS refers to the '**now or never**' moment
- If you fail to intervene at the 'now or never' moment, you risk:
 - giving the employee the impression that there is no problem
 - denying the employee the opportunity to correct their behaviour
 - causing further damage to morale, team members and the business more generally
- Acting at an early stage prevents problems becoming entrenched or more complicated



When to intervene



It's never too early to intervene

Having an informal conversation at the first sign of trouble may uncover an issue the employee needs support with

Or provide an opportunity to rectify a problem before it becomes more serious

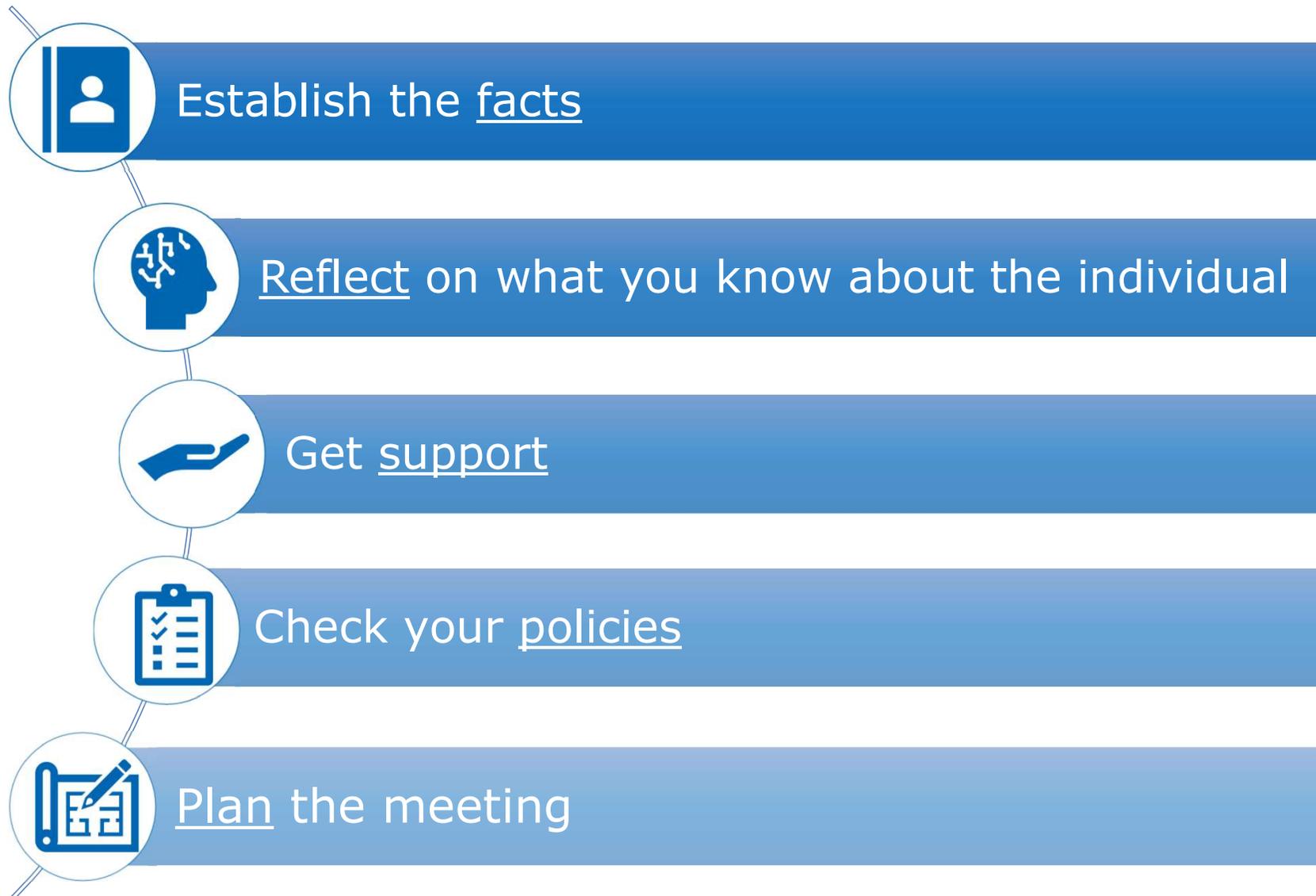
Ensure the response is appropriate: a serious act of insubordination will warrant more formal intervention than general moodiness and negativity

Negative attitudes

Managing conversations about negative attitudes

Preparing for challenging conversations

ACAS guide to managing challenging conversations



Preparing for challenging conversations

ACAS guide to managing challenging conversations

Introduction

- Set the right tone
- Explain the purpose and structure of the meeting
- Stay focused on prepared issues

State the issues and give evidence

- Explain the problem using your knowledge of the situation, giving specific examples and referring to dates, documents, work and interactions
- Explain the impact of the problem
- You may have already spoken to the employee about the issue

Ask for an explanation

- Listen to what they have to say, keeping an open mind
- Acknowledge their position and any mitigating circumstances
- Introduce questions and explore issue together – adjourn the meeting if new evidence emerges

Agree a way forward

- Ask employee for suggestions to resolve the issue and discuss options together
- Make a decision based on these – remember that you are the decision maker
- Monitor and feed back on progress, arrange follow up meetings
- Document any agreement and share with employee

Negative attitudes

Case study

Case study - scenario 1

- Andy is a new manager of a sales team. There have been long-standing issues with a member of his team, Sarah
- Sarah claims to dislike authority and has a history of making (usually unfounded) accusations against senior management. She has sent inappropriate emails in the heat of the moment both to management and other colleagues
- She also has a habit of speaking negatively about senior management, particularly to new joiners
- Andy has just been forwarded an email from Sarah to the other members of the team expressing negative views on the latest company announcement

What should Andy do?

- Informal discussion or disciplinary process?
- Risks of disciplinary process
- Informal discussion:
 - is there an underlying issue?
 - is any support required?
 - refer to relevant policies
 - set expectations for the future
 - make it clear that continuation of behaviour may result in disciplinary action



Case study - scenario 2

- Andy speaks to Sarah informally and her behaviour seems to have improved
- However, after about three months she starts expressing negative opinions about the company again
- At the latest team meeting she has a rant about the company's management and refers to the CEO and CFO in very derogatory terms and using very explicit language
- When Andy tries to speak to her after the meeting she is again abusive and yells at him. She then leaves the office and does not return until the next morning

What should the company do?

- Informal discussion or disciplinary process?
- Disciplinary process:
 - suspension?
 - investigation
 - the allegations
 - disciplinary hearing
 - potential sanctions – gross misconduct?
 - appeal
 - support (EAP)



Key points

Key points

- Don't let issues slide
- Tackle issues as early as possible
- Identify any underlying causes for the behaviour
- Provide support where relevant
- Set clear expectations as to required standards of conduct/performance
- If disciplinary proceedings are appropriate
 - follow your procedure and the ACAS Code
 - carry out an appropriate investigation
 - frame the allegations very clearly
 - provide the employee with supporting evidence



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