

## Progressing disciplinary and grievance procedures during the Coronavirus Pandemic – guidance note

Acas have just updated their advice to employers regarding variations to processes that we are all very familiar with. So, in exploring what this means for us, and how we can do things differently to achieve a robust outcome, we need to ensure that the principles of natural justice and fairness remain intact. We at SEE have reviewed this guidance. Our advice note here is intended as a practical approach to outline what we will be considering when asked to undertake independent investigations on your behalf, to ensure we comply with your policies and procedures and employment legislation. We hope you will find it useful in conducting your own matters internally.

### 1. Introduction

- 1.1. The fact that we now find ourselves grappling with the challenges of a Covid pandemic does not mean that employee relations challenges will cease, or necessarily diminish. Indeed, we at SEE, have noticed an increase in requests for independent assistance in progressing cases that perhaps have been delayed due to capacity issues, or that are just now emerging and / or becoming quite urgent.
- 1.2. We are all faced with making decisions about how best to progress this. We need to take into account new factors such as social distancing which we believe will be in place for some time to come, also the fact that some people may be unable to attend the workplace. This involves bringing all the relevant parties with us and ensuring that there are no technical 'loopholes' that may come back to bite us at the hearing or at employment tribunal (nightmare scenario that we as professionals want to avoid!!)
- 1.3. Clearly, we need to remain mindful and fully cognisant of how best to deal with these situations taking into account policies and procedures, employment legislation, business needs, business continuity and wider welfare issues. A key part of the welfare (mental health) consideration to everyone concerned is the ability to expedite processes so people are not left 'in limbo' longer than is necessary and achieve closure.
- 1.4. Firstly, there needs to be consideration about which steps to take – does this matter need to go down a formal route? Can efforts be explored to try to resolve informally through discussion and sharing of views in a managed way? Whatever happens, we need to be fair and equitable in our approach and ensure our practices are consistent, whilst taking account of the current circumstances and the needs of those involved.

- 1.5. We have heard that in some areas some Trade Unions are taking the position that no cases should be progressed at this time. However, that has not been our experience to date. Indeed, the trade unions we have been working with who are representing their members in grievances, are very keen for these matters to be expedited and are totally supportive of the processes we are putting place to do this.
- 1.6. In providing this guidance to you, we are keeping a close eye on the advice provided by Acas as the industry standard, whilst considering the practicalities of working in a local government setting and ensuring that terms and conditions of employment are complied with. In so doing, we are conscious that there may be legal challenges down the line and we are fully conversant with the need to provide an audit trail of decision-making and the process followed, should there be a subsequent challenge.

## 2. Principles to consider

- 2.1. This document provides a framework upon which to justify decisions on actions taken (or not taken) in a disciplinary, grievance or other employment situations based on the principle of a reasonable response by the employer. These decisions will be in accordance with sound employment practice, recognising that decisions will be made based on particular circumstances.
- 2.2. The decision on whether or not to pursue a case should be risk assessed using the following framework and principles for consideration under each of the points. A decision needs to be made as to whether it would be fair and reasonable to continue with, or to commence a disciplinary or grievance procedure.
- 2.3. Considerations before starting a process include:
  - A. How critical is it to commence / continue?
  - B. Impact on service provision of progressing the case / or not
  - C. Who are the parties involved and what is the impact of their involvement on service delivery? Eg currently certain services have high dependency on key workers such as social care. Consideration needs to be given to the potential impact of diverting resources at a critical time
  - D. Wellbeing impact on individual involved, other parties, witnesses
  - E. Availability of the parties – are the parties at work / working at home / furloughed?
  - F. If at the workplace, can social distancing be maintained for meetings whilst maintaining privacy? / can public health guidance be adhered to? / any constraints on accessibility to buildings / rooms?
  - G. Are there 'safe' (security compliant) facilities for video conferencing for meetings?
  - H. Does everyone have access to this technology if working at home or remote sites?
  - I. Is information available, or in an office or building that is not accessible?
  - J. Can relevant documents be accessed on the IT systems in place?
  - K. Do any reasonable adjustments need to be made for any disabilities?
  - L. Can provisions be made for individuals to be accompanied at meetings where relevant?
  - M. Have revisions to the process been communicated and are they agreed?

- 2.4. A dynamic risk assessment of how this will be progressed, taking into account the immediate practicalities, should be conducted and recorded for future reference, together with the agreement of parties that they are happy to continue under the revised arrangements.
- 2.5. As regards capturing evidence whilst it is fresh and current, it would be good practice, and appropriate, to commence the investigation stage to gather evidence in a timely manner so that the most accurate recollection of facts by witnesses are recorded. Much of this can be done remotely through video conferencing and sharing of documents. However, a decision to hear the case may be delayed, depending on circumstances at the time and taking into account the current public health advice.

### 3. Aspects to consider:

- 3.1. Whatever action is decided, the Acas Code of Practice needs to be complied with to demonstrate fairness and reasonableness. This will still be a consideration at employment tribunal – and a potential loophole to avoid. Factors to take into account in deciding whether, and how, to progress, are as follows:
- 3.2. **Severity of issue** – is the case so serious that neglecting to progress this brings a high organisation or reputational risk? For example, if this involves safeguarding concerns, potential criminal offences or serious breaches of other legislation. If the issue is one of gross misconduct requiring the employee to be (or remain) suspended from work, it may be expedient to seek to conclude this, so individuals are not suspended (on pay) for a protracted period.
- 3.3. If the issue is one of misconduct and the employee can remain at work, it may be acceptable to stay any action until the normal process can be resumed. The impact on the parties and colleagues of not progressing this needs to be considered.
- 3.4. Could the potential outcome of a hearing be dismissal? At this time, the recruitment market is reduced. It is likely to be more difficult to find new employment. This doesn't automatically mean the matter should not be progressed, but there may be resistance to progressing from the individual or Trade Unions.
5. **Statutory officer or senior management cases** – would pausing a process involving a Statutory Officer or senior manager mean that they were unable to adequately contribute to the level of decision making needed to fulfil their role and respond in the current crisis. You must ensure adherence to Statutory Officer procedures.
6. **Current cases and those close to resolution** – where cases are near conclusion what are the risks in terms of affecting the fairness of the process? If a case is almost concluded, it is likely to be best to conclude to achieve closure for all parties.

7. This may also include sickness absence management cases with no connection to Covid19, but careful consideration of Occupational Health / medical advice is required. It is also important to consider that reasonable adjustments may not be practicable at this time and therefore action should not be progressed where the employer is unable to implement appropriate support measures.
8. **Impact on service provision** – would continuing the case ensure more effective and efficient service delivery, for example if an employee is absent due to the stress of the process, would concluding the case enable them to return to work? They may be in a key worker role for example where a quicker return to work would support service delivery to vulnerable clients, this may include cases of sickness absence management.
9. **Wellbeing of, and impact on, the individual involved** – consideration should be given to the impact on the individual of both pausing and continuing with a process. If prolonging the process is likely to cause a greater adverse impact on the individual, it may be more beneficial to progress this. However, if there is likely to be a detriment to the individual, this should also be considered. An example is sickness capability where an individual must be dismissed to access ill health retirement benefits.
10. **Wellbeing of colleagues** – where a case impacts on the wellbeing of other members of staff, particularly grievances against colleagues, which would be resolved by concluding a process, these factors should be considered.
11. **Ability to conduct a fair process**– consideration must be given to the reasonableness of initiating, managing and concluding the process, particularly where a formal hearing is required, through remote methods.
12. Is it possible to make adjustments to the process which allow for all points to be fully examined and the principles of natural justice applied? Particularly where individuals may not have work supported ICT solutions (lap top etc) they may not have access to technology which allows conferencing facilities in a way which would replicate a physical meeting.
13. Whilst it is always preferable to have people present during investigation meetings, such meetings can be conducted using conferencing software, or over the phone. Representatives can be included in these calls, so the requirement to offer someone to accompany during the relevant parts of the process, can be complied with.
14. Witnesses can be presented with a series of questions in written format and asked to provide written responses to those questions.
15. Once the investigation is concluded and indicates a hearing is required, a decision can then be taken as to whether to move to a formal hearing or to stay the process. At this time, the recommended approach is to hold hearings remotely wherever possible. However, the same challenges for undertaking the investigation using video conferencing facilities will apply.
- 3.16 Where a remote meeting is not possible, consideration should be given as to whether you could safely hold a physical meeting. Some councils have continued to hear cases at a physical

hearing but have ensured all social distancing measures are in place along with facilities for ensuring personal hygiene practices can be adhered to as well.

- 3.17 **Agreement to adjustments to the process** – consideration should be given to any concerns raised by the individual, whether these can be addressed and whether it is reasonable to continue without agreement due to any of the considerations made. For example at an investigation meeting there is no statutory right to be accompanied, but in most cases this right will have been included in the procedure; or it may be impractical to adhere to procedural timescales set out in policies.
- 3.18 Any variation to procedural ‘norms’ will need to be agreed to by the employee(s) concerned. All adjustments to the process should be documented along with the rationale behind the decision to make that adjustment (or not). Employees should be asked to confirm their acceptance of any adjustments implemented in writing.

## 4. OTHER ASPECTS OF EMPLOYEE RELATIONS

### 1. **Sickness Absence Cases:**

- 4.1 Absence related to COVID-19 should normally be excluded when assessing sickness absence against triggers and any attendance targets set during earlier stages of the procedure.
- 4.2 It may be appropriate to pause monitoring periods that have been set as part of the outcome of an earlier stage in the process. This is because the majority of the workforce is currently working from home which may be masking some sickness that would ordinarily be obvious as the person is not attending the office.
- 4.3 In most cases, there will not be an immediate need to progress hearings under the sickness absence procedure. However, where ill health retirements were in progress, these should continue to be managed through the process up to and including the relevant dismissal.

### 4. **Performance Capability Cases:**

5. Where an existing improvement plan is in place, managers should discuss adjustments that can be made to the targets to take account of the fact that people are working from home or have been redeployed to different roles. Managers should make arrangements to have regular 1:1 catch ups with anyone on an improvement plan to monitor progress against the plan and any revised elements.
6. Where additional training formed part of the plan and it has not been possible to undertake that training due to the COVID-19 pandemic, managers and employees should explore the possibility of undertaking training remotely. Any monitoring of progress can not start until after that training has taken place which may result in the capability process being stayed.
- 4.7 With the rapid shift to the majority of our workforces working from home, this may have given rise to new concerns over performance capability. These are unusual times and

allowances need to be made. Many people are not suited to working remotely. Others are juggling working from home with childcare and home-schooling. Some will be struggling with mental ill health as a direct result of the virus or lockdown.

- 4.8 Early intervention by line managers to initiate a conversation with regards to their employees' personal circumstances and difficulties should be undertaken. It is unlikely that initiating a new formal capability process at this time would be deemed to be a reasonable or supportive approach.

## 5. Trade union involvement

- 5.1. Where there are cases where representation is not available, the question then remains is it reasonable to continue with a process where an employee wants to exercise their right to be accompanied?
- 5.2. Where possible, Trade Union engagement on individual cases should be made at the earliest stage. It is not reasonable to expect that all processes cease during this time, but it may be possible to delay some cases, and this should be considered.
- 5.3. It is important to engage with the unions at the earliest opportunity to discuss the proposed rationale as to when and why cases will continue including evidence of considerations made. If for any reasons the trade union resists participating in the process, then the following needs to be considered in light of the legislative requirements:

If—

- a) a worker has a right under this section to be accompanied at a hearing,
- b) his chosen companion will not be available at the time proposed for the hearing by the employer, and
- c) the worker proposes an alternative time which satisfies subsection (5),
- d) the employer must postpone the hearing to the time proposed by the worker.

(5) An alternative time must—

- a) be reasonable, and
- b) fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer.

- 5.4. If assessment has indicated that it is a priority to continue with a case, all procedures have been followed, all reasonable attempts have been made to make adjustments and to engage with the employee and their representative with all correspondence fully documented, there may be cases in which it is reasonable to go ahead.
- 5.5. Where dismissal is a possible outcome, very careful consideration should be given as to whether the decision to go ahead would constitute the employer unreasonably refusing the employee their right to representation.
- 5.6. You may wish to seek your own legal advice on this matter. Where the employer has followed a consistent and sound approach, has considered all options, documented the rationale and

given full opportunity for engagement, and the decision is taken to go ahead, even without representation, this may be considered a reasonable response, including in dismissal cases.

- 5.7. It is ultimately for the employee to arrange their representation and where a representative is not available on the chosen date, a reasonable extension must be considered. This may go beyond the statutory requirement of five working days, but it is not a reasonable expectation that the meeting is postponed until the end of the pandemic period when meetings can be convened in person.

## 6. Right of Appeal

- 6.1. The right of appeal still applies, following the same principals, taking into account the possible constraints previously outlined for conducting this process.

## 7. Final considerations

- 7.1. In many ways this is uncharted territory and there are currently no precedents to draw on. In taking decisions, employers need to be confident that they have demonstrated they have acted as a reasonable employer and followed a consistent approach to assessing each case. This may not necessarily mean that the same outcome is reached on each occasion, but the principles should be consistently applied and the rationale for the decision recorded to be able to respond to any potential future challenge.
- 7.2. For further information or advice in conducting your internal procedures, or seeking independent support in conducting an investigation, please contact [advice@seemp.co.uk](mailto:advice@seemp.co.uk)

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