

WHITE PAPER CONFERENCES:

Solution-Focused Answers For Employers

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Where and how can you draw the line if an employee frequently misses work, saying "I think I may have stress and depression", and won't engage with you despite you offering reasonable adjustments?

CONTENT

- 
- Context and working definitions
 - The legal framework - in outline
 - Key questions / issues
 - Practical points

Breaking down the question:

When can the employer terminate the contract?

How (i.e. what are the steps)?

What are the risks?

Where and how can you draw the line if an employee frequently misses work, saying "I think I may have stress and depression", and won't engage with you despite you offering reasonable adjustments?

What's the significance of passing references to wellbeing issues?

What if the employee is not cooperating?

ESSENTIAL CONTEXT

01

How long has the employee been employed?

02

What are his or her terms and conditions – e.g. pay, notice, contractual sick pay, PHI etc.

03

What is the extent / severity of the absence / underperformance?

04

What is the impact on the organisation / team / clients / stakeholders?

05

What contextual information do we have about the severity of the employee's health?

06

If this is a recent appointment, what do we know about this person's prior employment history (from their CV / application form)?

PART ONE:

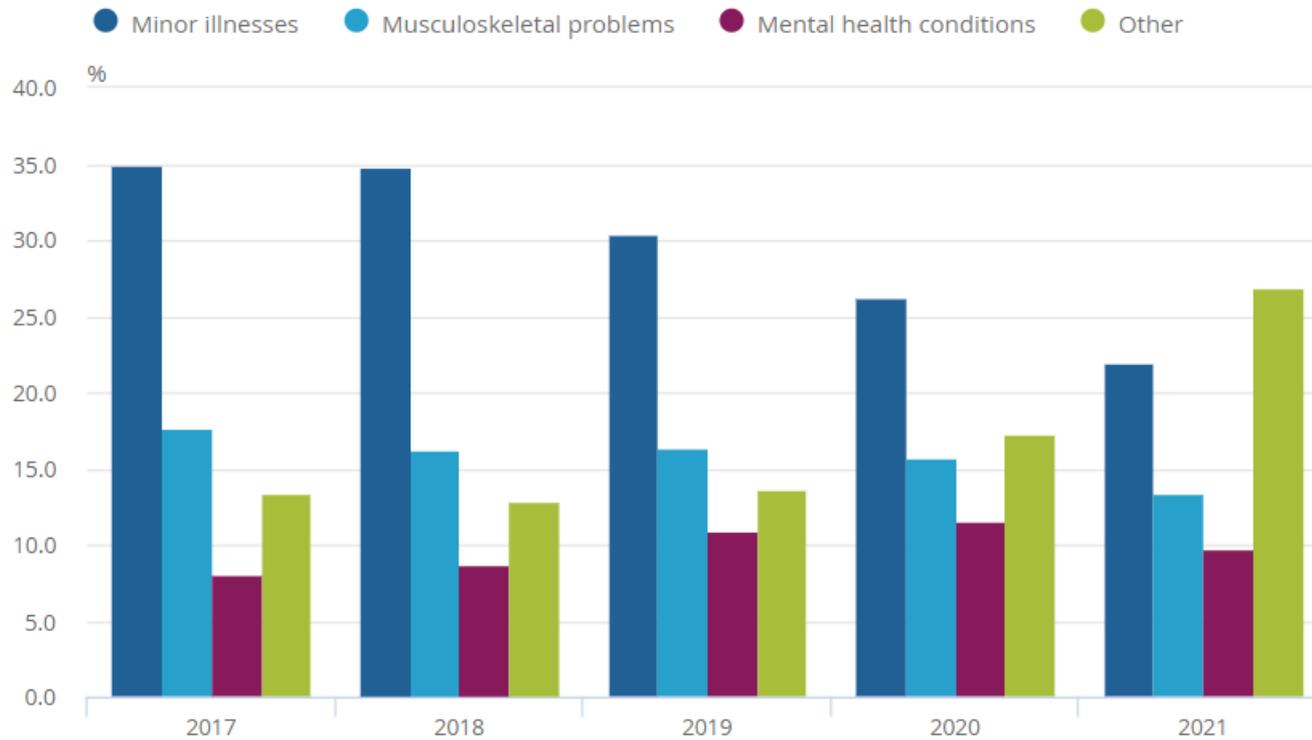
CONTEXT & DEFINITIONS

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Figure 2: “Other” conditions (which includes COVID-19) were given as the reason for over a quarter of occurrences of sickness absence in 2021

Percentage of occurrences of sickness absence, by top four reasons, UK, 2017 to 2021



Depression

DEPRESSION

19.7% of people in the UK aged 16 and over showed symptoms of anxiety or depression - a 1.5% increase from 2013. This percentage was higher among females (22.5%) than males (16.8%).

A depressive episode

The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), categorises depression based on time, symptoms, severity, and functioning. On average a depressive episode will last approximately 6 months. (In cases of reactive depression, the duration will typically be shorter).

Major depressive disorder

A major depressive disorder (MDD) which typically lasts between 6 and 18 months. MDD includes 5 of the following diagnostic criteria: (i) depressed mood and crying / tearfulness nearly every day; (ii) feelings of sadness, hopelessness, or emptiness; (iii) loss of interest in engaging in activities that would normally feel pleasurable or enjoyable; (iv) decreased appetite or increased appetite; (v) insomnia or hypersomnia (vi) feeling slow moving, restless, or fatigued; (vii) feelings of worthlessness; (ix) decreased concentration; and (x) thoughts of suicide.

DEPRESSION

Persistent depressive disorder

Persistent depressive disorder (PDD) is a chronic condition which lasts for **2 years or longer**. It generally involves less severe symptoms.

Perinatal/postpartum depression

Perinatal/postpartum depression (PPD) during pregnancy or after giving birth.

People with perinatal depression may experience feelings of anxiety, sadness, and fatigue.

Postpartum depression can occur immediately after the birth. **Typically, postpartum depression can last a few weeks. In some cases, it can develop into a major depressive disorder.**

DEPRESSION

Seasonal affective disorder

Seasonal affective disorder (SAD) impacts mood and energy levels when the seasons change.

Symptoms of this type of mood disorder may come and go with the seasons. Consequently, seasonal affective disorder typically lasts between 4 and 5 months. For most people, this disorder involves symptoms that start in the autumn and end in the spring.

Bipolar disorder

Bipolar disorder is a mental health condition that may cause changes in mood that range from extreme highs (mania) to lows (depression). The duration of an “episode” in bipolar disorder varies widely, with some studies suggesting an episode may last between 8 and 12 months.

Bipolar disorder is a lifelong condition.

'Stress'

Stress can be defined as a state of worry or mental tension caused by a difficult situation. Stress is a natural human response that prompts us to address challenges and threats in our lives. Everyone experiences stress to some degree... Stress affects both the mind and the body. A little bit of stress is good and can help us perform daily activities. Too much stress can cause physical and mental health problems.

World Health Organisation (WHO) definition

J v DLA Piper (UK) LLP: UKEAT/0263/09

... distinction... between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events".

We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress"...

J v DLA Piper (UK) LLP: UKEAT/0263/09

Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Equality Act 2010. This is because of the long-term effect requirement.

If... a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived.

PART TWO

The legal framework

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Legal framework



Unfair dismissal

Employment Rights Act 1996

- **Employees with two years' qualifying service** have the right not to be unfairly dismissed.
- A dismissal will be held to be fair if:
 - Employer shows that the reason (or principal reason) was one of the five potentially fair reasons for dismissal; and
 - The Tribunal finds that, in all the circumstances (including the employer's size and administrative resources), the employer acted reasonably in treating that reason as a sufficient reason for dismissal.

Potentially fair reasons

Unfair dismissal – fairness and reasonableness

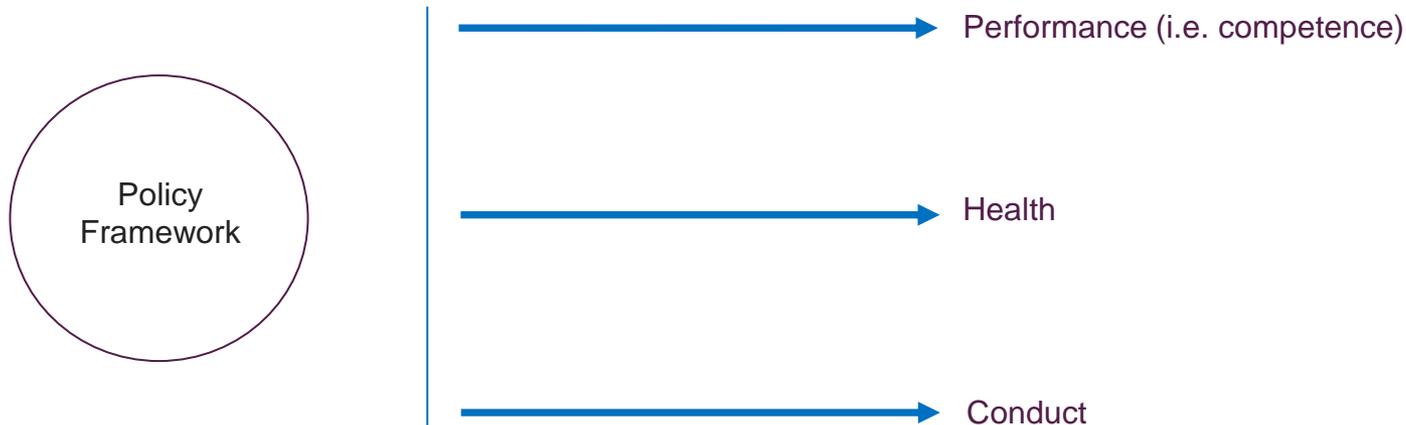
Employment Rights Act 1996

Five potentially fair reasons for dismissal:

1. capability or qualifications
2. conduct
3. redundancy
4. statutory restriction
5. “some other substantial reason”

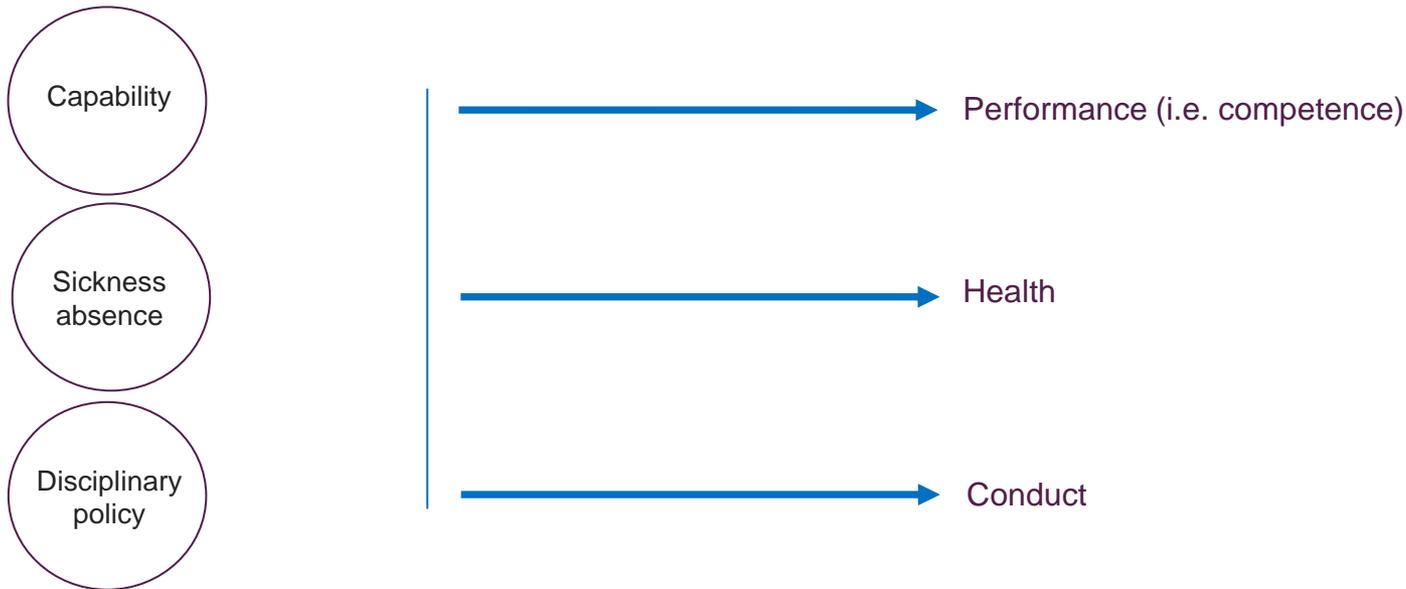
POLICY FRAMEWORK:

The appropriate approach to addressing performance, absence and misconduct are very different. It is problematic (legally and practically) to confuse these categories. Managers need to understand the underlying problem – and an organisation's policy framework needs to offer distinct processes for each situation.



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Reasonableness

Did the employer act reasonably, when dismissing?

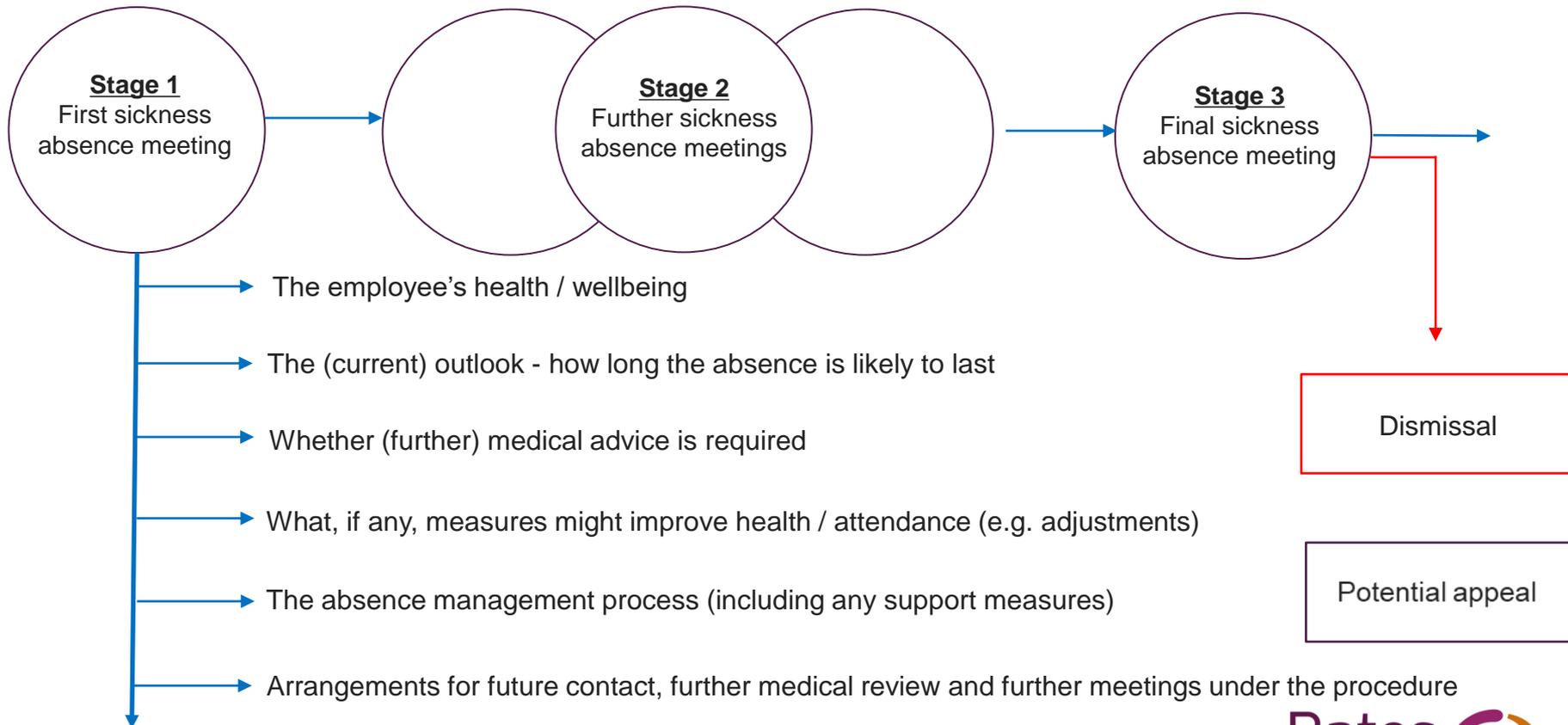
Test for reasonableness (section 98(4) of the ERA 1996).

- Did the employer follow a fair procedure?
- Did the employer act reasonably in treating the reason as a sufficient reason for dismissal taking into account the employer's size and administrative resources?

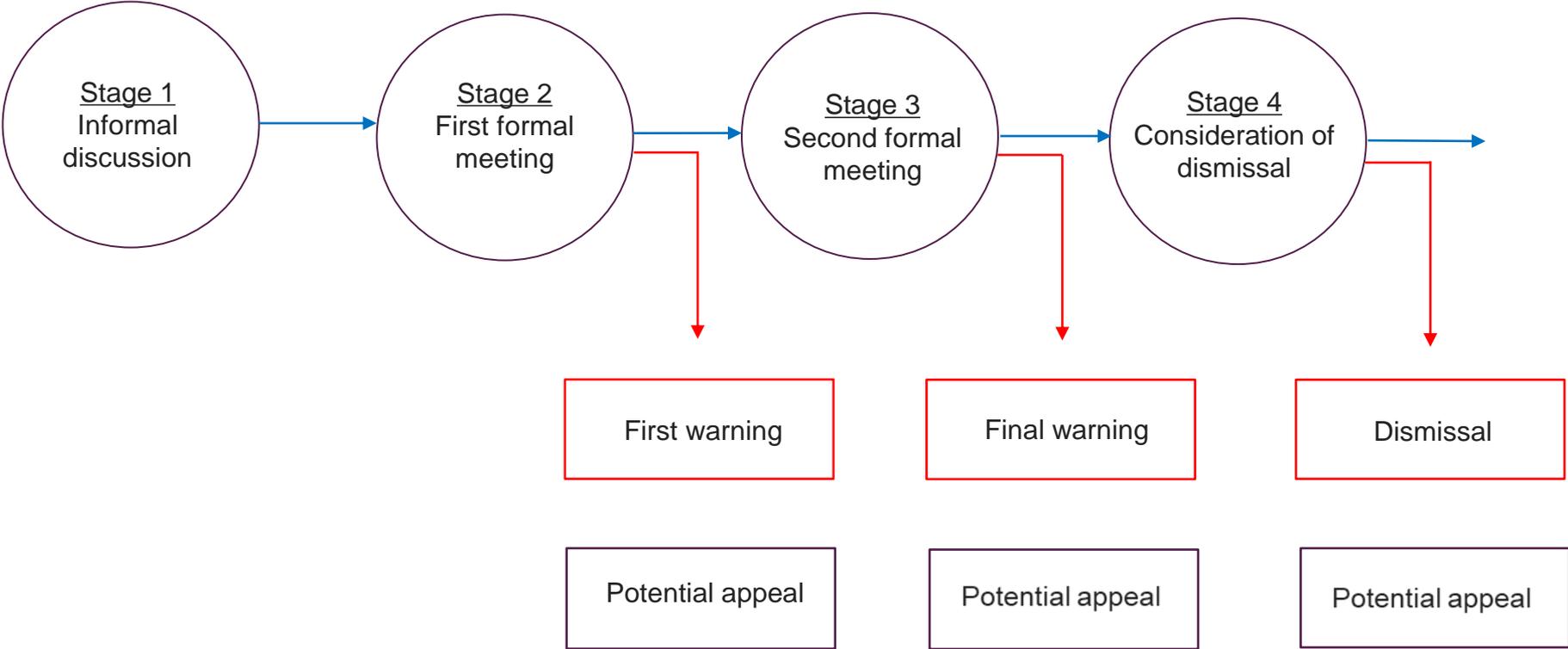
What does a fair process look like?

Sickness absence management

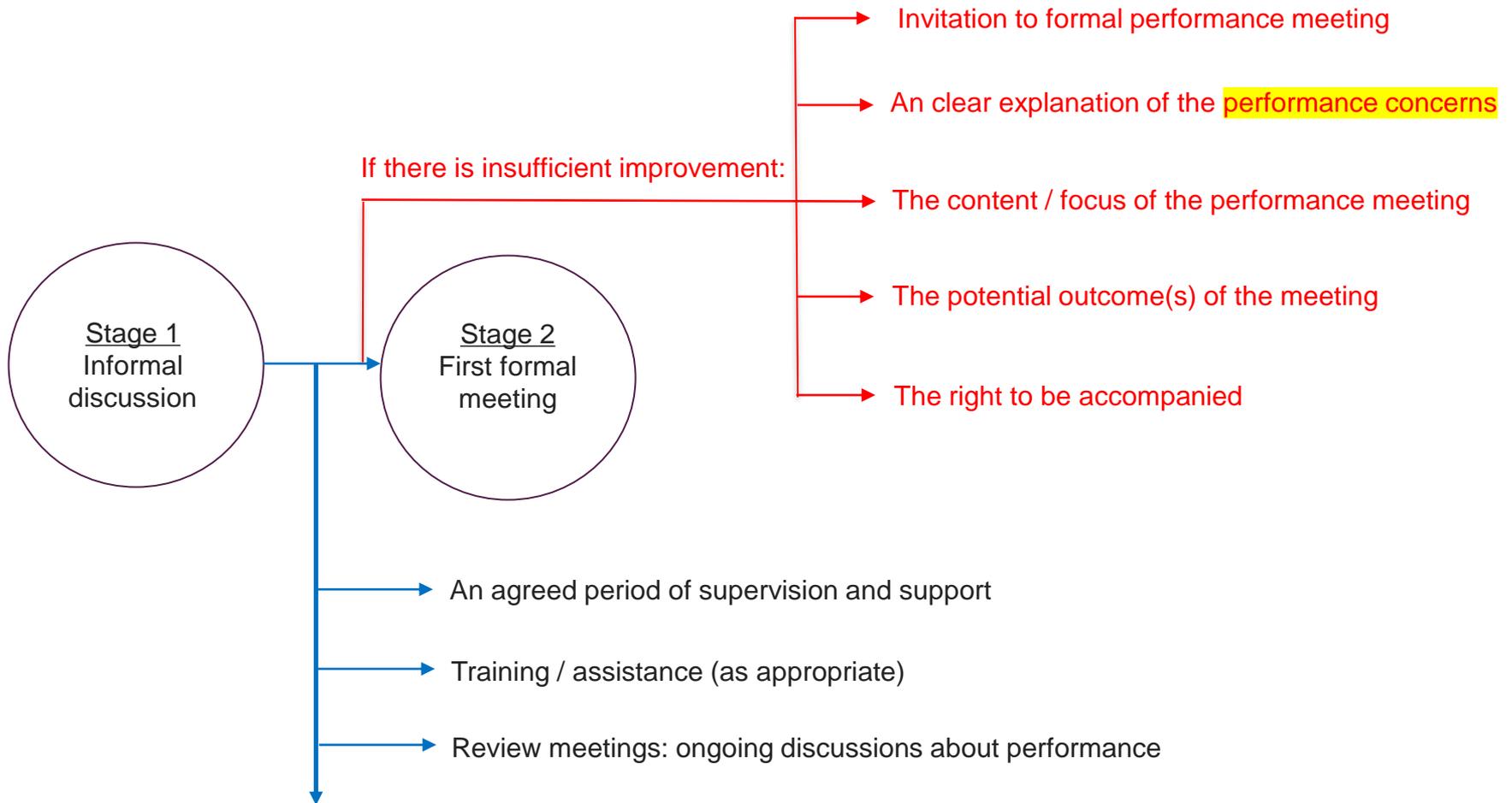
The precise sequence and duration will depend on a range of factors including: (i) the length of time an individual has been employed, (ii) the extent and impact of the absence, and (iii) the medical outlook. A typical process (for an employee with more than 2 years' service) will comprise:-



Performance management process



Performance management process



SOSR

01

Where SOSR is used to establish a fair dismissal, the employer must show that it has a **genuine reason** for the dismissal which could justify the dismissal of an employee holding the job.

02

There is **no set procedure** for a SOSR dismissal.

03

A fair procedure for a SOSR dismissal may vary depending on the underlying reason. As a minimum, **some form of discussion or consultation with the employee will normally be expected** before dismissal is confirmed.

An employee who “won’t engage”

- Dismissal following refusal to consent to engage with OH report:
 - Assuming that the employer's request is reasonable and proportionate in the circumstances, the refusal may amount to misconduct (refusal to follow a lawful and reasonable instruction) and may therefore form grounds for disciplinary action.
 - There's no reported case law on this – it is therefore not without risk.
 - It may be better for the employer to make a decision based on the underlying health issues and rely on incapacity (or poor performance) as the reason for dismissal.
 - If an employer has done all it reasonably can to obtain available medical information and if the individual continues to withhold consent for either an examination or information to be provided to the employer, a decision to dismiss may be within the range of reasonable responses open to it.
 - In Elmbridge, the Court of Appeal held that the employer, which had repeatedly extended deadlines set for the employee to provide her consent for a medical report over a number of months, had acted reasonably when it concluded, on the strength of the evidence available, that the employee was not capable and could therefore be dismissed.

An employee who “won’t engage”

Ridout v TC Group

The EAT held that employers cannot be expected to make detailed investigations into the effects of a disability without some help from the individual. If the job applicant in this case had provided more information before her interview, then the employer might have been expected to have done more to facilitate her.

Wilcox v Birmingham CAB Services Ltd

In Wilcox, the EAT held that a tribunal had been entitled to find that an employer had not known, and could not reasonably have been expected to have known, that the claimant was disabled until it received a consultant's report that had been jointly commissioned at the direction of the tribunal. Therefore, the employer had not been under a duty to make reasonable adjustments at the relevant time.

Wilcox v Birmingham CAB Services Ltd

The EAT upheld a tribunal's decision that, despite an employee stating that he was suffering from bipolar disorder, the absence of a definitive diagnosis meant that the employer did not know, and could not have reasonably been expected to know, that the employee was disabled. The tribunal considered that the employer had done all that could reasonably be expected of it to find out whether the employee had a disability; it had asked the right questions of a medical expert but the employee had declined to release certain medical information.

The duty to make reasonable adjustments

The key concepts

01

Disability (the statutory definition)

02

Knowledge (actual and constructive)

03

Provision, Criterion or Practice (PCPs)

04

Substantial Disadvantage

05

Reasonableness

REASONABLENESS

01

The extent to which the adjustment would have **ameliorated** the disadvantage.

02

The extent to which the adjustment was **practicable**.

03

The **financial and other costs** of making the adjustment, and the extent to which the step would have disrupted the employer's activities.

04

The financial and other **resources** available to the employer.

05

The nature of the employer's activities.

06

The **size** of the undertaking.

PART THREE

Practical points

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MEDICAL EVIDENCE / OH REPORTS

01

No clear diagnosis / prognosis

02

A lack of appropriate expertise

03

No critical assessment of the employee's account

04

An unwillingness to give a decisive view

05

Risk adverse

BROAD POINTS:

01

Clear focus on the predominant issue

02

Timeliness

03

Tone: patience, empathy, professionalism

04

Forward planning (not reactive management)



Get in touch

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