

Progressing Disciplinary Hearings in the face of ill- health /intransigence/ grievances....

WELCOME TO CLARITY

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Question

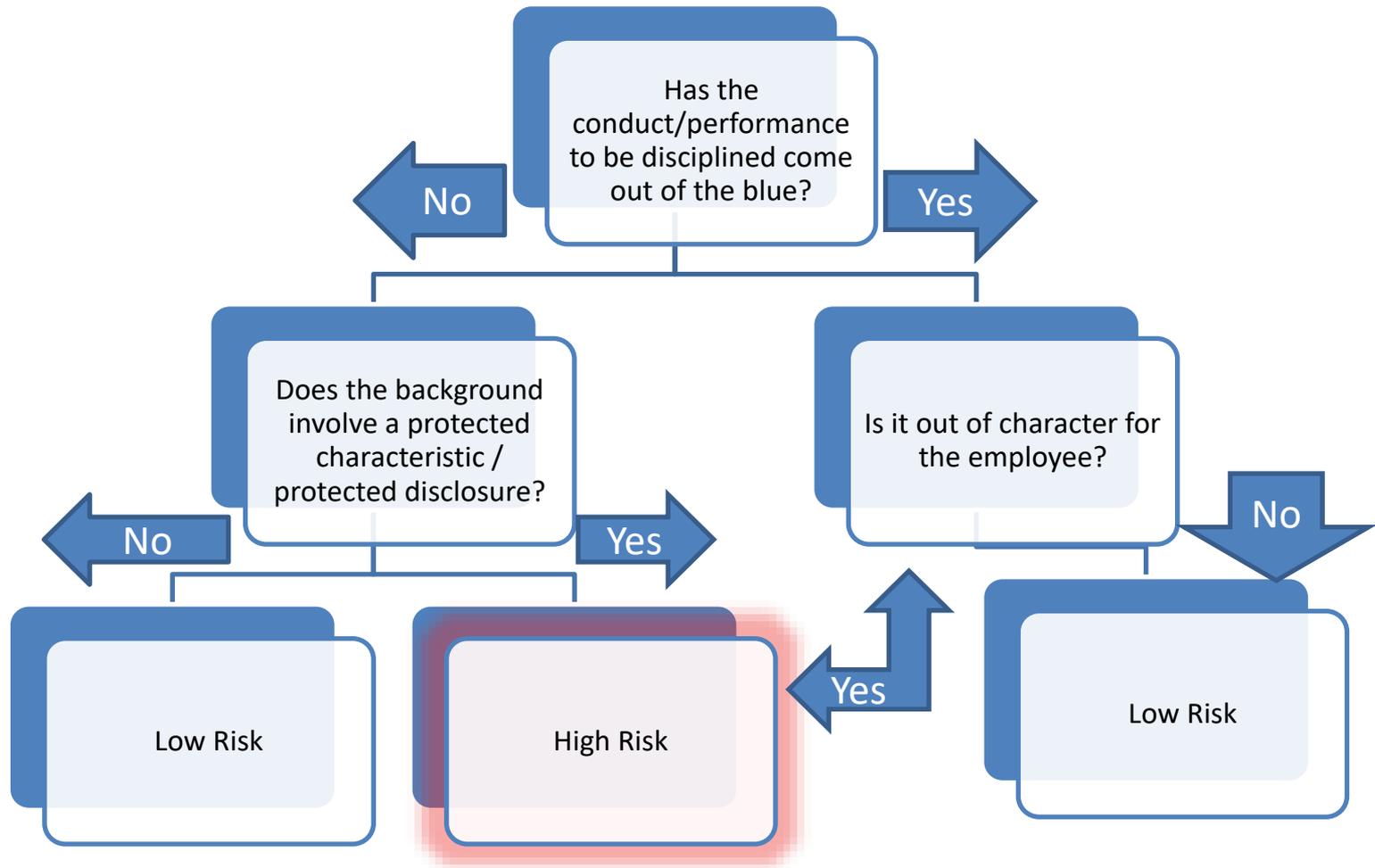
“How do you progress a disciplinary hearing when the employee is absent due to prolonged ill health, refuses to attend or counters with a series of grievances?”

Risk-based analysis

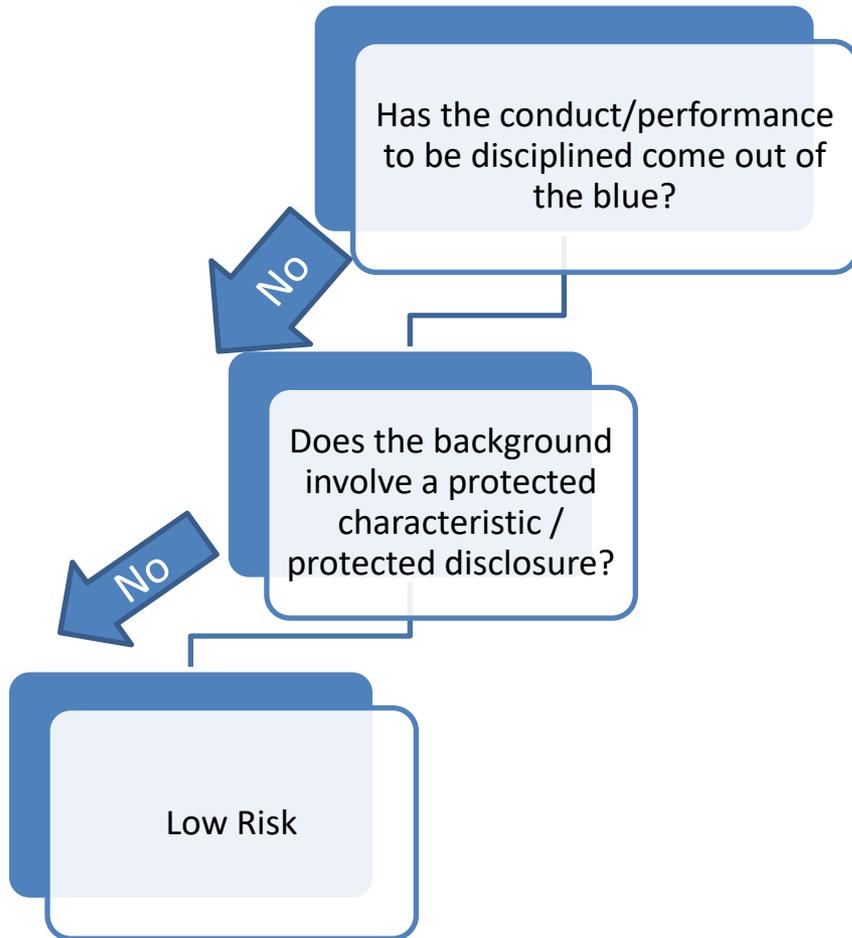
- You have a conduct/capability matter to manage
- You want to progress it
- Employee appears resistant
- What is your risk appetite?



Assessing risk in this scenario



Reducing risk...evidence



- No surprise...means past history
 - Notes of past management?
 - Previous grievances raised about person?
 - Consider past explanations for conduct/poor performance....have steps been taken to address issues?

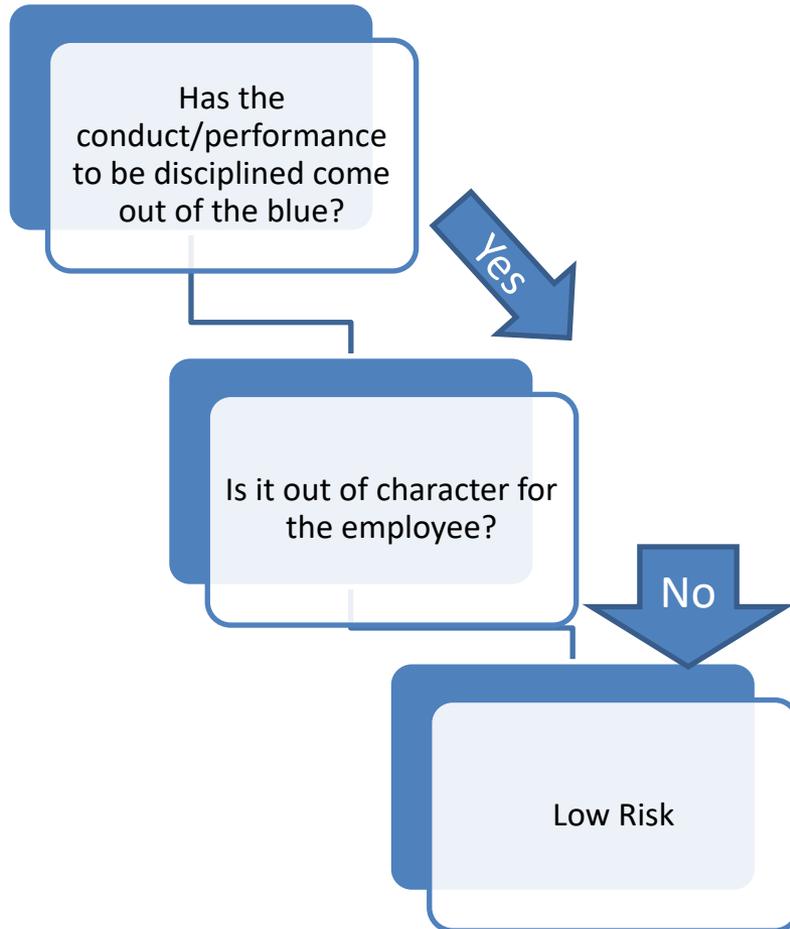
Employee resistance in this scenario.....

- **Ill-health** – past history of conduct – unless ill health is a sudden diagnosis of something serious/critical, keep going!
 - Offer to adapt hearing arrangements:
 - Location (e.g. employee's house)
 - Accompanying person (e.g. spouse)
 - Allow written submissions instead of appearance in person
 - Only postpone once
-

Employee resistance in this scenario.....

- **Non-attendance**
 - Postpone once, then conduct hearing in absence
 - Allow appeal
 - **Grievance raised (no discrimination/whistleblowing)**
 - Is the grievance relevant to the discipline and, if so, how so?
 - Isolate any relevant matters and conduct mini-investigation to determine relevance/impact
 - Exclude any complained-about individuals from dealing with disciplinary
 - Deal with remaining discipline and grievance concurrently
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Reducing risk – analysing background



- No past history but not unusual for this employee
 - Why has nothing been done to date?
 - If likely sanction not dismissal, low risk anyway (unlikely to claim constructive dismissal for a warning)

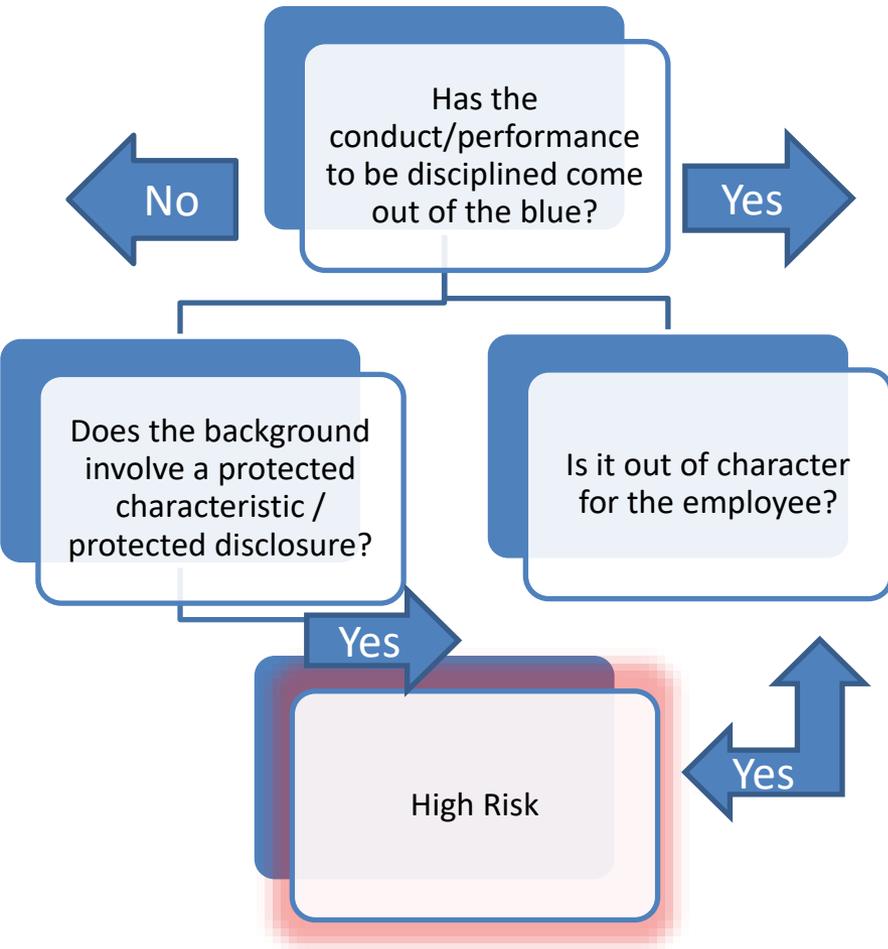
Employee resistance in this scenario.....

- **Ill-health** – are they attributing their conduct to their ill-health (because the conduct isn't out of character)?
 - Should you believe them?
 - Ask for evidence of ill-health at time of conduct taking place
 - How does that tie in with your past experience that it isn't out of character? Were they ill every time?
 - OH report?
 - If not, but simply can't attend hearing, offer to adapt hearing arrangements:
 - Location (e.g. employee's house)
 - Accompanying person (e.g. spouse)
 - Allow written submissions instead of appearance in person
 - Only postpone once
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Employee resistance in this scenario.....

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High risk scenario



- Here, either:
 - There is a pattern of behaviour against a background of high-value claim type; OR
 - There is a red flag because this is highly unusual for this particular employee

Employee resistance in this scenario.....

- **Ill-health** – either
 - Existing adjustments aren't working OR you need to investigate if ill-health has caused the conduct/capability (reasonable grounds for suspecting a disability??)
 - OH report critical – need a good letter of instruction including
 - Organisation's point of view – make your perspective/challenges clear
 - Consider what you need to know and ask appropriate questions
 - Provide details of sickness absence record from work
 - Be open with employee about all information/provide a copy of the referral letter
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If existing adjustments aren't working....

- Has something changed? If the adjustments were effective before, why not still? Environmental factors? Has health changed?
 - Obtain up to date OH report
 - Consider what other adjustments can be made including considering:-
 - The extent to which the adjustment would neutralise the disadvantage.
 - Practicability of the adjustment
 - Cost of the adjustment, and disruption to your business
 - Financial and other resources available to you
 - Availability of external financial or other assistance
 - Nature of the your activities / size of your business
 - Objective test – ultimately for Tribunal to decide, if challenged
 - Involve the Employee....
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Involving the employee...

- **Preston v E.ON Energy Solutions [2022] EAT 192**
 - Employee with epilepsy
 - Exacerbated by stress
 - Absent from work – OH report
 - Employer suggested adjustments on temporary basis – employee insisted on permanency
 - Stalemate – employer insisted on return – employee refused to engage
 - Dismissed – claimed failure re adjustments and dismissal arising from a disability – claim failed
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Red flag to a new medical condition...

- Behaviour/performance completely out of character for this employee – legal question – *ought the employer to have known about the disability and the substantial disadvantage?*
 - Thorough investigation is critical as a first step
 - how does the employee explain the change in behaviour?
 - Has their manager/ close colleagues had alarm bells ringing? If so, for how long?
 - OH Report if any hint of ill health, particularly if long-serving employee
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Employee resistance in this scenario.....

- **Non-attendance**
 - Investigate with employee re why not attending – assess risk
 - Postpone once, then conduct hearing in absence
 - Consider action short of dismissal (could still be a risk)
 - Allow appeal
 - **Grievance raised** (potential discrimination/whistleblowing)
 - Is the grievance relevant to the discipline and, if so, how so?
 - Isolate any relevant matters and conduct mini-investigation to determine relevance/impact
 - Exclude anyone with knowledge or involvement in discrimination/whistleblowing aspects
 - Consider whether discipline would still be appropriate if anything impacted by discrimination/whistleblowing is excluded
 - If too inter-mingled, and you are risk-averse, deal with grievance first
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Things to consider around risk...

- Read your policies and procedures – have you followed them throughout?
 - What are the employee's legal options? If only option is to resign with no other job to go to, unlikely to happen.
 - Remember protected conversations don't work where there is a discrimination aspect to the claim.
 - Bear in mind the availability of interim relief for the employee where whistleblowing exists – quick, expensive and brutal if you lose!
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Questions

