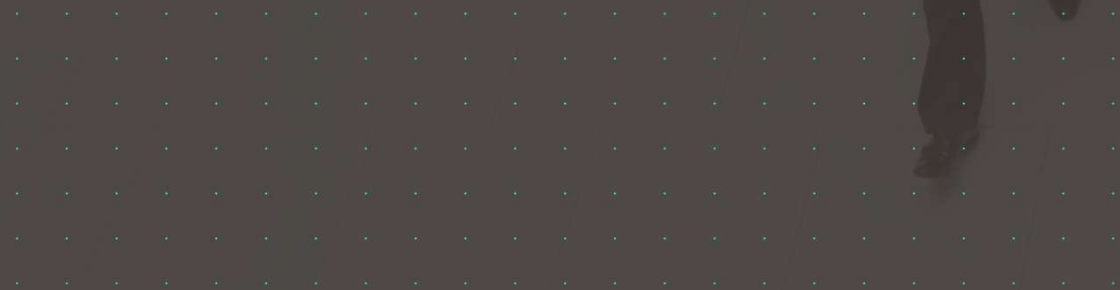


A&L Goodbody

How to handle disciplinary roadblocks

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The Assignment...

■ Bullying

“How do you progress a disciplinary process when an employee perceives bullying and counters with multiple grievances, refuses to engage, or goes off sick partway through?”

Roadblock....

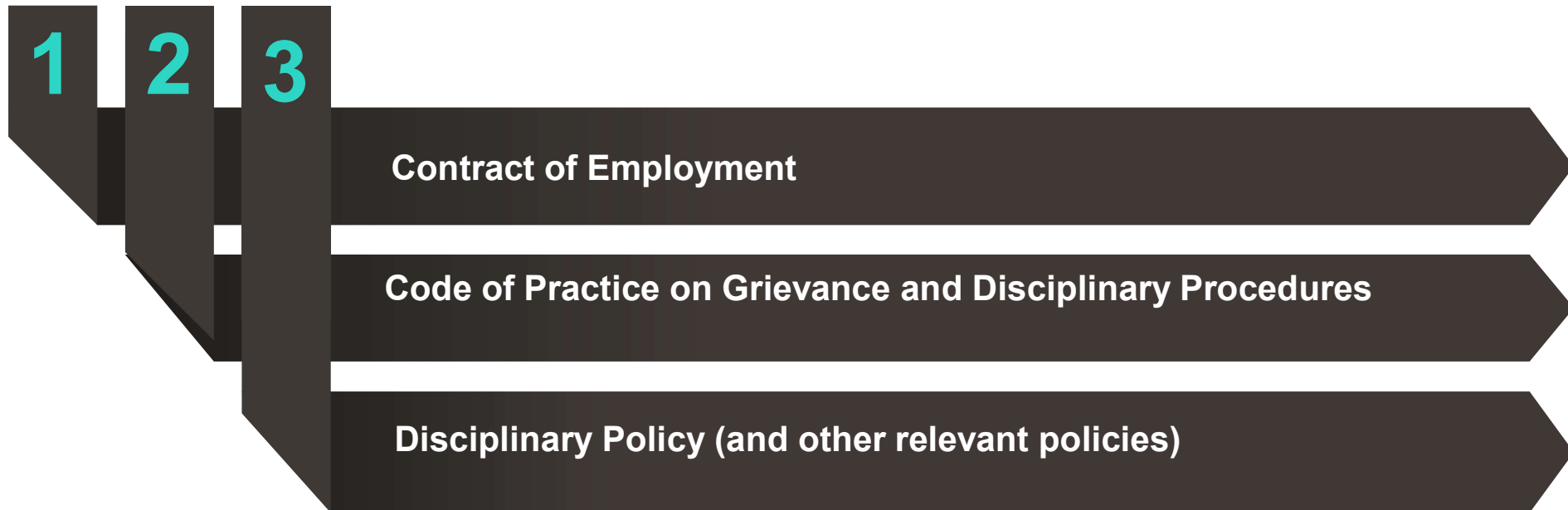


Common Roadblocks

**Bullying Complaints/
Grievances**

Sick Leave

The Basics



What is Bullying?

Ruffley v The Board of Management of St Anne's School (Supreme Court)

- **Repeated:** conduct must be repeated - requires a "*pattern of behaviour*", not a "*number of incidents*".
- **Inappropriate:** behaviour which is inappropriate at a human level "*not merely wrong*" – i.e. it does not necessarily need to be unlawful or erroneous behaviour.
- **Undermine dignity at work:** conduct which will qualify as undermining of an individual's right to dignity at work must be "*both severe and normally offensive at a human level*".

What is NOT Bullying

- 1 Expressing differences of opinion strongly
- 2 Ordinary performance management
- 3 Offering constructive feedback, guidance or advice about work related behaviour which itself is not welcome
- 4 Reasonable corrective action taken by an employer relating to the management and direction of employees (e.g. performance management)
- 5 Workplace conflict where people disagree with each other's views

Employer got it *Wrong*

- **QA Inspector v Medical Equipment Manufacturer (WRC 2020)**
 - > Employee placed on a PIP after 9 years service by a new manager
 - > Employee lodged grievance against manager
 - > Employee initially refused to attend PIP meetings
 - > Employee ultimately agreed to attend PIP meetings but only if a witness attended
 - > Employee received a warning for failing to comply with a management instruction (from the manager who issued the instruction)
 - > Employee invited to a new PIP meeting, insisted witness attend again

Employer got it *Wrong*

- > Employee dismissed for “gross misconduct” in continuing to fail to comply with management instructions

- > **AO**
 - Critical of delay in progressing employee’s grievance while noting the disciplinary process was progressed expeditiously

 - Found refusal to permit a witness attend was unreasonable

 - Held instruction to attend PIP meetings was not reasonable – in fact, found employee’s refusal to attend PIP meetings was reasonable in the circumstances

 - Only awarded €10,000 due to limited evidence of financial loss

Employer got it *Wrong*

■ **Quality Inspector v Medical Device Company (WRC 2020)**

- > Employee raised grievance about the conduct of her manager at a meeting
- > That manager separately disciplined her due to conduct related issues at another meeting
- > Manager then initiated a PIP process – she refused to attend PIP meetings and ultimately failed PIP
- > Separate disciplinary panel decided to dismiss her
- > Employee argued her dismissal was flawed as manager was biased and had set her up for failure on the PIP.

Employer got it *Wrong*

- **AO:**

- > The Respondent's HR department were aware of complaints and counter complaints by the employee/her manager, yet allowed the PIP/disciplinary process to conclude without investigating the employee's grievance against her manager.

"In an operation that had at least over a hundred employees, I found it incredible that the Respondent did not intervene in this interpersonal dispute and investigate the Complainant's grievance..."

- > Awarded 6 months salary in compensation

Employer got it *Right*

■ VAT Operations Manager v A Manufacturer (WRC 2021)

- > New manager placed the employee on a PIP
- > Failed first PIP and placed on a second – employee objected to PIP
- > Employee claimed PIP goals were unreasonable and being placed on a PIP was tantamount to workplace bullying
- > Employer expressly advised employee he could raise a grievance following being placed on a PIP or alternatively have his dissatisfaction with being placed on a PIP noted in the PIP document. He chose the latter.

Employer got it *Right*

> AO:

- Significant employee never raised a formal grievance about PIPs
- Did not accept evaluation of employee's performance via PIP process constituted bullying behaviour
- Stated there is a distinction between “...*the conduct of an employer which is upsetting for an employee and conduct that constitutes bullying...*”
- Material that employee offered opportunity to withdraw resignation and have concerns formally investigated, which he declined

Employer got it *Right*

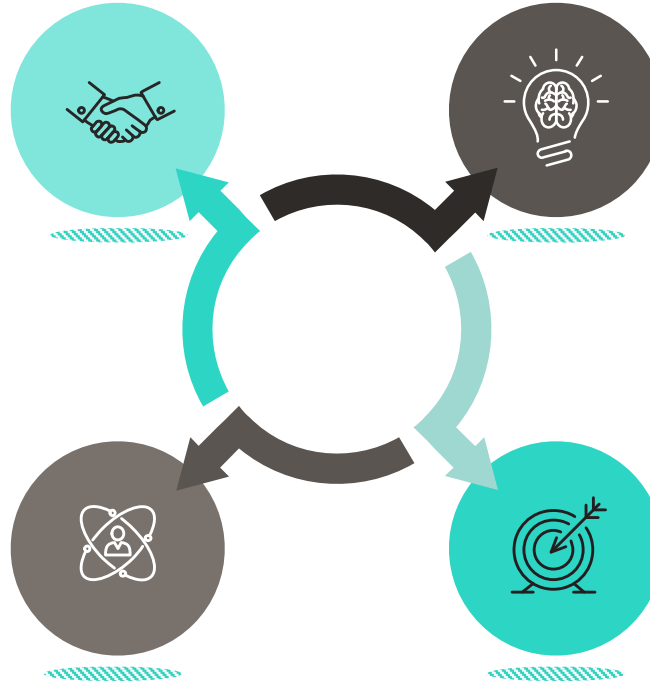
- PIPs were conducted in accordance with company procedure, they were documented and goals/objectives shared with him at outset.
- No evidence of a breach of contract or such unreasonable behaviour as to justify the employee's claim he was forced to resign.

Case Law Takeaways

Deal with Roadblocks

01

- Investigate/Swap in decision maker etc.
- Do a root cause analysis



Watch out for *new* managers

02

- Ensure consistency of approach

03

Make sure PIP stands up to objective scrutiny

- Both decision to commence PIP and contents of PIP

04

Procedure, Procedure, Procedure

- If you have a PIP policy follow it – same goes for disciplinary

MIA on Sick Leave

- Very common for employees in disciplinary processes to go on sick leave
- Sometimes genuine...
- Make sure disciplinary policy caters for this – including ability to rely on occ.health report
- Accept third opinion *sometimes* required

Occ.Health Referrals - Top Tips

01

Identify an appropriate expert

Talk to your network!

02

Detailed Referrals

Take time to complete referral and make sure it is detailed – but remember referred employee will likely see referral form (or at least assume they will).

03

Provide relevant context

- Nature of role
- Absence history
- Any possible “triggers” for absence
- Any reasonable accommodations in place/planned to be put in place

04

Ask multi-layered questions

- Fitness to work
- Fitness to participate in HR process
- Relevance of reason for absence to performance/conduct issue
- Need for specialist input?

Risks of Cracking On...

- No risk free option
- Aggrieved employee AND/OR frustrated managers
- Unfair Dismissal/Constructive Dismissal claim
- Potential for other types of claims e.g. disability discrimination, failure to provide reasonable accommodation.

The Open Road...



Contact Information



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Questions?

