WHITE PAPER CONFERENCE: REDUNDANCY AND DISMISSAL

IN A GRIEVANCE, DISCIPLINARY OR UNDER-PERFORMANCE MANAGEMENT SITUATION, WHAT CAN AN EMPLOYER DO IF THE EMPLOYEE RESPONDS BY TAKING LONG-TERM SICKNESS LEAVE, FOR REASONS OF STRESS OR ANXIETY?

BACKGROUND:

1. This paper is aimed at addressing the following question: in a grievance, disciplinary or performance management (**GDP**) situation what can an employer do if the employee responds by taking long-term sick leave for reasons of stress or anxiety?

2. In answering this question I will look at the following issues:

   (i) **Understanding the legal risks this situation presents:** I will consider the tension between an employer's obligation to progress a GDP process and the need for the employee to have the chance to state their case. I will also consider the additional risks which arise if the employee is disabled for the purposes of the Equality Act 2010.

   (ii) **What should the employer do in response?** I will consider the steps available to an employer faced with this situation including: (i) talking to the employee; (ii) obtaining medical advice; (iii) considering postponement of the hearing; (iv) adjusting the way the hearing is held; and (iv) proceeding without the employee.

3. The *CIPD's Health and Wellbeing at Work Annual Survey Report 2018* (the **Survey**) reported on absence management trends, policy and practice from an extensive survey completed in November 2017. The Survey provides an insight into the degree to which employee absence is attributable to stress, anxiety and other mental health-related disorders.

4. As far as stress is concerned, 39% of respondents reported stress as one of the top three causes of short-term absence (i.e. typically under 4 weeks' absence) within their business, with 8% reporting it as the top cause. A further 50% of respondents reported stress as one of the top three causes of long-term absence within their business, with 22% reporting it as the top cause. In addition, 37% of respondents reported a rise in sickness absence due to stress.

5. As far as anxiety is concerned, 27% of respondents reported mental ill-health (including anxiety-related disorders) as one of the top three causes of short-term absence within their business, with 2% reporting it as the top cause. A further 56% of respondents reported mental ill-health as one of the top three causes of long-term absence within their business, with 22% reporting it as the top cause. In addition, 55% of respondents reported a rise in sickness absences due to anxiety and depression.

6. These statistics demonstrate that stress and mental ill-health is a significant cause of both short and long-term absence and is on the rise. The causes of stress and mental ill-health are numerous. However, if asked for a common trigger of stress or anxiety-related illness amongst employees, many HR professionals and employment lawyers would point to the commencement of a GDP process.

7. It is perhaps easy to understand why the launch of a formal disciplinary or performance management process is a stressful and anxiety-inducing experience for an employee. They face investigation, a formal hearing and a range of potential sanctions extending all the way to demotion and dismissal. Depending on the seriousness of the issue in question and the employee's job role, the employee may also be concerned about matters such as: notification to a regulator and/or the police, the content of any future reference and their future job prospects. Furthermore, depending on the issue, the employee may experience a change in their day-to-day working relationships (e.g. colleagues may keep their distance from an employee who has been accused of sexual harassment).

8. Although in a grievance situation the process is initiated by the employee, and they may not be at risk of any sanctions (unless there is a separate disciplinary or performance management process in the background), such processes can still be stressful and anxiety-inducing for the employee. The launching of a formal grievance is not usually a step taken lightly. It will typically relate to matters that have built up over some period of time about which the employee feels aggrieved, some or all of which may have been raised informally and not resolved to the employee's satisfaction. It also puts the employee "at odds" with their employer, and, depending on the content of the complaint, possibly with some of their colleagues and/or managers. An employee in this position also faces the formal steps of investigation and a hearing.

9. Where an employee who is the subject of a GDP process takes sickness absence on the grounds of stress or anxiety in the middle of the process the employer must grapple with what to do next. The options are not always straightforward.

10. The employee may take a period short-term absence which does not require certification by a GP directly before a key point in the process (e.g. the disciplinary hearing). The employee may then return to work, only to do the same again when the hearing is rescheduled. This behaviour may lead the employer to suspect that the employee is malingering. In such circumstances, it would theoretically be open to the employer to treat the employee's behaviour as misconduct (i.e. a dishonesty offence potentially leading to a gross misconduct dismissal). However, the employer should be slow to take such action without compelling evidence that this is what the employee has done. Disciplining on the grounds of a mere suspicion will lead to an unfair result.

11. Where the employer is satisfied that the absence is genuine, the employer's approach will usually be determined by the length of the absence. Where it seems likely that the absence will be short-term (typically, fewer than 4 weeks), the employer will usually (but not always) be able to postpone the process until the employee has returned to work and can participate in the process. For further discussion of what an employer should do if it *cannot* postpone the process, see paragraphs 55 to 59 below.

12. However, where the absence is expected to be long-term (i.e. typically, 4 weeks or more), and it is not clear when the employee will return to work, the position is more complicated. The remainder of this paper discusses how the employer should respond in this situation.

UNDERSTANDING THE LEGAL RISKS:

The ACAS Code and Guide

13. Before moving on to discuss the options available to the employer, it is important to understand and appreciate the most common legal risks that arise in this situation.

The starting point is to consider the impact of the statutory ACAS Code of Practice on Disciplinary and Grievance Procedures (the **Code**). The Code is supplemented by a more detailed non-statutory ACAS Guide to Discipline and Grievance at Work (the **Guide**). The Code and Guide apply to disciplinary (which includes performance management even where dealt with under a separate capability procedure) and grievance procedures. The Code sets out the core basic principles for handling such situations and is supplemented by more detailed best practice guidance in the Guide.

14. Employment Tribunals are legally required to take account of the Code when considering relevant cases. Where an employer unreasonably fails to comply with the Code, an Employment Tribunal will have the power to increase any compensatory award made in a relevant case by up to 25%. In addition, any such failure could affect the procedural fairness of any resultant dismissal.

15. There is no requirement to take into account the guidance in the Guide and there are no direct adverse consequences attached to non-compliance. However, as the Guide sets out best practice recommendations, a prudent employer should abide by the guidance wherever possible. This approach will help to ensure that any outcome is fair.

16. Which principles in the Code are of particular relevance to this situation? The first core principle to consider is the requirement for employers and employees to raise and deal with issues promptly and not unreasonably to delay meetings, decisions or confirmation of those decisions. Some important relevant extracts from the Code are set out below:

    (i) **Investigations:** *"It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case"* (paragraph 5).

    (ii) **Hearings:** *"The meeting should be held without unreasonable delay"* (paragraph 11) and *"Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received"* (paragraph 33).

    (iii) **Appeals:** *"Appeals should be heard without unreasonable delay"* (paragraphs 26 and 42).

17. The second core principle to consider is the requirement for employers to give employees an opportunity to state their case before any decisions are made. Indeed, this principle has been described by the Employment Tribunal as the *"bedrock of a fair dismissal process"*[1]. Some important relevant extracts from the Code are set out below:

    (i) **Disciplinary matters:** *"The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses"* (paragraph 12).

    (ii) **Grievances:** *"Employees should be allowed to explain their grievance and how they think it should be resolved"* (paragraph 33).

[1] Bridgeman v Family Mosaic Housing Association, ET Case No. 2201804/11

18. Although employees are under a duty to *"make every effort to attend the meeting"* (paragraphs 12 and 34) they may not be able to do so where they are unwell. It's possible that there may be circumstances where an employee is signed off sick from work but is considered fit to attend a hearing. However, assuming that the employee is *not* fit to attend a hearing, the employer is left with a quandary: how can they progress the process in a timely fashion when the employee is unable to attend a hearing to state their case?

19. In no circumstances should the employer seek to force the employee to attend the hearing. Any attempt to do so risks breaching the employer's duty of care to the sick employee, as well as the implied duty of trust and confidence.

Employer's internal policies

20. In addition to the obligations imposed by the Code, when deciding how to navigate this situation, the employer should also remember to consult any relevant internal policies. As well as the policy governing the particular process in question (disciplinary, performance or grievance), policies governing what happens where the employee is sick, suffering from stress and/or has a disability should be considered.

21. These policies might set down the roadmap for dealing with this situation. For example, they might provide that medical advice will always be sought if the employee is unfit to attend the hearing. If the employer does not comply with the commitments made in its own policies, they risk breaching the employment contract. If the policies are contractual this would be a breach of an express term. If the policies are non-contractual this could amount to a breach of the implied term of trust and confidence. Such non-compliance could also risk any resultant dismissal being found to be procedurally unfair.

Disabled employees

22. Where an employee takes long-term sickness absence the other risk that a prudent employer should consider is whether the employee is disabled for the purposes of the Equality Act 2010. If the employee is disabled this is likely to affect how the employer manages the process in question.

23. The reason it is important to consider this issue is because liability for disability discrimination can arise even where the employer doesn't *actually* know the employee is disabled. This will be the case where an Employment Tribunal considers the employer should be fixed with "constructive knowledge" of the employee's disability. Constructive knowledge captures those things that an employer can be fixed as knowing about had they been reasonably diligent. In other words, if it was reasonable for the employer to have known about it then they will be deemed to have knowledge of that fact.

24. Where an employee is absent on grounds of long-term sickness by reason of a mental-health issue, this could potentially be viewed as a "red flag" which a reasonable employer would have investigated further to understand whether the employee had an impairment amounting to a disability. If the employer fails to investigate the issue (in order to gain actual knowledge of the employee's disability status) there is a risk that they could be fixed with constructive knowledge. Where an employer is deemed to have constructive knowledge of a disability they can be liable for: (i) a failure to make reasonable adjustments; and (ii) discrimination arising out of a disability. Damages for both claims are uncapped.

25. For this reason, it is prudent to investigate the issue and reach a considered view on whether the employee is disabled. Where the conclusion is that the employee is disabled, then the employer is able to make appropriate adjustments to the process and seek to make decisions which are free from the risk of discrimination (or, at least, justifiable). The EHRC Statutory Code of Practice on the Equality Act 2010 provides that employers should not discriminate against workers in the way that disciplinary and grievance procedures are designed or implemented (paragraph 17.91) and that employers may need to make reasonable adjustments to procedures to ensure they do not put disabled workers at a substantial disadvantage (paragraph 17.93). Potential adjustments are discussed further at paragraphs 52 to 54 below.

26. Could an employee suffering from "anxiety" or "stress" be disabled? A person is considered disabled for the purposes of the Equality Act 2010 if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities (section 6(1) of the Equality Act 2010).

27. Anxiety is capable of amounting to a mental impairment for the purposes of the Equality Act 2010. However, the other elements of the disability test would need to be satisfied in order for the employee to be disabled. If the anxiety episode is a new phenomenon which has been triggered by the GDP process, and which is expected to resolve after the completion of that process, then the employee could well fail the "long-term" requirement of the test. However, the employee could suffer from an anxiety disorder which is controlled on a day-to-day basis (which may be why the employer does not know about it) but which has been exacerbated by the GDP process. In such circumstances the employee could well be disabled.

28. Stress, in itself, is not a mental impairment. The HSE definition of stress is: *"…the adverse reaction people have to excessive pressures or other types of demands placed on them".* Therefore, stress is better understood as a reaction rather than a mental impairment. However, stress could indicate the presence of an underlying mental impairment such as anxiety, depression or a personality disorder. Therefore, the risk of a disability should not simply be discounted.

WHAT SHOULD THE EMPLOYER DO IN RESPONSE?

Talk to the employee

29. An essential first step for an employer in this position is to establish a dialogue with the employee. This is a step an employer should take in respect of any employee who is off long-term sick, however, it is all the more pressing where there is an ongoing GDP process. In 2011, the Chartered Institute of Personnel Development (**CIPD**) and the mental-health charity, MIND, published joint guidance entitled: *Managing and supporting mental health at work: disclosure tools for managers.* A slightly abbreviated version of the guide was published in 2018, however, this paper refers to the 2011 version which contains additional guidance pertinent to the issues discussed here.

30. The CIPD / Mind guidance discusses the challenge faced by an employer who is seeking to discipline or performance manage an employee who then takes time off for stress or another mental health problem. The guidance acknowledges that it is a *"challenging problem"* for the employer to know how to respond reasonably and it is *"not an easy situation".*

31. The guidance advocates a *"twin-track approach"* with the disciplinary/performance management processes conducted concurrently with the process of managing the

individual's absence, addressing their health needs and supporting their return to work. It is recommended that a discussion is had with the employee *"as soon as possible"* and that this is done by someone who is not involved in the disciplinary or performance process. The guidance also recommends allowing the employee to be accompanied to *"any important meetings"* by a trade union representative, colleague, mental health advocate or someone else who understands their condition (e.g. a family member or friend). Although the guidance does not expressly refer to grievances, it is to be assumed that a similar approach would be sensible.

32. In terms of what is discussed, the guidance stipulates that the employer should *"…explain that the disciplinary or performance management procedure will need to proceed as soon as they are well enough to attend a meeting to discuss the issue".* In this context, it could also be helpful to explain to the employee the obligations that the employer has under the Code to: (i) progress the GDP without unreasonable delay; and (ii) give the employee the opportunity to state their case. The employer would also be wise to offer to modifications to the hearing process which might encourage the employee to participate (such modifications are discussed further at paragraphs 52 to 54 below).

33. In addition, the employer should also seek to gain a better understanding of the employee's health: it may be that at this early stage all the employer has seen is the GP's certificate. The employer should ask the employee about how they are feeling, their prognosis and their views on whether are able to participate in the GDP process. The employer should also discuss the need to obtain medical advice about the employee's condition and whether there are any adjustments the employer should be making to assist their return to work (and, if they can't yet return to work, their participation in the GDP process). The employer should seek consent from the employee to: (i) write to their GP for a medical opinion; and (ii) attend an assessment with an independent occupational health advisor.

Obtain medical advice

34. The employer should seek to gain a better understanding of the employee's condition generally (including whether they might be disabled) and, specifically, in relation to their ability to attend a hearing in the GDP process.

35. The employer should ask the occupational health advisor for advice on the following issues:

    (i) What is the employee's condition and prognosis?

    (ii) Is the employee disabled for the purposes of the Equality Act 2010 (the specific elements of the disability test should be set out)?

    (iii) If the employee is disabled, are there any reasonable adjustments which would assist them in returning to work?

    (iv) Is the employee fit enough to attend the hearing? In seeking the answer to this critical question, a number of additional questions should be put to the advisor:

        - Does the employee have the ability to understand the allegation/s or issues in question?
        - Is the employee able to instruct a representative to assist them?
        - Does the employee have the ability to provide an explanation in writing?
        - Are there any modifications to the GDP process which *could* be made to enable the employee to participate (and, if they are disabled, any reasonable adjustments which *should* be made)?

36. Given that the employee may have been absent for several weeks by this point, the employer should ask the advisor to expedite this advice to help avoid "unreasonable delay" contrary to the Code.

37. If the advice is that the employee is fit enough to attend the hearing with modifications, the employer should discuss this with the employee and seek to agree what modifications will be put in place to allow the hearing to proceed. Possible modifications are discussed further at paragraphs 52 to 54 below. However, if the advice is that the employee is not fit enough to attend the hearing, even with modifications, the employer will have to consider whether to postpone the hearing or proceed without the employee.

38. A final point to remember here is that the question of whether the employee is disabled is one for the employer to answer: it cannot simply "rubber-stamp" the occupational health advisor's advice. Therefore, if the advisor is of the opinion that the employee is not disabled, then the employer should consider this advice against the other evidence it has about the employee's health (e.g. the GP's advice; the employee's views; sickness absence record; evidence of their conduct and performance at work etc.), before reaching a conclusion.

Postpone the hearing

39. The decision whether to postpone the hearing (or not), is an important one. As discussed at paragraph 11 above, where the absence is short-term an employer is usually expected to postpone the hearing until the employee's return. Where the absence is / is likely to be long-term, and the employee is unfit to attend the hearing (even with modifications – see paragraphs 52 to 54 below), the question of whether (and for how long) to postpone is often a more difficult one, requiring very careful consideration.

40. Failure to offer a postponement in appropriate circumstances risks breaching the Code's requirement to allow the employee the opportunity to state their case. In the case of ***Bridgeman v Family Mosaic Housing Association***, an employee went off sick shortly before a scheduled capability hearing. The employee was already on a final written warning for her performance and had a track record for delaying previous capability hearings. In the circumstances, the employer decided not to postpone, held the hearing without her and decided to dismiss on the grounds of poor performance. The Employment Tribunal decided the dismissal was procedurally unfair, holding that it was premature for the employer to proceed in the employee's absence on the first occasion she was unable to attend (notwithstanding her past approach to other hearings). The Tribunal noted that the right to have a hearing and put one's case was the *"bedrock of a fair dismissal process".*

41. Conversely, postponing the hearing for a long period of time and, therefore, delaying the GDP process risks breaching another requirement of the Code; namely, to progress all investigations, hearings and appeals without ***"unreasonable** delay"* (see paragraph 16 above). What is and what is not unreasonable will depend on the circumstances of each case but, as a guide, where the employer has:

    (i) discussed the matter with the employee and sought their views on their health and ability to participate in the GDP process;

    (ii) obtained medical advice on the employee's condition and ability to participate in the GDP process; and

(iii) offered to modify the GDP process to enable the employee to participate,

it will be in a strong position to demonstrate that it has taken all reasonable steps to progress the process. In such circumstances, a decision to postpone would result in a delay but not an "unreasonable" one.

42. As can be seen, therefore, whether or not to postpone is carries with it risk. A blanket approach of not offering postponements is likely to undermine the fairness of any decision; conversely, a blanket approach of allowing an indefinite postponement could well lead to unreasonable delay. What factors, therefore, should an employer consider to help them make the right decision? Helpfully, the Guide sets out which considerations are relevant (page 20).

43. **Internal policies:** any internal rules setting out what happens if the employee fails to attend a GDP hearing due to sickness should be followed. A failure to do so risks breaching the employment contract (see paragraphs 20 to 21 above).

44. **Seriousness of the issue:** the seriousness of this issue in hand will be a critical factor in deciding whether or not to postpone. In a disciplinary or performance situation, where the employee has been accused of serious misconduct or underperformance there is, arguably, a stronger case for the need to resolve the process as speedily as possible (subject to not prejudicing any parallel criminal or regulatory investigations). The same applies in respect of grievances. This is particularly the case where very serious allegations are made about another employee (e.g. sexual harassment). In such cases, the employer has to balance its obligations to the complainant and to the accused. In the recent case of ***Piepenbrook v London School of Economic and Political Science***[2] the complainant made (malicious) allegations of sexual harassment against a senior colleague, P, who had previously rebuffed her advances towards him. The employer failed to follow its own procedure for handling such complaints, failed to impress on the complainant that the matter should be kept confidential and allowed the process to become *"unnecessarily protracted"*[3]. P suffered a depressive illness and brought a personal injury claim against the employer. The High Court found that the employer had failed in its duty of care towards P in the way it had handled the grievance (although, ultimately, the claim failed for other reasons).

45. **Employee's track record:** the employee's track record will be a relevant factor in deciding whether it is reasonable to postpone. This will include looking at matters such as their:

(i) disciplinary record (including any current warnings);

(ii) general work record;

(iii) experience;

(iv) position; and

(v) length of service.

As a general rule of thumb, an employer should be prepared to take a more lenient approach towards an employee with a good track record.

[2] [2018] EWHC 2572 (QB)

[3] Although in *Piepenbrook* the delay was not caused by the postponement of the hearing, it serves as an illustration of the risks of an unacceptable delay to the process.

46. **Medical opinion:** where the medical advice is that the employee is fit to attend the hearing or a modified hearing (despite being signed off sick from work generally) but they still refuse to attend, then this would be a factor weighing against postponing and in favour of proceeding without them. However, if the medical advice is that the employee is not yet fit to attend the hearing then, unless other factors indicate a pressing need to proceed with the process, a postponement should be granted. Ignoring medical advice of this nature without good reason is very risky. In the case of ***William Hicks and Partners (A Firm) v Nadal***[4] an employee went off sick with stress shortly after the commencement of a disciplinary procedure concerning allegations of bullying. The employee's GP wrote to the employer stating that the employee was not fit to attend a disciplinary hearing in the foreseeable future. The employer discovered that the employee had been in negotiations with a prospective employer about a new job. It, therefore, decided to proceed with the disciplinary hearing in her absence and dismissed her. The EAT upheld the Employment Tribunal's finding of unfair dismissal on the grounds that the employer should not have ignored medical advice without compelling evidence that she had been *"pulling the wool over her own doctor's eyes"* or *"authoritative contrary medical evidence"* about her fitness, neither of which it had. However, the EAT did go on to say that, exceptionally, there may be cases where an employer had made proper enquiries, including sufficient medical enquiries, to establish that the employee *was* fit to attend the hearing but had unreasonably declined to do so without just cause. Therefore, an employer who believes the medical advice it has received as to fitness to attend is wrong should seek a second medical opinion.

47. **Consistency:** when making a decision on whether to postpone or proceed the employer should consider how it has dealt with any similar cases in the past. A failure to do so could lead to arguments that the process is unfair on the grounds of inconsistency.

48. Where it is decided that a postponement is required, the next question will be how long to postpone the process for. As stated in paragraph 11 above, where the absence is short-term in nature, the employer will usually be expected to postpone until the employee returns to work. Where the absence is long-term in nature, the employer will need to reach a decision on what length of time is reasonable in the circumstances. This will vary from case to case and will require the employer to consider, again, all of the factors set out at paragraphs 43 to 47 above. As well as being relevant to the question of *whether* to postpone, these factors will help the employer to determine *what length* of postponement is reasonable.

49. In addition to these factors, the employer should also consider whether it is (or will be) possible to proceed with the hearing in a modified way (see paragraphs 52 to 54 below). If it is not (or will not be) possible to do so, then this lends weight to a longer postponement. If it is (or will be) possible to do so, then this would suggest that either no postponement or a short postponement would be appropriate until the modified arrangement could be put in place.

50. For example, employee A has raised a moderately serious grievance, has an exemplary track record and is severely unwell. Occupational health advises he is unable to participate in any sort of process at present. In this case, it is likely to be reasonable for the employer to take a more 'relaxed' approach to postponement (e.g. perhaps agreeing to postpone for several months at a time before reviewing the

[4] EAT 0164/05

position). Compare this with employee B who is facing a very serious disciplinary allegation (e.g. fraudulent conduct), has a poor track record and is only moderately ill. Occupational health advises he should be able to participate in a modified hearing at some point in the next month. In this case, it is likely to be reasonable for the employer to take a more controlled approach to postponement (e.g. perhaps agreeing to postpone for two weeks at a time before reviewing the position and considering whether a modified hearing could take place).

51. Once a decision has been taken to postpone the hearing, the employer should notify the employee in writing of the length of the postponement and advise them that the decision will be kept under review and further medical advice sought in due course. The employer should also remind the employee that it is prepared to modify the way the hearing is held to enable it to take place (and accommodate the employee's disability if they are disabled).

Modify the way the hearing is held

52. Offering to modify the way in which the GDP hearing is held is a good strategy for an employer faced with this situation. It serves a number of purposes:

    (i) It may encourage the employee to participate in the process;

    (ii) It will help demonstrate a fair and reasonable approach to the overall process, increasing the chances of any dismissal being procedurally fair;

    (iii) If the process is ultimately postponed, then it helps demonstrate that you have tried to come up with creative solutions to allow it to proceed with the employee's involvement, increasing the chances of any delay being seen as "reasonable" and compliant with the Code; and

    (v) If the employee is disabled, it helps demonstrate that you have sought to make reasonable adjustments to the process to remove any disadvantage suffered by the disabled employee.

53. It is prudent to consider offering modifications from an early stage if it appears likely that the employee will be unable to participate in the GDP process in the usual way.

54. There are a variety of modifications that can be offered covering: where and how the hearing is held; who is allowed to accompany the employee; the role that companion takes in the hearing; the structure and timing of the hearing; and the making of written submissions in addition to, or instead of, attending the hearing in person. Any specific medical advice on appropriate modifications should be followed. The employee should also be asked for their views on what modifications would assist them.

Proceed without employee

55. In some cases it may be necessary to proceed with the hearing without the employee present. This should, generally, be viewed as the last resort, to be exercised with caution, in cases where:

    (i) the medical advice is that the employee is fit to attend the hearing or modified hearing but they refuse to do so;

    (ii) the medical advice is that the employee is not fit to attend the hearing or modified hearing but the matter is so serious that a postponement cannot be justified in the circumstances (or, very exceptionally, where offering the

employee opportunity to state their case could not make any difference to the decision to dismiss - see, for example, ***Parker v Clifford Dunn***[5] and ***Harris & Shepherd v Courage***[6]);

(iii) the medical advice is that the employee is not fit to attend the hearing or modified hearing, a postponement is granted, but there is no indication of when, or if, the employee will be fit to attend a hearing or a modified hearing.

Although the Code stresses the importance of allowing the employee to state their case (see paragraph 17 above) it is also recognised that in disciplinary and performance management cases: *"Where an employee is unable…to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available"* (paragraph 25 of the Code). This is supplemented by guidance in the Guide which says that in such situations the employer: *"will need to consider all the facts and come to a reasonable decision on how to proceed"* and *"may conclude that a decision will be made on the evidence available"* (pages 20 – 21 of the Guide). The Code and Guide do not deal with the approach in a grievance situation. There may be a stronger case to postpone for a longer period in a grievance situation, subject to the point discussed at paragraph 44 above regarding the seriousness of the matter **and** the employer's duty to the accused.

56. Crucially, the employer must consider all relevant factors before reaching a decision and ensure that the rationale for proceeding without the employee is carefully recorded. It is likely that an Employment Tribunal in any subsequent unfair dismissal case would require a detailed explanation of why the employer chose to proceed without the employee (given the need to allow the employee to state their case). Where the employer has discussed the matter with the employee, sought medical advice, offered to modify the hearing and has postponed the hearing (where appropriate), it is more likely that a decision to proceed in the absence of the employee will be viewed as reasonable. Furthermore, if there is medical advice that the employee's ill-health has been caused and/or exacerbated by the GDP process, there is a stronger case for proceeding without the employee so as to avoid having the matter hanging over the employee's head indefinitely.

57. Where the employer decides to proceed with the hearing without the employee, they should always notify the employee in writing in advance that this is what will happen (page 21 of the Guide). The employee should also be provided with a further opportunity to make written submissions.

58. When it comes to making the decision in the GDP process, the employer should remember that if they have recently discovered that the employee is disabled, then this may impact on their approach to sanction. In the recent case of ***City of York Council v Grosset***[7], the Court of Appeal found that an employer had discriminated against a disabled employee where it dismissed him for an act of gross misconduct which, unbeknown to them, was rooted in his disability. Therefore, in a disciplinary situation, the employer should give consideration to the potential connection between the employee's disability and the misconduct in question. Similarly, in a performance management context, the presence of a disability should be taken into consideration. The CIPD / Mind guidance stresses that *"…where there are suspected or known health*

[5] [1979] IRLR 56

[6] [1982] IRLR 509

[7] [2018] EWCA Civ 1105

issues, these should be explored, prior to any formal processes. If the root causes of poor performance are not addressed, any solutions are unlikely to fully resolve this issue". If the disability explains the poor performance, then it would be wise to suspend the process to consider what package of support could be put in place to assist the disabled employee.

59. Finally, even where an employer proceeds without the employee, it must still offer the employee the right of appeal. A prudent employer should offer a full re-hearing on appeal to allow the opportunity to correct the procedural deficiency of the first instance hearing.

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