

# SUSPENSIONS

## 1. Introduction

This reps bulletin examines suspension from work as part of a disciplinary process and considers whether an employer taking this line of action without understanding the lessons to be drawn from relevant case law might find the result to be frustrating – and in some circumstances expensive.

## 2. A scenario

Consider a workplace scenario: an employee is facing allegations of serious misconduct. As part of its disciplinary procedure the employer suspends the employee pending disciplinary action (see Reps bulletin EMP 2017 114). The suspension letter expressly states this is not a disciplinary sanction and does not imply a finding of guilt. The employee is sent home and told not to engage in any work, or to have any contact with colleagues, customers or business contacts – a standard letter many reps will have seen on numerous occasions.

## 3. Appropriate suspension

An employer might consider suspension to be appropriate for one or more of the following reasons:

- to enable a reasonably thorough disciplinary investigation to be conducted without interference by the employee
- to end the alleged gross misconduct immediately

- to remove the employee without delay from the public eye
- to prevent the employee contacting other employees, clients and customers and so seeking to influence their evidence.

Suspension would only be expected to arise because of alleged serious misconduct. It may be impossible for the employer to conduct a disciplinary investigation where the employee remains at work, or where there has been a breakdown in relations at work, and suspension is necessary to keep parties apart.

## 4. ACAS guidance

An employment tribunal (ET) is required to take into account the guidance contained in the ACAS *Code of Practice on Disciplinary and Grievance Procedures* in determining the fairness of a dismissal.

Section 8 of the Code states: “In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that the suspension is not considered a disciplinary action.”

The consequences of failing to review a suspension was shown in *Camden and Islington Mental Health and Social Care Trust v Atkinson*. The employee retired from her employment to care for a sick husband. However, the Employment Appeal Tribunal found the retirement letter was only the vehicle for her leaving. The real cause was her

continuing suspension which it found to be a fundamental breach of her contract of employment and she had in fact been constructively unfairly dismissed.

### **5. No “knee-jerk” reaction**

Employers should always carry out a preliminary investigation to establish evidence of the alleged misconduct – and its seriousness – before deciding to suspend an employee. Alternatives to suspension should also be considered. Courts and tribunals have consistently ruled that suspension should not be an automatic, knee-jerk reaction to an alleged misdemeanour. Such a knee-jerk response has the potential to lead to serious repercussions for the employer. Suspending an employee may be found to be a breach of the implied term of trust and confidence between the employee and employer, entitling the employee to resign and claim constructive dismissal – although that is not an option a TSSA rep should recommend without taking advice from a full-time officer.

### **6. Relevant case law**

In *Gogay v Hertfordshire County Council* the Court of Appeal awarded substantial damages for psychiatric injury to a care worker at a children’s home who had been suspended for unfounded allegations of sexual abuse.

In *Agoreyo v London Borough of Lambeth* the High Court held that the suspension of a teacher following allegations that she had used unreasonable force on two children with “challenging” behaviour amounted to a breach of the implied term of trust and confidence. In that case the council did not appear to have a proper procedure for dealing with this type of allegation. Instead, it simply suspended Ms Agoreyo as its default

position. The High Court was critical of the employer’s failure to consider alternatives to suspension or to consider her version of events before the suspension decision was made. The employer’s liability may not even end there. The House of Lords (now the Supreme Court) in *Eastwood v Magnox Electric plc* ruled that financial losses flowing from suspension (such as loss of reputation) can be claimed separately from any claim for unfair dismissal.

In *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* the Supreme Court reaffirmed that suspending an employee can give rise to a separate claim.

### **7. Not a neutral act**

The Court of Appeal in *Mezey v St George’s Mental Health Trust* held that suspension is not a neutral act because it: “changes the status quo from work to no work and inevitably casts a shadow over the employee’s competence” – a conclusion echoed in *Agoreyo* (see above).

The courts have consistently cautioned employers about being too hasty in suspending employees. In *Crawford v Suffolk Mental Health Partnership NHS Trust* the Court of Appeal found the Trust had wrongly suspended two long-standing nurses over allegations that they had tied a dementia patient to a chair, advising employers not to: “subject employees to (suspension) without the most careful consideration and a genuine and reasonable belief that the case, if established, might justify the epithet ‘criminal’ being applied to the employee’s conduct”.

### **8. Paid suspension**

There is no common law right for an employer to suspend an employee without pay. The ACAS Code of Practice recommends that any investigatory period is with pay.

Therefore, unless there is an express clause in the individual contract of employment entitling the employer to suspend without pay, such action should always be with pay. Unpaid suspension without that contractual term may lead to an ET claim for unlawful deductions from wages.

### **9. Reps' action**

Reps dealing with a member under suspension should check the following points:

- whether the employer has considered any alternatives – such as placing the employee on leave, working from home, temporary redeployment
- whether there are reasonable grounds for the suspension, so as to avoid any potential breach of the implied term of trust and confidence
- whether the notice of suspension includes reasonable grounds for the suspension and explains why there are no alternatives measures that could be imposed on – or agreed with - the employee
- whether the letter makes clear the suspension is neither a disciplinary sanction nor an indication that a decision on guilt has been reached, and is merely to allow for a proper investigation to be conducted as quickly as possible
- whether the terms and restrictions during suspension are clearly stated.

Reps should seek to gain assurances from the employer that:

- the fact of the suspension will be kept confidential
- the investigation will be conducted without undue delay
- the suspension will be as short as possible and reviewed regularly

- any necessary disciplinary action is concluded as soon as possible
- pay and other normal benefits will continue throughout the period of suspension.

It goes without saying that the employer's responses to these points should be fully documented and records kept, either by the employee or by the rep on the member's behalf.

### **Further Information**

More information on this and other legal matters is available from:

- ❑ Val Stansfield, Employment Rights Adviser at [stansfieldv@tssa.org.uk](mailto:stansfieldv@tssa.org.uk) or 020 7529 8046
- ❑ the TSSA Helpdesk – 0800 328 2673

The information given here is for general guidance only and should not be regarded as a complete or authoritative statement of the law.