



Legal update — May 2019

## Employment and pensions Disciplinary matters

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**There are a number of tricky issues which can crop up during a disciplinary process. Here are our #TrowersTopTips for dealing with the unexpected.**

**Trowers' Top Tip: if a disciplinary allegation overlaps with a criminal investigation, you don't always have to wait for the criminal process to conclude before taking action.**

The claimant in *North West Anglia NHS Foundation Trust v Gregg* was a doctor facing disciplinary, regulatory and police enquiries after two patient deaths. He was suspended and a police investigation commenced. When a professional disciplinary body, the Interim Orders Tribunal (part of the General Medical Council) temporarily suspended the claimant's registration and withdrew his licence the Trust stopped his salary. This was in part because it argued that the claimant's contractual entitlement to pay was contingent on his being ready, willing and able to perform his work. The claimant's lawyer advised him not to participate in a disciplinary hearing as he would risk prejudicing himself in the criminal investigation. When the Trust refused to adjourn the investigation, the claimant brought High Court proceedings for an interim injunction.

The High Court granted an injunction preventing disciplinary proceedings pending the end of criminal proceedings. It held that the Trust's decision to pursue its own internal disciplinary process rather than delaying it until the police investigation was completed, and the decision taken as to whether or not the claimant would be charged with a criminal offence, was a breach of the implied term of trust and confidence.

The Court of Appeal disagreed. It held that the question was whether the conduct of the employer was calculated to destroy or seriously damage the relationship, and even if it was, whether there was reasonable and proper cause for that conduct. Only a real danger of injustice would justify an injunction, and here the Trust was following its own contractually binding disciplinary procedures, and the doctor was contractually obliged to participate in the process.

The decision in *Gregg* confirms that there will generally be no need to suspend contractual disciplinary proceedings until the outcome of any criminal proceedings is known.

**Trowers' Top Tip: Don't suspend without pay unless your contracts of employment allow you to.**

Another issue arising in *Gregg* was that of the claimant's suspension without pay. The Court of Appeal found that the Trust had not been entitled to do this. The express terms of the claimant's contract did not permit the deduction of pay during an interim suspension. The claimant was ready, able and willing to work, but the decision of a third party tribunal had removed his registration to do so. Where the contract did not address the issue of pay during suspension the default position should be that an interim suspension should not attract a reduction of pay. The Court found that exceptional circumstances, such as a complete or part admission of guilt, might justify a pay deduction, but this was not the case here.



Unless there's a contractual right to do so, an employer should not stop an employee's pay during a period of interim suspension.

**Trowers' Top Tip: Do consider suspending if it's necessary to conduct a fair investigation.**

Will a suspension to enable a misconduct investigation to be carried out fairly constitute a repudiatory breach of the implied term of trust and confidence? This was the

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opinion of the High Court in *Agoreyo v London Borough of Lambeth*, but the Court of Appeal has subsequently disagreed. This means that employers will now have more freedom to suspend without fear of repercussion when they want to investigate misconduct.

The claimant was hired to teach a class of children, two of whom were particularly challenging. She was not told before the offer of employment that she would be teaching children who had such severe behavioural, emotional and social difficulties and had not received any training in how to manage this. She was suspended because of the force she used in three incidents involving the two children.

During the period of her employment (which amounted to a few weeks) the teacher spoke on several occasions to the head teacher about the difficulties she was experiencing. Prior to the last incident the teacher sent an email in which she asked for other members of staff "to be more hands on and helpful". Following this email it was agreed that support would be put in place, yet the suspension occurred almost straight away before the support had had time to take effect.

In the Court of Appeal's opinion the suspension was not sufficient to breach the implied term relating to trust and confidence. The question to consider was whether the way in which the employer had responded to reports received of possible misconduct was reasonable and proper, so that matters could be investigated. If the response was reasonable and proper it could not be said that the employer had breached the implied term of mutual trust and confidence. As the context was one in which the employer had to safeguard the interests of very young children, the Court concluded that the school had reasonable and proper cause for suspension in this case.

Following the decision in *Agoreyo* employers will be able to suspend individuals in order to investigate misconduct without worrying about automatically breaching the implied term of trust and confidence. However, it's worth noting that the issue of suspension is always going to be highly fact specific, and in this instance there were safeguarding concerns which made the employer's action reasonable.

### **Trowers' Top Tip: If in doubt, follow your policies and contracts.**

It will still be wise to avoid suspending as a knee-jerk reaction unless it is a reasonable and proper course of action. Other alternatives should always be considered first. Before imposing a suspension an employer should always ensure that they have thought it through with care and have reasonable grounds to suspend. Any suspension policy should be operated consistently to avoid potential discrimination claims.

If contracts do not already contain an express right to suspend in the event of serious misconduct then employers should consider the insertion of such a right. Unless there is a clear contractual right to do so, an employer will not be able to suspend an employee without pay, so while a suspension takes effect the employee should continue to receive their normal pay and benefits.

If serious misconduct has taken place an employer may wish to consider suspending the employee who is being investigated. Suspension should be considered as an option where there is a potential threat to the employer's business or to other employees. It may also be appropriate where it is not possible to properly investigate the allegation if the employee remains at work, or where relationships at work have broken down.

An employer must have reasonable and proper cause for any suspension. If not then it risks breaching the implied term of mutual trust and confidence. Any period of suspension should be kept as short as possible and should be regularly reviewed.

### **Trowers' Top Tips on Suspension**

You should bear the following points in mind before suspending an employee:

- Avoid suspending as a knee jerk reaction.
- Put an express right to suspend in your contracts of employment.
- Consider alternatives to suspension.
- Ensure you have reasonable grounds to suspend.
- Operate any suspension policy consistently to avoid potential discrimination claims.

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### **May 2019 © Trowers & Hamlins**

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