Severance Arrangements and Settlement Agreements	
When does approval need to be obtained for severances from DH/NHS Improvement and HM Treasury? Do we still have to get approval for redundancies?	Prior approval needs to be obtained from DH in the case of NHS Trusts and CCGs and from NHS Improvement in the case of Foundation Trusts, as well as from Treasury for all special severance payments which, put simply, amount to non-contractual severance payments to employees. If DH or NHS Improvement approve the business case, they seek Treasury approval on behalf of the employer. As from March 2013, any employment tribunal claims settled with a severance payment at judicial mediation must now be approved in advance by HM Treasury. The Trust Development Authority (now NHS Improvement) issued guidance to NHS Trusts in June 2013 whereby they advise NHS Trusts to seek prior approval from them for any contractual payments over £50,000 which would therefore include redundancy payments, as well as any payments made to directors. The Trust Development Authority advocated involving them at an early stage; so this would be before there is any contractual obligation created to make the payment. The template form also requires sight of the draft settlement agreement and any reference. They are very much stepping into the shoes of the former Strategic Health Authorities, although the guidance provides for the Trust Development Authority's approval to be obtained in a larger number of circumstances than was previously the case with the Strategic Health Authorities.
If the provisions of a settlement agreement are breached, how can they be enforced?	Breaches of settlement agreements are enforced by way of a breach of contract claim. It rarely happens in practice as there is an issue as to what the employer's loss is any event. One of the great problems of settlement agreements is enforcing confidentiality.
In light of the Francis Report and recent coverage in respect of "gagging" clauses, what is the position on inserting confidentiality clauses in settlement agreements?	Advice from DH going back to 1999, so shortly after the Public Interest Disclosure Act protecting whistleblowers came into force, has made it clear that NHS employers should not use "gagging" clauses in contracts of employment and settlement agreements. "Gagging" clauses are restrictions which seek to prevent disclosure of information in the public interest and are in fact unenforceable under the Public Interest Disclosure Act. NHS Employers' guidance on "the use of compromise agreements and confidentiality clauses" dated April 2013, includes a model clause regarding confidentiality at Annex A which employers are encouraged to use. It basically states that the settlement agreement shall not prejudice any rights the employee has or may have under the Public Interest Disclosure Act 1998 and/or any obligations

	that the employee has or may have to raise concerns about patient safety. Confidentiality clauses certainly have their place in achieving a clean break, but we all need to think very carefully about the individual circumstances in each case and which confidentiality provisions are needed so for example, is it necessary to extend confidentiality to the circumstances giving rise to the settlement agreement, to the fact that there is a settlement agreement in existence or even the fact of a payment being made. If it is a redundancy, for example, why would any of these restrictions be necessary? Employers also need to think carefully before inserting a non-derogatory statements clause within settlement agreements.
TUPE	
How do we minimise the risks associated with transfers given the potential increase in contracting out of services to non-NHS providers?	The 2006 revision of TUPE introduced the concept of 'service provision change' transfers. It was intended to widen the scope of TUPE to cover cases where services are outsourced, in-sourced or assigned to a new contractor. For there to be a service provision change, there must be an organised grouping of employees which has as its principal purpose the carrying out of activities concerned on behalf of the client. 10 years on the tribunals are awash with cases testing the scope of service provision change. Points to highlight to minimise the risks associated with such transfers: 1. Getting TUPE indemnities from the current provider and if necessary through the commissioner to cover the risk of TUPE not applying on a subsequent transfer and having a price adjustment mechanism in case of hidden costs; 2. Maintaining an organised grouping – this means that employees must be deliberately organised for the purpose of carrying out the activities required by the particular client contract. There must be some deliberate planning or intent in the way the employees are organised not just a working practice of the employer. As providers you need to make it clear to commissioners as to who their client team is and how they are organised to deliver the service in accordance with their requirements; 3. Assigning resources to the work so that it is an identifiable economic identity. The more flexibly the service is run, the more it is indistinct from other services and less likely that TUPE will apply. There are proposals to reform TUPE. The Government response to TUPE consultation has stated that the Service Provision Change definition is here to stay, with a proposed amendment in line with recent case law to state that the activities must be fundamentally or essential the same. We should have the draft of TUPE 2014 Regulations in December 2013.

What are is a COSOP/ TUPE-like transfer, and what are the benefits?	COSOP is the Cabinet Office Statement of Practice issued in January 2000 and revised in 2007. It was drafted by the Cabinet Office as guidance to support transfers between public sector bodies. COSOP doesn't confer any legal rights in itself and is not a mechanism capable of effecting transfers of employment. It is essentially a policy containing an expectation that in circumstances where TUPE doesn't apply, the principles of TUPE should be followed and employees involved should be treated no less favourably than had TUPE applied. What a COSOP transfer can't do for example is provide for statutory continuity of service to transfer but the employer may for example maintain terms and conditions even though it doesn't need to. Therefore these employees would not have the right to claim unfair dismissal as they wouldn't have two years' service. Because COSOP has these shortcomings, in the transition involving the abolition of PCTs, for example, the Secretary of State didn't rely on COSOP alone but used statutory transfer schemes to preserve statutory continuity of service. The benefit is that jobs and terms and conditions may be safeguarded due to the application of COSOP. However, employees would have to agree to transfer on this basis.
Does a transferee have the power to move a transferring employee's work location following a transfer?	TUPE deems an employee's resignation to be a dismissal where it is in response to a substantial change to the employee's working conditions to their material detriment. In *Tapere v South London and Maudsley NHS Trust*, the EAT held that whether there has been a substantial change in working conditions for the purpose of regulation 4(9) of TUPE is a question of fact to be determined by reference to the nature, as well as the degree of change. *Tapere* confirms that the contractual mobility clause (we can transfer you to any Trust location) is limited to the location of the transferor Trust and not the locations of the new employer. So a tribunal will consider the impact of the proposed change from the employee's point of view and if the employee considered the change to be detrimental, whether it was a reasonable standpoint. A detriment is material if it is more than trivial or fanciful. In the more recent *Abellio London Ltd v Musse and others* case, the EAT upheld a tribunal's decision that a relocation of 6 miles because of a TUPE transfer was a substantial change in bus drivers' working conditions to their material detriment. A move from north to south of the river was substantial, and an increase in the working day of between one to two hours was a material detriment.

The Contractual Arrangement	
How can contractual terms be varied?	The safest approach to changing fundamental terms and conditions of employment of a group of employees is through consultation with the unions where there are 20 or more employees you are proposing to dismiss to effect the change, as well as individually. Where agreement is obtained, change is straightforward. In the absence of agreement, employers will need to consider whether they are prepared to simply introduce the change in the hope that very few employees are left in disagreement or whether they are prepared to take the step of dismissing and re-engaging on new terms. The offer of re-engagement should clearly take place on or before expiry of the contract. The more radical and negative the change the harder the employer will have to work to achieve it.
Can we issue new and different terms and conditions to new starters?	Employers can vary components of terms and conditions not collectively agreed for new starters fairly easily for example obtaining greater flexibility but would need to watch differences in pay for example for equal pay challenges. In any event, in terms of AfC there is a majority commitment to maintaining a national handbook of terms and conditions albeit keeping changes under review.
How do we know if we have the ability to demote and move an employee as a disciplinary sanction? When does such a step amount to a breach of contract?	Only if you have the contractual power to do so.
Disability	
Should we ask Occupational Health to advise on whether or not the employee is disabled?	Where an employee is on sick leave it is crucial to get some form of medical opinion and evidence to understand the employee's illness, and where it is likely to lead. The purpose of medical evidence is to inform the employer about the nature of the illness and the prognosis, The recent case of Gallop v Newport Borough Council confirmed that an employer should not simply rely on OH's opinion that an employee is disabled, but should apply its own mind to the question.
Do we need to protect pay when a disabled employee is redeployed either temporarily or permanently into a lower banded post?	This gives rise to the question of reasonable adjustments. We need to consider whether a particular adjustment would have been reasonable to make in the circumstances. Does it ameliorate the disabled person's disadvantage, what is the cost in light of the employer's financial resources and what is the disruption of the adjustments on the employer's activities. The purpose of reasonable adjustments is to

	enable disabled people to play a full part in the world of work, not a general duty to support through difficulties. In *Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagele*y, the EAT held that the duty to make reasonable adjustments did not require an employer to top up an employee's part-time earnings during a phased return to work. The only time protection would need to be considered is where the employer's failure to pay the protection results in the disabled employee being off sick.
Fixed Term Contracts	
A consultant is retiring next month. We and he want him to return on a fixed term contract. We are going to enter into that contract now, but to commence two weeks after his retirement to ensure that there is no continuity of employment. Is this OK?	This is a very common scenario within the sector, giving the employee the benefit of both their pension and continued employment, whilst allowing the employer to continue to benefit from the employee's skills. However, following the case of Welton v Deluxe Retail Limited t/a Madhouse (in administration)) [2013] ICR 428, the scenario set out in the question is likely to result in the individual having continuity of employment for unfair dismissal purposes. Further detail - In the case of *Welton,* Mr Welton had been employed in a shop in Sheffield which was closing. His employment terminated but in the week after the termination of his Mr Welton was unsuccessful at first instance, but the EAT upheld his appeal and referred to section 212(1) of the Employment Rights Act 1996 which provides that: 'Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.' Applying that judgment to the question, if the fixed term contract is entered into with the consultant prior to the termination of his permanent position, then although there will be a two-week break until the consultant commences employment under the fixed term contract, as the contract of employment will be in place, the consultant will benefit from continuity of employment. Assuming then that you do not enter into the new fixed term contract until the consultant commenced employment under the fixed term contract, is the arrangement a "sham" to avoid continuity? The case of *Booth and others v USA 1998* WL 1043238 suggests that arrangements to prevent continuity do not invalidate the break in continuity. In the case of Booth, the Claimant was employed on a series of fixed term contracts, all of which were just short of two years with breaks of two weeks between each contract (this being prior to the reduction of the unfair dismissal qualification period to one year). When the last fixed term contract came to an end, Booth brought a claim for redundancy payment, with the USA arguing that he did

	not have the necessary continuity of service. The EAT found for the USA and upheld that there had been a break in service and continuity even though the gap between contracts was a sham arrangement designed to prevent Mr Booth gaining statutory rights. Continuity can also be preserved by way of section 212 of the Employment Rights Act 1996. However, it is strongly arguable that the two most relevant factors set out in this section, either a "temporary cessation of work" or employment continuing "by arrangement or custom", do not apply. It seems unlikely that there is a "temporary cessation" as the work of the consultant will be still be there to do and it is simply that it has been agreed between the parties that the consultant will not attend work for those two weeks and will not be in employment. It would also appear that the consultant is not "by arrangement or custom" to be regarded as continuing employment, as the whole purpose of the arrangement is to break continuity (as per *Booth and others v USA*). Finally, this is a particularly tricky area and it is crucial as to what is said or signed when and we would therefore recommend that HR are involved as far as possible to ensure that there is no more than an agreement in principle for the consultant to return on a fixed term contract and the fixed term contract is not signed until the day that the consultant returns.
I have a consultant engaged on a fixed term contract, who has previously retired from his full time position. He does not work on call, nor does he wish to do so. We need to engage consultants who work on call as it is more economic for us to do so. Where do I stand?	Following the second meeting if it is clear that the consultant's feedback is not going to result in a change of approach then termination of employment can be confirmed. The ACAS CODE OF PRACTICE ON DISCIPLINARY AND GRIEVANCE PROCEDURES does not apply to dismissals for the non-renewal of fixed term contracts and there is no need therefore, as a result of the ACAS Code, to offer the right of appeal against termination, although you may choose to do so for completeness. Termination of the contract can either take place at the end of the fixed term contract or earlier than that date, providing that there is a specific right within the fixed term contract for early termination. It would be usual for such a provision to be included, but we do still see the occasional fixed term contract which has no break clause within it. Finally, it is worth noting that in the circumstances where you are seeking to terminate the employment of a previously retired consultant or consultants, there would be an argument to say that there is either direct age discrimination or indirect age discrimination occurring. However, both these forms of discrimination can be

Managing Doctors	
I am dealing with allegations which are a mixture of conduct and capability. I have heard that in some circumstances I can separate the conduct issues and proceed to hear those. What are the circumstances in which I can do this?	Where the conduct is so serious that it may necessitate the consideration of the conduct issues separately from capability (i.e. serious probity cases). See *Hussain v Surrey & Sussex*.
What are the challenges I am likely to face if I separate conduct from capability?	Potential threats of injunction.
Handling Disciplinaries	
What are our obligations to allow an employee to be represented by their representative of choice, particularly where that rep has limited availability?	An employee has the right to postpone the hearing once for up to five working days, but should the chosen companion still not be available within that timescale, the employer is entitled to request that the hearing proceed, with an alternative companion. Further Detail: Under SECTIONS 10 TO 15 OF THE EMPLOYMENT RELATIONS ACT 1999, workers and employees have a statutory right to be accompanied by a trade union representative or a fellow worker at a disciplinary hearing. For these purposes a disciplinary hearing is a hearing that could result in: a formal warning being issued to a worker; the taking of some other disciplinary action, such as suspension without pay, demotion or dismissal; or the confirmation of a warning or some other disciplinary action (e.g. an appeal hearing). (SECTION 13(4) EMPLOYMENT RELATIONS ACT 1999). The companion should be someone who is either an official employed by the trade union of which they are an official; any other official of a trade union where the union has reasonably certified the official as having appropriate experience or training; or another of the employer's workers. N.B. AS THERE IS A SEPARATE SECTION OF QUESTIONS ON DOCTORS, THE RIGHT TO LEGAL REPRESENTATION IS ASSUMED TO BE BEYOND THE SCOPE OF THIS ANSWER, BUT THE PRINCIPLES IN RELATION TO POSTPONEMENT IN

	THE EVENT OF THE UNAVAILABILITY OF THE COMPANION APPLY EQUALLY WHEN THE LEGAL REPRESENTATIVE IS UNABLE. Where the employee's chosen companion is unavailable at the time proposed for the hearing by the employer, the employee has the right to suggest an alternative time which is not more than five working days later. The alternative date suggested must also be "reasonable". (SECTIONS 10(4) AND (5), EMPLOYMENT RELATIONS ACT 1999) It is unclear in this context what would be "reasonable", but a date proposed by the employee would presumably not be reasonable if the employer's key personnel are unavailable at that time. It is also worth noting that the right to be accompanied only applies where the worker has "reasonably requested" to be accompanied. The ACAS CODE OF PRACTICE ON DISCIPLINARY AND GRIEVANCE PROCEDURES gives some guidance as to when a request would not be "reasonable" in these circumstances. It suggests that it would not be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing, nor would it be reasonable for a worker to ask to be accompanied by a companion from a remote geographical location if someone suitable and willing was available on site.
Is the failure to suspend an employee, who is the subject of a disciplinary investigation, inconsistent with a subsequent dismissal as a result of that investigation?	No, not necessarily. Suspension is a serious step and careful thought should be given in each specific factual circumstance as to whether suspension is appropriate, even where dismissal may be a subsequent sanction. Further detail – In instances of serious misconduct, an employer may wish to suspend the employee who is being investigated. This may be appropriate, for example, where there is a potential threat to the organisation or other employees, or if it is not possible to properly investigate the allegation if the employee remains at work (for example because they may destroy evidence or attempt to influence witnesses). It may also be appropriate to suspend where relationships at work have broken down. However, in such cases each individual is likely to have their own view of who is to blame and the employer should be careful not to give the impression of having pre-judged this issue. An alternative to suspension is redeployment. Redeployment may be with restricted activities. However, any employer who does redeploy an employee should ensure that the redeployment is kept under review and is managed carefully. The employer should make sure that the employee is not ostracised and is kept informed of the progress of the investigation and the likely period of redeployment.
I have an employee due to attend a	Ultimately, unless alternative arrangements can be reached, the need for a timely resolution of disciplinary

disciplinary hearing. They say that they are too stressed to do so. Can I proceed in their absence?	matters may compel the employer to hold the disciplinary in the employee's absence and make a decision on the basis of all the evidence available, but such a decision should only be taken after obtaining medical evidence and giving strong consideration to postponement and other ways for the employee to be represented at the hearing. Further detail – It is a common problem for employees, on being told to attend a disciplinary hearing, to absent themselves by reason of ill health, frequently citing stress as the cause. The employer is then caught in the middle, on the one hand wanting to ensure that matters are dealt with speedily, particularly if it is a serious case where other employees' interests are involved, but on the other hand the employee may genuinely not be well enough to attend the hearing and the employer will want to ensure as fair a process as possible, particularly where the outcome may be the dismissal of the employee. An employer should proceed cautiously in the event of an employee saying that they are unfit as a result of stress to attend the hearing. Whilst an employer may believe that the ongoing proceedings are contributing to the employee's stress related condition, and thus should be resolved sooner rather than later, such an assumption should not be made without seeking medical advice. Medical advice can be sought either from the employee's own GP or an independent doctor such as an occupational health physician ("OH"). Whilst an employee may believe that being signed as unfit to work because of stress will allow them to avoid the disciplinary proceedings, the medical view is often different. The Department for Work and Pensions (in their "Health and Work Handbook") notes the effect of OH are likely to recommend a postponement if (i) the patient has severe depression, or has only recently started taking anti-depressants, (ii) the employee does not have the ability to understand the allegations made against them, (iii) the employee cannot distinguish right from wrong (iv) the employee is not able to instruct a friend or representative to represent their interests or (v) if the employee does not have the ability to understand and follow the proceedings. In most cases of "stress", OH is likely to recommend proceeding with the disciplinary because these circumstances do not exist. However, it is important that the employer has a documented record of OH, or other medical, advice to this effect, and does not assume that it is appropriate to proceed. If a disciplinary hearing is postponed on medical advice, then there will of course come the point at which no further delay can be withstood. This may be because the ill employee is not the only individual with an interest in the matter being resolved or because memories of witnesses may fade with time. In such circumstances the employer has to take a decision whether and how to proceed. In most cases it

	would be inappropriate simply to let matters drop in the interests of rehabilitating the employee, although this may be a decision taken in a minor case. If the matter is not to be dropped, then consideration is to be given to alternative ways of conducting the disciplinary hearing, such as by telephone, at a neutral place or location or even inviting the employee to submit written submissions and holding the hearing in their absence. If the employee does wish to attend a hearing, consideration may be given by the employer to agree to the employee bringing a friend or family member, rather than restricting them to a colleague or trade union representative. Where an employer does not give careful consideration as to the appropriateness of suspension and carries out a "knee-jerk" suspension, then such action may be a breach of mutual trust and confidence by the employer. This is even the case where the police have become involved in a matter (CRAWFORD AND ANOTHER V SUFFOLK MENTAL HEALTH PARTNERSHIP NHS TRUST [2012] IILR 402 (CA)).
Changing Terms and Conditions	
I am undertaking a collective consultation regarding changes to terms and conditions with my workforce. For how long do I have to consult?	However, do you have to consult for the full 45 days? No, not necessarily. The 45-day period is the minimum period before the first dismissal can take effect. The obligation under the Trade Union and Labour Relations (Consolidation) Act 1992 is to consult with a view to reaching agreement. The process of consultation should therefore continue for as long as is appropriate in order to either reach an agreement or exhaust the possibility of doing so. If you are consulting on changes to terms and conditions and it becomes clear that you are not going to reach an agreement, then it is possible to issue notice of termination and re-engagement to employees so long as that notice of termination does not take effect within the protected 45-day period beginning with the commencement of consultation. Of course, in practice many employers do continue to consult for the full 30/45 day period on the basis that there is the possibility that employee representatives will argue that, in issuing notices of termination and reengagement during the protected period, the employer has failed to allow consultation to run its full course. It is therefore important that if you are seeking to issue notices of termination and reengagement prior to the end of the protected period that all details of the consultation are clearly documented so that it can be shown that consultation has concluded prior to the issuing of notices. The recent USDAW v Ethel Austin Case has held that the UK collective redundancy legislation does not properly implement the EU Directive from which it stems, and therefore the words "at one establishment" should be deleted from the TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992. . The effect of

	this is that employers who are proposing to dismiss 20 or more employees within a 90 day period are required to consult with affected employees across all sites, not just those at which 20 or more redundancies are proposed. Failure to do so will give rise to liability for a collective award.
My management of change procedure says that if I am contemplating changing terms and conditions, I have to consult for 90 days. Can I now consult for only 45 days?	Not necessarily. If the management of change procedure has been agreed with the trade unions, then you will still have an obligation to consult for up to 90 days, notwithstanding the recent change in the legislation, unless, and this would appear to be an unlikely scenario, the management of change procedure specifically allows for a shorter consultation period in the event of a change in the statutory requirement. In light of the statutory changes to reduce the minimum consultation period required by the Trade Union and Labour Relations (Consolidation) Act 1992, you may wish to seek to renegotiate your agreement with the unions on minimum periods of consultation. However, it would seem unlikely that the unions would want to willingly reduce the minimum period of consultation.
What tips do you have to successfully implement changes to terms and conditions?	As a minimum you will need to consider (i) the legal steps you need to take, (ii) your strategy and communication (including the business case for the changes) and (iii) whether it is appropriate to offer an incentive. Legal steps – we have talked about minimum periods of consultation, be they 30 days, 45 days or 90 days. Consultation does not need to last for these periods of time, but if it becomes necessary to dismiss employees and offer reengagement, then those dismissals cannot take effect within the protected period. If it is necessary to dismiss and reengage, then for any employee who does not accept reengagement, they will have the right, assuming they have sufficient service, to bring a claim of unfair dismissal. It is therefore important that you have a potentially fair reason for the dismissal. In the case of a change to terms and conditions it is usual that the potentially fair reason, for the purposes of the It may also be appropriate to carry out an equality impact assessment on the effect of the proposed changes to terms and conditions to ensure that there are no potentially discriminatory effects on those who have a protected characteristic for the purposes of the Equality Act 2010.

	Incentive – you may also want to consider whether it is appropriate to provide some incentive to the employees to agree to the change to terms and conditions. Such an incentive may be time limited and it is possible that any incentive can be withheld from those who do not agree to the change within the time limited period. In the case of Slade v TNT (UK) LTD, TNT offered employees an incentive to change their terms and conditions. When this was rejected the incentive was withdrawn. TNT subsequently dismissed and reengaged employees without the incentive. The employees' claim of unfair dismissal was unsuccessful, the ET accepting that it was reasonable for TNT to make a time limited offer and withdraw that when it was not accepted, subsequently dismissing and reengaging as they had explained to employees that they would if the offer was not accepted.
Do I need to extend the contract of a fixed term employee to the end of her maternity period, where the fixed term contract would otherwise expire during the maternity leave?	If the employee is on an AfC contract then 15.42 says that an employee subject to fixed term or training contracts and who has: • 12 months' continuous NHS service at the beginning of the 11th week before the expected week of childbirth • and notifies her employer before the 15th week of childbirth that she intends to take mat leave, "shall have their contracts extended" [to allow them to receive the 52 weeks which includes paid contractual and statutory maternity pay and the remaining 13 weeks of unpaid maternity leave.] What if not on AfC Contracts or don't have 12 months' service? The key issue is what is the reason for the termination of the fixed term contract? If the FTC expires whilst the woman is on maternity leave and the proposed reason for the non-renewal of the contract was a redundancy situation, then Regulation 10 of the Maternity and Parental Leave etc Regulations 1999 has effect. This means where, during the employee's maternity leave, it is not practicable by reason of redundancy to continue to employ her under her existing contract of employment she is entitled to be offered a suitable available vacancy in the circumstances so it is referred back to the employee's circumstances. We would say suitable availability would mean "fixed term". Answering the second part of the question, once the maternity leave period has come to an end then Regulation 10 of the Maternity and Parental Leave etc Regulations 1999 no longer applies. The employee should be taken through a redundancy process as any other member of staff would be, including permanent members of staff. It is important to ensure that just because the employee is on a fixed term contract that

	she is not treated less favourably as a result, such treatment being in contravention of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Assuming therefore that permanent members of staff have the right to be placed on a redeployment register when at risk from redundancy then the fixed term members of staff should be treated likewise. At all times the employee should be dealt with fairly and consistently with permanent members of staff (to avoid any suggestion of less favourable treatment on fixed term status). However, it is also important that, just because she is pregnant, you do not treat her more favourably than you would treat males or that if you do that such treatment is proportionate, remembering the case of Eversheds Legal Services Ltd v De Belin [2011] 3 CMLR 12 where a female lawyer on maternity leave was treated more favourably than a male lawyer to a disproportionate extent, during a redundancy selection process, and the male lawyer's subsequent dismissal was found to be unfair and discriminatory on the grounds of sex.
Francis Report	
What practical steps can we take to encourage people to raise concerns?	The first step is to have a well drafted and easily accessible whistleblowing policy, and staff should be made aware of the policy. Employers should adopt as a minimum standard Freedom to Speak Up: Raising concerns for the NHS, the national integrated whistleblowing policy published by NHS Improvement in April 2016 with a view to standardising the way NHS employers support staff who raise concerns. Trusts must appoint a Freedom to Speak Up Guardian in line with the recommendation in the Francis Report. • Move away from 'whistleblowing' – negative connotation of an adversarial/alienated employee approach – raising concerns is about being part of the desire to make the service better • Explicit 'open door' policy, whereby individuals are encouraged to raise concerns • Make it clear that victimisation/harassment of a whistleblower will result in disciplinary action • Investigate promptly and keep individual who raised concern informed of progress where possible (subject to individual confidentiality/criminal investigation).Clear demonstration of what has changed as a result of a concern being raised, e.g. as a result of concern X we have done Y [the Inquiry heard evidence that reporting of concerns at Mid Staffs improved after this approach was adopted] – one local trust publishes all letters (subject to personal confidentiality/commercially sensitive) it receives together

	with a response • Follow your policies and procedures and be consistent • Training and support for managers – internal, legal advisers, Public Concern at work • Whistleblowing champions at various levels • Visible board level support • Confidential Whistleblowing helpline – with high visibility Chief Executive hotline • Staff meetings: one organisation has instituted a system whereby junior staff are given the opportunity to discuss concerns in a meeting without senior management present – any issues raised are then presented to managers as a 'group concern', without the need f or one individual to 'stick their head above the parapet'. • Clear publicity around raising concerns – e.g. poster campaign, 'credit card sized' leaflets distributed around the workplace, notes on payslips
The Francis Report has called for increased 'openness' and transparency, but how do we balance this with the need to protect our Trust, and its staff?	A difficult balancing act! What is openness – enabling concerns and complaints to be raised freely without fear and questions asked to be answered. What is transparency – allowing information about the truth about performance and outcomes be exhausted) when this may be necessary to protect the welfare of staff members. In June 2013: Whistleblowing legislation (PIDA) was amended to remove the requirement for disclosures to be made in 'good faith' (it was very difficult to establish bad faith anyway as even if there was dual motivation often there was a kernel of a legitimate concern). Usefully there is an additional requirement that disclosures must be in the public interest, not just relating to the individual's contract of employment or sense of grievance in an employment context, although recent case law has minimised the impact of this somewhat.. Compensation may be reduced at ET if a whistleblower has acted in bad faith.
Social Media	
Can an NHS employer discipline an employee for making offensive comments on their personal social	This rather depends on the detail in the question – offensive about colleagues, about patients, about the employer? It also depends on when/where the posts have been made – has the access to the personal social media

media accounts?	been on employer time or equipment? If that is the case and it is in breach of policy or excessive you can also discipline for the use of time/equipment, not just the content. So yes you can always discipline but the real question is can you discipline safely without risk of unfair dismissal or discrimination claims? If take an unreasonable stance or do not follow a fair process risk claims of constructive or actual unfair dismissal. Be wary of a kneejerk reaction and the instant reliance on 'bringing the organisation into disrepute' – damage is often speculative and difficult to substantiate/quantify. Need to be proportionate. This is an issue of conduct and therefore for disciplinary action including dismissal to be fair, you need: - G - - Sanction is within range of reasonable responses - Disciplinary procedure was procedurally fair. Starting point is to make it clear to staff that making offensive comments about work/colleagues/ patients/suppliers may be considered misconduct and in certain circumstances conduct amounting to gross misconduct. The organisation needs to have a clear internet/social media policy – set the parameters expected for staff. Policy should be clear. Need to balance 'protecting Organisational interests' with employee's rights to: - Participate in legal, off-duty and off-site conduct - Report illegal activity (blow the whistle) - Privacy/family life/freedom of expression – HRA Issue common sense guidance for use of social media responsibly and safely: - Protecting business reputation – prohibit disparaging/defamatory statements about organisation/patients/suppliers (be aware of right to raise concerns – but suggest this is done in a more appropriate forum) - employees should make it clear speaking on own behalf not organisation

	- avoid posting commercially or patient confidentiality sensitive information - Prohibit postings of anything colleagues/customers/patients would find offensive, including discriminatory comments, insults or obscenity – refer to anti-harassment/discrimination policies. - Prohibit postings about colleagues, patients, organisation without written permission of the individual. - Identify breach may result in investigation and possible disciplinary action – make it clear that there are potential consequences to online behaviour - Set out the extent to which Trust allows its equipment/time to be used accessing social media (wholesale prohibition unwise). If boundaries exceeded that in itself could amount to misconduct – regardless of whether the content was offensive **Two recent ET cases** Mr G sent an email from his home computer to a former work colleague's personal email. It was offensive (racist and sexist) and also bore the caption This must be forwarded on. It was forwarded on by that colleague to someone else who worked within the prison system (key client for the organisation). ET found dismissal for gross misconduct fair i.e. acting in a way that could damage the employer's reputation or integrity within the range of reasonable responses to regard the forwarding on of this email to one of its clients as something that may damage its reputation. ET was influenced by the fact that the content ran contrary to the stated aims of the employing organisation – i.e. the support and treatment of disadvantaged and minority groups – therefore damaged the organisation's reputation. Preece v JD Weatherspoons. Ms Preece had been the subject of abuse from some customers – she then engaged in an online FB conversation with colleagues/friends re those customers which was not very polite.

	Weatherspoons had an internet policy referred to in its handbook – which listed as gross misconduct acts committed outside work that had an adverse effect on employees suitability for job or which brought company into disrepute. Ms P said she believed her FB was limited to just friends so no real damage was done. Balancing exercise – rights to privacy/freedom of expression v organisation's right not to have its reputation damaged. Should take into account all the circumstances: - Previous record - Existence of a policy, knowledge of a policy - Impact on employer reputation – context and how widespread ET found fair dismissal. Need to follow a fair procedure – investigate, fair hearing, right to appeal, proportionate response and sanction.
Is an employer liable for an employee's discriminatory remarks made on Facebook, Twitter etc regarding an employee's colleagues?	All seen the headlines – "Nurses discuss ill patients on facebook" Increasing use of internet – lack of immediate accountability – say things wouldn't dream of saying in the work canteen. Has clear implications for HR teams who have to deal with the fall out, both internally and potentially if claims of discrimination are brought by the affected colleagues. Employers can be held vicariously liable for discrimination by their employees. Comments about other colleagues may amount to harassment – unwanted conduct that has the purpose or effect of violating a person's dignity or creating an offensive, intimidating or hostile environment. Liability may arise for employer even if posts are made on personal computer or in own time and regardless of whether the employer knew or approved of the actions Potential defence available: To avoid liability employer may argue employee not acting in 'course of their employment' but Tribunals have interpreted that concept very widely. Fact the offending act took place while an employee was not at

	work or acting under instruction from employer is unlikely to defeat the claim – *Jones v Tower Boot Co Ltd 1997* – external/personal gatherings (physical or online) with any connection to work likely to be covered by 'in the course of employment – fact specific. So can't rely on arguing that simply because it occurred on her personal FB it is outside of the course of employment. To avail itself of a defence, an employer must demonstrate it took all reasonable practical steps to prevent the harassment • Clear policy setting out expectations as to behaviour – in social media policy and Dignity at work policies/Equal Opps policies. Make it clear this extends to personal use of social media when referring to work, colleagues, patients or others connected to the employment relationship. Make it clear online behaviour, even outside the workplace, should conform to appropriate standards • Clear identification that breaches of policy will result in disciplinary action and may be considered acts of gross misconduct • Communicate those policies to employees – at induction or regular updates to intranet – make it an electronic requirement they have read the policy before they can use a work PC • Training for staff/managers on equality issues/acceptable standards of behaviour • Follow your policy, act promptly when complaints made, instigate a disciplinary investigation, word will spread so take preventative action • Not enough to act reasonably/promptly in response to the complaint – it must demonstrate reasonable preventative measures ET will take a two-stage approach: - look at what the employer has done - consider whether there were other reasonable steps that it could have taken When considering whether the steps taken by the employer are reasonable it can consider the likely effect of those steps and whether or not they have actually been effective. Employer is not criminally liable for any criminal offence under the EqA committed by the employee

Is it acceptable to vet potential recruits' Twitter and Facebook accounts?	Increasingly used by recruiters and interestingly a disparity between views of candidates and recruiters. Microsoft 2009 report – under 15% candidates thought their online activities would attract scrutiny, 41% recruiters had withdrawn/not offered a role because of concerns re online activity. Number of risks associated with rejecting candidate based on what is found on line. Discrimination – protected characteristic... sexual orientation or religious beliefs not on CV but may be evident from FB or Twitter. Most employers would give other reason for rejection but if disappointed candidate found evidence the information re the protected characteristic was used then likely to have a successful claim. If the employer does carry out a check and uses/records that information – it is processed for the purposes of DPA – could carry out a DPA subject access request. Need to ensure compliance with 2nd, 3rd and 7th Data Protection principles – purpose, accuracy, proportionality and security of processing. Information Commissioner – no specific guidance on using online profile but be aware of DPA. Part 1 Employment Practices Code – good practice recommendations for pre-employment vetting. - Candidates should be told in advance about vetting process (give them an opportunity to tidy up/change privacy settings. - Give candidates an opportunity to comment on accuracy of any information used to make the decision to appoint - Checks should be made as late as possible in the recruitment decision. - Should only be used where there is no less intrusive/reasonably practicable alternative - Employers need a clear justification for conducting checks which should be based on the environment in which the applicant will work - ICO recommends limiting screening to an examination of the genuinely public aspects of candidate's life such as work history/qualifications Keep in mind that when viewing a FB post or twitter you are viewing a snapshot in time and do not have the complete context/background so exercise caution – the information may be inaccurate or may point to a potentially protected characteristic. Require verification or give opportunity for comment. Ensure you keep good records of the selection process – record where you found the information and why

	you considered it relevant to the role. Seek to negate a claim for discrimination Very intrusive – as a public body you must have regard to the HRA – Art 8 Right to a Private and family life and Art 10 and freedom of expression. ACAS Social Media Guide very useful.
Redundancy	
If an employee is off sick at the time of a redundancy consultation, should we postpone the consultation?	It will depend on what your management of change policy says – if it has express provisions need to follow that to avoid a breach of contract claim and add weight to an unfair dismissal claim. In the absence of express contractual policy, you still need to have overall regard to the fairness of the process to avoid a finding of unfair dismissal. Individual consultation (even if futile as there are no alternatives) is a key element of a fair process. Whilst a finding consultation would have been futile will substantially reduce compensation, perhaps to zero, a failure to consult will be procedurally unfair. Also, in the case of a sick employee you need to bear in mind that the sickness absence may relate to a disability and therefore unless you can demonstrate objectively justified to go ahead without postponing and that it was not a reasonable adjustment to postpone for a finite period there is a risk of a discrimination finding. An employer should include employees who are absent (on sick or maternity leave, for example) in the redundancy consultation. Whether it is reasonable to postpone is case specific but it would have to be exceptional for an ET to be persuaded that no postponement should be allowed. Act reasonably – postpone once, seek medical report if likely to be long-term – medical report should give a diagnosis, a prognosis, give an opinion on individual's ability to engage in the consultation and timescale for their ability to attend the meetings. If the timescale is unrealistic or does not reasonably fit within the redundancy exercise, suggest alternatives such as a rep attending on their behalf or seeking their views in writing. If the employee does not co-operate with the employer's attempts to consult by other means, when it would be reasonable to make a decision in the employee's absence (dismissing for redundancy) would depend on all the circumstances. For example, in cases where the sick employee is the only person whose position may be made redundant I can imagine that a tribunal would find it unreasonable for an employer not to consider postponing the meeting for a further period (in the absence of facts and case law, I cannot comment on what that further period might be). In cases where the redundancy exercise involves a group of employees, I can imagine that a tribunal would be more sympathetic to an employer that decided to proceed to make a decision in the employee's

How can a Trust argue that it can avoid making a redundancy payment because it wants to offer a suitable alternative role and can an offer of suitable alternative work be conditional?	Two-part question: - What does a Trust have to do to avoid paying a redundancy payment on the grounds that a suitable alternative role has been offered? - Can an offer of suitable alternative work be conditional? Under the statutory scheme if an employer wants to argue that the employee has forfeited the right to a redundancy payment the employer must satisfy core requirements: - it must offer the role (even if employee has already indicated she/he won't consider it.) - Offer must be made before the previous employment/role ends (offer only made when received by employee) - Offer need not be made in writing but it is advisable – need evidence trail - Offer can be made collectively rather than to the individual but employer will need to be able to demonstrate that reasonable steps were taken to make the employee aware of the offer - Offer must be reasonably precise - Identifying the role as an alternative job, not just a statement of intent to find one. Set out the terms in sufficient detail. If the terms are materially different need an explanation of the difference. - If offering multiple different jobs, give sufficient detail of each to enable the employee to make an informed decision - New role must start within 4 weeks of the old role ending – need to be precise re date - If the terms of the new role differ from the old role i.e capacity and place, requirements then a 4-week trial period should be offered. Statute says that is 4 calendar weeks, it doesn't matter if the business closes for 2 weeks – that does not extend the time period. Can only be extended for retraining and that needs to be agreed in writing before the old employment ends. If the employee goes into the new role there is no dismissal for redundancy and therefore no right to a redundancy payment If the trial period is unsuccessful the employee is deemed to be dismissed on the date the old employment/role came to an end.

	If the employee either refuses the suitable alternative role or terminates the trial early or on the expiry of the trial period, then they lose the entitlement to a statutory redundancy payment on the basis that the role was suitable alternative employment and their refusal unreasonable. Whether (a) the role was suitable and (b) whether the employee's rejection of it was reasonable is an objective/subjective test but there is some overlap between the two concepts. Suitability of the alternative employment – it requires an objective assessment of whether, having regard to the nature of the job offered (the whole of the job: status, content and terms, especially wages, hours and location) and the employee in question, the job is a match for the employee (Carron Co v Robertson (1967) 2 ITR 484 (Court of Session)). However, it is not an entirely objective test, as the question is whether the alternative employment is suitable for that particular employee. Whether an employee's refusal of a suitable job was reasonable depends on the subjective reasons the particular employee has for rejecting it (and not whether a hypothetical "reasonable employee" would have accepted it). This will cover factors relating to the employee's personal circumstances such as their health as well as their personal and family commitments. In practice, the more suitable the offer, the easier it will be for the employer to show that the refusal was unreasonable. *Readman v Devon PCT* (the reasonableness of a nurse with a career in community nursing (matron level) rejecting an modern matron role in a hospital setting). Burden is on the employer to prove both the suitability and the unreasonableness – difficult to prove a negative but increasingly, in the current economic climate and with the high value of NHS redundancy terms we are seeing ET's examine much more critically the employees assertions as to why it was reasonable for them to reject the offer – if they suspect the rejection was purely financial i.e the employee wanted to take the money and go to another job then they will look at that very carefully. Can it be conditional – only to the extent that the employer can withdraw the offer during the trial period. If they go past the trial period the redundancy situation no longer exists and the employer will have to find another fair reason for dismissal i.e. capability/performance. Need to be careful in imposing conditions as these might become one of the factors which makes it more reasonable for the employee to refuse the offer of alternative employment.
Equalities	
What can we do if we find out that an employee failed to disclose full details	

of health problems during the recruitment process?	Disabled candidates were being put at a disadvantage in the jobs market and • Prohibits employers from asking potential recruits questions about health, other than for prescribed reasons. • Shifts the burden of proof automatically to the employer where a job applicant who has been asked a prohibited health question brings a direct disability discrimination claim. S60 EqA 2010 states that, other than in the circumstances set out in section 60(6), a person (A) to whom an application for work is made must not ask about the health of the applicant (B) either: • Before offering work to B. • Where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work. This applies whether the employer asks the question of the applicant or of some other person, such as the applicant's former employer by way of a reference request. To do so would be unlawful and risk enforcement action by the EHRC. There are prescribed circumstances when questions can be asked in a pre-employment context – where the questions are necessary for the purpose of: - Establishing if applicant will be able to undergo the recruitment assessment process and/or whether a reasonable adjustment is needed to the recruitment process - Estabishing if applicant will be able to carry out a function that is intrinsic to the work – think long and hard what is intrinsic to the work - Monitoring diversity of applicants - Taking permitted positive action If the role requires a particular disability, establishing whether the applicant has that disability If an employee has failed to disclose full extent of health problems, then you as an employer are stuck with a situation where you have to deal with the employee as you find them. This is different if the employee has positively lied about their health issues – i.e. a positive failure to disclose a blood-borne disease if working in an exposure prone environment, risk to public safety. Can rely on lack of honesty/integrity to dismiss as issue is so fundamental. Be clear whether the lie is sufficient to

	justify dismissal. However, if the disclosure or lack of disclosure is not so extreme then you are in the position that you have to deal with the employee has you find them. You will need to consider whether those health problems are capable of amounting to a disability – if not i.e. lots of different ailments causing high absence or not an impairment that substantially affects ability to carry out day to day activities you can go one of two routes – performance manage through the capability procedure but time consuming and if the health issues are impacting on the operational performance of the team/unit query whether you want to take that time (especially as no statutory protection against unfair dismissal until 2 years service or (more riskily) you can discipline/dismiss for the lack of honesty/integrity issues in the completion of the application form – much quicker process. Risk is the 'health problems' may amount to a disability even if not previously defined as one – to dismiss or subject to a detriment may amount to discrimination. Will have a duty to look at whether dismissing/disciplining the individual will amount to direct discrimination (which cannot be objectively justified) or discrimination arising from a disability (which you will need to objectively justify. Also you will, once you are aware of the 'disability' be under a duty to make reasonable adjustments if the individual is at a substantial disadvantage in the work place So .... whilst it may stick in your craw that they have not been honest, unless there is no risk that it is a disability, you will need to go through a fair process looking at objective justification and the issue of reasonable adjustments before you can dismiss. It doesn't mean you can't dismiss just that you must lay the foundation blocks for a fair and non-discriminatory dismissal.
Can we take disciplinary action against an employee who is on maternity leave?	Simple answer – Yes! Fact employee on maternity leave is not a block to investigating/conducting disciplinary proceedings. In fact, delay may present more risk of unfairness as an employee who is not made aware or not given an opportunity to respond until the allegations are stale and the evidence tired may argue prejudice on the grounds of her pregnancy/maternity leave and as such an act of sex discrimination. However, avoid the two-week compulsory maternity leave period. Also requirement to act reasonably or risk future litigation so try and achieve a balance, allowing employee to focus on her family/private life for a reasonable period – is there going to be any prejudice in delaying the process. Key will be the communication with the individual – seek to reach agreement as to the process... any postponements, how and where she is interviewed... allow her to make childcare arrangements, any

	attendance in AML deem a kit day so she is paid. In pursuing disciplinary issues, the employer must ensure that it avoids discrimination. In support of its position, it must follow its procedure correctly (taking care to properly document both the pursuit of the procedure and decision making) to avoid or defend any allegation that it is pursuing action for a reason related to pregnancy, childbirth or absence on maternity leave. Given the risk of allegations of inappropriate conduct it is important to ensure that an investigation is thorough and that this properly supports any subsequent disciplinary action. It is important to ensure that an employee on maternity leave is not disadvantaged because of her absence from the workplace. Accordingly, the employer's normal procedure may need to accommodate the following: **Timing** Is the employee about to give birth or have they recently given birth? These may be particularly sensitive times and best avoided by the employer. **Communication** The employer may already have discussed the employee's preferred method of communication as part of arrangements for her maternity leave. These should be respected. However, the employee may change her mind once they are told of disciplinary proceedings (an anxious employee who may have been happy to receive written communications may now want to speak to the employer by phone as well; an employee who was relaxed about telephone contact may **Meetings/hearings** Given that the employee is on maternity leave she cannot be compelled to attend meetings or hearings (although she may want to do so). Again, this is a matter that the employer can raise with the employee. They can suggest that a meeting go ahead if this acceptable to the employee (perhaps at an off-site venue, or the employee's home) or, if the employee does not want to attend meetings, give the option of matters being conducted in writing or, if the employee does not agree to either option, in her absence. If meetings go ahead, the employer may wish to be more flexible than usual about companions at the meeting. In the event that there is a dismissal, the employee will remain entitled to 39 weeks' statutory maternity pay (assuming that she was still employed in the qualifying week). The employer will also need to adapt to particular events. For example, how to proceed with an employee

	who is diagnosed with post-natal depression.
Is obesity a disability for which we have to make adjustments?	Not of itself but it can be linked to potential disabilities. Obesity itself is not an impairment for disability discrimination purposes. However, obesity might make it more likely that the individual has impairments which meet the definition of disability i.e. substantial and long-term affect on the individual's ability to carry out day to day activities (including but not exclusively work activities). Note the decision of the Employment Appeal Tribunal (EAT), in a case called. This decision looked at whether the focus should be upon the cause of the employee's symptoms or upon their effect. Mr Walker had a number of different ailments asthma, depression, knee problems, chronic fatigue but with no organic cause other than his obesity. He was 21 stone. The EAT said that it is the effect of the employee's symptom that is the key question; the fact that the symptoms have no physical or mental cause other than obesity is not relevant. In this particular case, the employee in question weighed 137kg (over 21st) and (1) to consider whether or not the employee has an 'impairment'; and (2) to consider whether the impairment is physical or mental. NB – it is the impairment that is the key question i.e. the asthma, the weak knees, the depression; not whether the impairment is caused by an identifiable 'disability' or condition. Also, if someone's overeating/obesity was caused by depression it could be argued that this 'arises from their disability' – therefore protected from detriment/unfair treatment. Need to establish that the requirement was a proportionate way of achieving a legitimate aim... i.e. performance management for excessive sick leave or failure to carry out tasks If an employee's impairment (not just the obesity) could fall within the legal definition of disability, then need to be careful not to discriminate in terms of recruitment/training/promotion opportunities/ protection from harassment and also the duty to make reasonable adjustments will potentially arise – not to alleviate the impact of being overweight but to alleviate the disadvantage caused by the impairment – if his knees are destroyed because of the weight he's carrying would it be a reasonable adjustment to see if his duties can be carried out sitting down/in a wheelchair. Of course the adjustment has to be REASONABLE. If impairments that could/likely to fit disability criteria are identified as part of the whole picture of an obese employee/candidate:

	Look at whether the performance management action can be objectively justified. That will only be justified if you can evidence that it was a proportionate way of achieving a legitimate aim. To succeed in this you will need to demonstrate that you have considered reasonable adjustments to alleviate the specific impairment and either implemented them or made a reasonable decision there are no adjustments that can be made. Practical advice – if an overweight employee is struggling to carry out key duties of their role, as part of the performance management refer to OH – get a constructive/forensic analysis of their general health and ability to carry out the role. If there are no impairments identified other than being overweight, take appropriate management action i.e. tell them to get fit for their jobs or risk being performance managed. If there is a risk of impairments being identified (regardless of the fact they are caused by the obesity issue) then you will need to be careful – look at objective justification and the requirement to consider reasonable adjustments.
Trade Unions	
Can an employer prevent shop stewards calling unscheduled meetings with employees during working hours?	ACAS Code of Practice is key. There are two assumptions: 1. That the shop steward is from a union recognised for specific purposes by the employer 2. That the shop steward is a representative for one of the statutory specified purposes and that the meetings are to do with that specified purpose. If the answer to both of those assumptions is yes then... TU representatives have a statutory right to reasonable paid time off to carry out trade union duties. No statutory right to be paid for activities (but may want to consider for good Industrial Relations). Still have the right to reasonable time off (unless the meetings themselves amount to industrial action). Meetings are within the definition of 'activities' (preparing for the meeting would be 'duties'. TU members have a similar statutory right to carry out trade union activities but it is unpaid. Key word is reasonable in all the circumstances – size of organisation, frequency of meetings, the production process, public safety, need to maintain a public service. Question is – are unscheduled meetings during working hours reasonable? Simple answer is NO – the ACAS Code of Practice says both reps and members should give as much notice as possible (preferably in writing) – purpose (whilst maintaining confidentiality), timing and duration

	and location of proposed meeting. Obligation of TU reps to be flexible to minimise business disruption. Equally employer should be reasonable in their response to the request. Ideally a partnership protocol should exist setting out the requirements/rights/obligations for both the TU members/reps and the employer. If not then what to do with a union rep who calls unscheduled meetings. Speak with TU reps regarding the appropriateness of their conduct, refer them to the ACAS Code of Practice. If it falls on deaf ears give them fair warning, refer it to their regional officers. Make it clear the activity will be unpaid if they don't give reasonable notice. Indicate disciplinary action will be taken if the Shop Stewards continue in this approach. However, such disciplinary action against a Union Rep would be highly sensitive and inflammatory - ACAS Code of Practice on Disciplinary matters - need to notify TU regional officers of proposed disciplinary action. Hopefully can be avoided. If not risk that a detriment claim will be brought so need to ensure made it clear that the action is not taken as a result of the shop steward carrying out the activity/duty but the manner in which they are carrying out that activity/duty - i.e. unscheduled and in breach of the ACAS Code.
What happens if a union representative is unavailable to attend an investigatory meeting and the employee's colleague is unwilling to attend the meeting?	In reality it will come down to what is in your disciplinary/grievance procedure and whether they are contractual but assuming they follow the statutory framework the position is: Any worker who is required/invited to attend a disciplinary/grievance meeting has the right to be accompanied by either a TU rep official or a colleague of his choice - s10 ERA 1999 If the chosen companion is not available at the time of the hearing, they are obliged to suggest a reasonable alternative time within 5 working days of the original hearing time. If they do that then the employer must postpone. No further statutory right to further delay. If they don't comply with the above timetable (and it is often honoured in the breach) then the employer can press on with the hearing but will have to be careful as it will still be an issue of reasonableness, particularly if the end result of the meeting was dismissal or some other disciplinary penalty. Suggest two strikes and you're out... if you fear there is a delaying tactic then one approach is to give two potential hearing dates and say pick one. Trick is in the question though – the statute says attendance at a 'hearing' and this is defined in the statute as 'a hearing which could result in a formal warning (i.e. become part of the employee's personnel record) or

	some other disciplinary action i.e. suspension without pay. The question asks about an investigatory meeting – *Skiggs v South West Trains* EAT 2005 held that an investigative meeting re a grievance was not a 'disciplinary hearing' at which the employee had the right to be accompanied. As for the unwilling colleague you cannot compel an employee to act as a companion but in the interests of good HR it is always a good idea to make it clear that there will be no detriment for them if they do and make it clear they can take reasonable time out of the working day to perform that role. It is often in the employers interests to have someone acting as a companion – consider flexing the policy if there is a disability issue which would affect the conduct of the hearing/meeting – may be a reasonable adjustment. If your contractual policy is more generous then follow that as to not do so risks a breach of contract/possible constructive unfair dismissal claim or change your policy to reflect the statutory guidance.