

The Work Couch

Navigating today's tricky people challenges to create tomorrow's sustainable workplaces

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Episode 24 – How to tackle seven tricky disciplinary issues, with Joanna Holford

Ellie: Hi, and welcome to the Work Couch Podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law with the emphasis firmly on people. My name is Ellie Gelder. I'm a senior editor in the employment equality and engagement team here at RPC. And we'll be exploring the constantly evolving and consistently challenging world of employment law and all the curve balls that it brings to businesses today. We hope by the end of this podcast, you'll feel better prepared to respond to these people challenges in a practical, commercial, and inclusive way. And to make sure you don't miss any of our fortnightly episodes, please just hit the follow icon and please do share with your colleagues.

Here at RPC, our lawyers are frequently advising employers on handling disciplinary matters and also representing employers in employment tribunal proceedings that involve disciplinary matters. It is an area that is ripe for conflict, miscommunication and above all legal risk, and it can cause our clients real headaches. So what are the most commonly encountered and the most tricky disciplinary issues that can really throw a spanner in the works? Well, with me to run through these and give us her top tips, I'm thrilled to be joined by Joanna Holford, Senior Associate in our Employment, Engagement and Equality team. Jo, thank you so much for joining us. I know you're incredibly busy with client work. So we're really lucky to pick your brains as you are literally at the coalface of advising on disciplinary issues.

Joanna: Thanks for having me, Ellie. Yes, it's really busy at the moment. And you and I spoke a while ago about how this is such a topical issue for so many employers. And as you say, we're seeing the same complex issues come across our desks time and again. So I thought it'd be really helpful to run through these and give our listeners some practical tips on what to be aware of at the outset, hopefully before you even need to call on the help of lawyers.

Ellie: Fantastic. And before we start, we obviously do need to flag that this podcast is as ever, not a substitute for legal advice. But if you are dealing with a tricky disciplinary situation and you need advice, you can contact our team. Just look at our page on the RPC website, www.rpclegal.com and look for the employment engagement and equality page.

Joanna: Yes, that's really important to say. Thanks, Ellie. And assuming employers are at the beginning of a disciplinary matter, there are certain sources of information they need to go to first as a starting point. So firstly, employers will need to carefully take note of their own relevant company policy. There's likely to be a disciplinary policy or procedure in most workplaces. And this is particularly important where it's contractual. So secondly, you can also turn to the basic practical guidance and principles which are contained in the [ACAS code of practice on disciplinary and grievance procedures](#). The code really is the best starting place when considering the approach to take to a disciplinary. It's also a really critical step because while a failure to follow the code does not in itself make a person or organisation liable to proceedings, employment tribunals will take the code into account when considering relevant cases. Mostly we see this in unfair dismissal cases. Tribunals may also adjust any awards for compensation by up to 25 % for an unreasonable failure to comply with any provision of the code. And lastly, sitting alongside the code is the [ACAS guidance](#). This supplements the code. The guide itself does not need to be taken into account by tribunals and parties cannot be penalised for failure to follow it, but it does provide practical guidance on the handling of disciplinary matters.

Ellie: Thanks, Jo. So three really important preliminary steps there. So let's kick off then with a really common issue. And that is where an employee raises a grievance partway through a disciplinary process. So what do employers need to be aware of and how can they best approach that one?

Joanna: Yes, this is probably the most common tricky issue we see. We've got an employer that has started a disciplinary process, that's underway. And then midway through it, the employee raises a grievance. So this is actually touched on in the ACAS code. It's got a section on overlapping grievance and disciplinary cases. And it states, "Where an employee raises a grievance during a disciplinary process, the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related, it may be appropriate to deal with both issues concurrently." But I don't think this takes us very far. So then we turn to the ACAS guidance, as this has a little bit more additional information

which is actually really helpful. It includes a list of examples where it might be appropriate to suspend the disciplinary procedure pending the grievance process. So this is where you put the disciplinary process on hold, deal with the grievance and then come back to the disciplinary again. So the first is where the grievance relates to a conflict of interest that the manager holding the disciplinary meeting is alleged to have. So here you'll want to investigate those allegations before proceeding with the disciplinary. The second is bias is alleged in the conduct of the disciplinary meeting. Again, you can see the importance of determining that before carrying on with the disciplinary. The third is management have been selective in the evidence they have supplied to the manager holding the meeting. And the final one, and probably this is the most common, is where there's allegations of discrimination in that grievance. So unless those circumstances apply, we're left in a situation where both options are available and which route is taken will depend on the nature of the allegations, both in the disciplinary and the grievance. And often timing is a consideration. It's really important that disciplinary allegations are handled in good time so that both the employee concerned and any witnesses involved are able to have a good recollection of events. If there's a concern that suspending the disciplinary will cause unnecessary delay, then that might be a reason to continue and proceed. Sometimes the points raised in the grievance need to be analysed and consideration should be given to them whether they are part of the disciplinary. So it might be that points have been raised by way of a separate grievance, but actually they're completely relevant to the disciplinary allegations themselves. An employer might decide that actually the proper forum for dealing with those points is in the disciplinary. Another example of this is if it arises after the disciplinary outcome, it might be that this is actually an appeal in relation to the disciplinary rather than a separate grievance. Where the disciplinary and grievance are handled concurrently, it's really important they are handled entirely separately to prevent the outcome of one influencing the other. This means having different people handling each process, a manager for each and also HR, and also making sure the information is not passed between the different teams dealing with the grievance and disciplinary. This is often an allegation that might arise in a later tribunal claim is that one was impacting the other. So what happened in the grievance then led to a disciplinary decision being taken.

Ellie: Thank you, Jo, for clearing up that particularly tricky situation. What about where the employee commences a period of sickness absence during the disciplinary process? Another quite common scenario.

Joanna: Yes, absolutely. It's another issue that commonly arises during a disciplinary process. So the employee that's facing the allegations starts a period of sick leave just after they're informed of them. So again, here we can turn to the ACAS guidance and this states that employers may arrange another hearing if an employee fails to attend through circumstances outside of their control, for example, illness. But ultimately, the approach to take will depend on the individual circumstances, including whether the employee is disabled under the Equality Act and how long the sickness is likely to last and the nature of the illness itself. I think sometimes you have to take a common sense approach to this. And if it's a sickness that will be a matter of days, someone's got the flu or a heavy cold, it's just sensible to wait until they're back at work and reschedule for then. But if it's looking like the employee is going to be off for a longer period, then I think you have to consider a wider range of factors. And the starting point will be to consider, well, are they unfit for work? But actually, could they potentially attend a hearing? So there's an important distinction here. They might not be well enough to do their day-to-day job, but it might be possible that they are well enough to attend a hearing. And the way to determine this is to consider medical evidence. So that might be a GP's fit note that has some advice or actually reaching out to occupational health to see what they think as well. The other point to consider is whether there's a mental health aspect. Sometimes the disciplinary procedure itself can cause the stress or anxiety and having this, you know, carrying on, hanging over the employee's head, it can make the situation worse. And you also need to consider your duty of care to them, you know, will carrying on impact their health? The third point to consider is the seriousness of the disciplinary allegations, the more serious, the quicker an outcome is likely to be needed, particularly where there are other employees that are involved. And finally, the need to complete the disciplinary process in good time and whether a long delay in itself could render the outcome unfair.

Ellie: And Jo, you mentioned that the employee could be off sick because of a disability. So what kinds of things do you need to bear in mind if that's the case?

Joanna: Yeah, so if the employee has a disability, then the duty to make reasonable adjustments will be engaged. There might be steps that you can take to allow the hearing to go ahead. For example, it might be you hold it via Teams rather than in person. You might allow them to be accompanied by someone other than a colleague or a trade union representative, might be a family member, for example. Or you might allow lots more breaks during the hearing. In some situations, an employer may get to a point where they need to proceed without the employee attending the hearing. The ACAS guidance includes reference to this and making a decision based on the papers alone. However, I have to say this is very rare and it is a risky approach. You need to consider all the circumstances first. And the ultimate risk is a finding of unfair dismissal if of course the sanction is dismissal. Also where the employee is disabled, the risk of a discrimination claim would also need to be assessed. If it does get to this point and you want to proceed without an in-hearing, then it's important to ask the employees for their own written representations so they have chance to put forward their case.

Ellie: And another aspect that can be problematic is where the alleged behaviour is just totally out of character for the employee concerned.

Joanna: Yes, so this is rarer than the issues we've discussed so far, but it's not unheard of by any means. I've come across disciplinary proceedings where the allegations are completely out of character for the individual concerned. They may have a completely unblemished career with their employer and then something happens that is unusual. That behaviour in itself might be an indication that something's wrong. And this can range from the employee suffering from a recent period of stress at work impacting them to a more serious mental or physical condition. So in previous cases where this has come up. It could also be in relation to the medication they're taking and that might have caused the behaviour rather than the underlying condition itself. So if this is potentially happening, then ill health should be investigated as far as possible. This is likely to involve obtaining occupational health advice or in some cases, approaching the employee's own doctor or reaching out to an experienced consultant. An employer may also need to take this into account in relation to any mitigation put forward by the employee and considering the relevant sanction. It might be that they say the allegation did happen, but then they put forward as mitigation that it was because of medication or a condition they have, again, potentially with medical evidence. It could be that the behaviour is linked with that condition or medication and that medical evidence will really be key in determining that. It's also important to consider the impact this might have on the other employees and take steps to alleviate their concerns. But obviously it's vital that you don't disclose any personal sensitive data about the employee who's suffering from ill health to others. And this is incredibly tricky.

Ellie: Yeah, I can imagine that's a really difficult tightrope to walk there for the employer. Let's look at another complicated situation where the allegations involve a criminal element. How would that affect the employer's disciplinary process?

Joanna: Yeah, so where I see this arise, it's often that something that's happened, you know, entirely unrelated to work, it's a criminal charge that's taken place outside of work and then an employer hears about it, maybe through another employee. And then the question is whether they can take disciplinary action in relation to those criminal charges. And helpfully, this is dealt with in the ACAS code. This states that if an employee is charged with or convicted of a criminal offence, this is not normally in itself reason for disciplinary action consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do the job and their relationship with their employer, work colleagues, and customers. So what does this mean in practice? It involves an assessment of the situation, including the nature of the allegations, the employee's role, what are they doing at work, and who they work with. And this last point is probably the most important. So again, the ACAS guidance provides a little bit more detail. And where it is thought that the conduct may warrant disciplinary action, the following guidance should be borne in mind. So firstly, the employer should investigate the facts as far as possible, come to a view about them and consider whether the conduct is sufficiently serious to warrant starting the disciplinary procedure. Secondly, where the conduct requires prompt attention, the employer need not wait until the outcome of the criminal prosecution before taking fair and reasonable action. Sometimes the criminal process can take a really long time and the misconduct might need more prompt attention at work and you don't have to wait for the outcome to do that. Thirdly, where the police are called in, they should not be asked to conduct any investigation on behalf of the employer, nor should they be present at any meeting or disciplinary meeting. If a disciplinary ends up in a tribunal for a finding of unfair dismissal, then it's going to be key that the employer took the decision. And if the allegations do take place at work and could potentially be a criminal offence, then what do you do in those circumstances? And I would say this is where it gets really complicated and we could do a whole podcast on this in itself. So my tip would be to seek legal advice straight away.

Ellie: Absolutely, yes. Thank you, Jo. Can I ask also what the employer should do if the employee is just refusing to cooperate with the employer's disciplinary process, having been charged or convicted for a criminal offence outside work?

Joanna: Yes, so helpfully the ACAS guidance has some advice here and that suggests that the employer should not be deterred from taking disciplinary action in these circumstances. The employee should be advised in writing that unless further information is provided, a disciplinary decision will be made on the available information and that could potentially result in the employee's dismissal. So it's a bit like the situation we were talking about earlier where someone doesn't come to a hearing. It might be that you get to a point where you decide it on the paperwork alone. And again, it's important to ask for the employee's input, even if that is simply in writing. So ACAS warns that employers should consider all relevant factors, not only potential pressure from the workforce to dismiss an employee and possible disruption to the business resulting from that pressure before reaching any decision. So often you might get other employees that have heard about what's happened and they're sort of pressuring you to take action, but you need to consider all the factors in those circumstances. And ACAS also recommends that it will normally be better for an employer to take disciplinary action rather than rely on contract being frustrated in these circumstances because they can no longer perform their duties.

- Ellie:** And finally, let's look at the particularly knotty situation where you have a witness in a disciplinary investigation who is just really reluctant, or they might even be refusing to take part in that investigation. They might be worried about how it's going to impact their working relationship with the person in question. So how should employers deal with that one?
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- Joanna:** Yes, this is often more of an employee relations and engagement exercise than a legal one. For a disciplinary to be fair, the employee needs to know the case against them. This will include who are the witnesses and what are the evidence that they're providing. So this means that for witnesses who are reluctant to take part, speaking with them, confirming the importance of the disciplinary process and also explaining the steps that will be taken to assist them. Reassurance can be given that they can provide their evidence by statement, but there is a chance they may be needed at the disciplinary hearing itself. And something that often comes up is the potential cross-examination of witnesses by the employee, you know, who are at the centre of the disciplinary, at the disciplinary hearing. I must say this is rare in practice though, and the test is one of reasonableness. There may be cases in which it would be impossible to act fairly and reasonably unless cross-examination is permitted. However, this will not always be the case and it will depend on the individual circumstances of the disciplinary. And it's important to say here that the tribunals and courts have previously stressed that such hearings are not quasi-judicial hearings - you know, they're disciplinary hearings and proceedings that are taking place at work. In the grievance process, there is more commonly times when witnesses can be anonymous and the documents redacted, but this is much riskier with a disciplinary process. You know, again, we've spoken about this, but it's the importance of the employee knowing the case against them. So they do need to know who those witnesses are and be given all the information. And if that's not provided to them, then the potential outcome is that the dismissal is unfair.
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- Ellie:** Wow, thank you, Jo. You've run through a whole host of really difficult situations, and you've provided some invaluable practical nuggets to help our listeners feel that more confident when faced with these challenges. So thank you.
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- Joanna:** Pleasure Ellie, thank you for having me.
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- Ellie:** If you would like to revisit anything that we discussed today, can access transcripts of every episode of the Work Couch podcast by going to our website. So that's www.rpclegal.com/theworkcouch. Or if you have questions for me or Jo, or perhaps you've got suggestions of topics you'd like us to cover on a future episode you can get in touch, you can email us at theworkcouch@rpc.co.uk. We'd really love to hear from you. Thank you all for listening and we hope you'll join us again in two weeks when we'll be taking a deep dive into disability inclusion at work with the fabulous Samantha Renke, who many of you will know. But for those of you who don't, Sam is an actress, broadcaster, writer and disability rights campaigner and she's totally rewriting the narrative around disability. It's going to be a really powerful, informative mini-series, so do tune in for that one.



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