

West Midlands Employers

Framework of Principles for Consideration of Progression of Casework during the Coronavirus Emergency

for use by Local Authorities / other public sector bodies

1. Introduction

- 1.1 Employee relations issues will continue to arise during the current Coronavirus pandemic and there are inevitably cases which commenced prior to the emergency measures being implemented. Local Authorities and other public sector bodies are faced with making decisions about how to best deal with these situations taking into account their current policies and procedures, employment legislation, business needs and business continuity and wider welfare issues.
- 1.2 It is important that where practicable employers take a consistent approach to assessing whether to progress an individual case.
- 1.3 West Midlands Employers advocates a response which is consistent across the region where Local Authorities make an assessment on a case by case basis. We recognise that information, guidance and instruction is being received periodically. We understand that some Trade Unions are taking the position that no cases should be progressed at this time, however this document sets out a framework of principles on what to consider as part of that assessment, in order that there is a regional perspective and response to any potential challenge and a systematic approach. Should the position change nationally, guidance will be updated.
- 1.4 These principles are designed to apply to casework under any Human Resources policy and/or procedure where there is a right to be formally accompanied, whether or not this is at a formal stage of any such procedure.

2. Framework of Principles

WME Position

- 2.1 At WME we have taken the approach that we want to support our Local Authorities to be able to justify their decisions on actions taken (or not taken) in a disciplinary, grievance or other Employee relations areas based on the principle of a reasonable response by an employer. These decisions will be in accordance with sound employment practice. It is not possible to cover every possible situation or circumstance. We also want to ensure consistency with decisions made by other councils. We will continue to gather intelligence in this area.
- 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 (examples are not an exhaustive list and there is no order of priority):
 - A** Severity of issue – i.e. gross misconduct or misconduct
 - B** Does the process involve a statutory office or Senior Officer?
 - C** Where is the case current and is near resolution
 - D** Impact on service provision
 - E** Wellbeing of, and impact on the individual involved



- F Wellbeing of colleagues – including Line Managers and others directly impacted
- G Ability to conduct a fair process remotely
- H Have all parties agreed to the adjustment to the process?

- 2.3 **Severity of issue** – consideration should be given to whether the case is so serious that neglecting to continue with a process brings a high organisation or reputational risk. For example if the case involves safeguarding concerns, potential criminal offenses 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 try and resolve the issue so they are not at home on pay for a protracted period. 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.
- 2.4 **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.
- 2.5 **Current cases and those close to resolution** – where cases are near conclusion what are the risks in terms of effecting the fairness of the process? If a case is almost concluded it may be prudent to conclude the situation so it is not “hanging over” the employee or the team. If no action has yet been taken however it may not help to start on the route – but with the caveat above on the severity of the issue. This may also include absence management cases with no connection to coronavirus but careful consideration of OH/medical advice. 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.
- 2.6 **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.
- 2.7 **Wellbeing of, and impact on the individual involved** – similarly consideration should be given to the impact on the individual of both the option to pause and the option to continue with a process. If prolonging the process is likely to cause greater concern for the individual it may be more beneficial to move ahead. Similarly if there is a detrimental impact on the individual this should also be considered, for example a capability case where an individual must be dismissed to access ill retirement benefits.
- 2.8 **Wellbeing of colleagues** – where a case impacts on the wellbeing of other members of staff which would be resolved by concluding a process these factors should be considered.
- 2.9 **Ability to conduct a fair process remotely** – consideration must be given to the reasonableness of concluding the process, particularly where a formal hearing is required. Is it possible to make reasonable 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 the physical hearing. It is also important to consider that it is best practice to carry out investigations as soon as possible in order that recollection of events is likely to be more accurate, this may mean that the investigation is completed but it is considered appropriate to delay a hearing in some cases. Adjustments to how investigations are conducted will be also be necessary to avoid face to face meetings. In the case of formal performance procedures (capability) it is unlikely that these can be fairly progressed as the ability to implement the support necessary to bring about improvements is severely restricted, as is adequate monitoring. It is therefore unlike that these cases could be progressed at this time.
- 2.10 **Agreements to the 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 and variation by agreement will be needed. Consideration should also be given to documenting the adjusted procedure and indicating that the individual understands how this will be done if the decision to proceed is taken.

3 What about union involvement?

- 3.1 WME is aware of the general TU position of not progressing casework at this time. There may be cases where representation is not available because of this position. The question then remains is it reasonable to continue with a process where an employee wants to exercise their right to be accompanied?

WME Position

- 3.2 WME recommends that, where possible, 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 that it is possible to delay some cases, and this should be considered. A position statement to the unions to include a rationale as to when and why cases will continue including evidence of consideration against the points A to H above to be assessed should be issued with a commitment to engage fully with them on individual cases which need to be pursued. There may still be refusal to represent an employee but at present there is no amendment to the Employment Relations Act 1999 section 10 The right to be accompanied which states:

(4)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),

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.

- 3.3 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. 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. WME has sought a legal opinion on behalf of the region and this confirms that where the employer has followed a consistent and sound approach, given all options consideration, documented the rationale and a given full opportunity for engagement, the decision to go ahead even without representation may be considered a reasonable response, including in dismissal cases. 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 as outlined above but legal advice confirms 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.

- 3.4 In many ways this is uncharted territory and there are currently no precedents to draw on. In taking decisions LAs 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 potential future challenge.

