



Legal update — September 2017

Employment and pensions Suspension: pitfalls and best practice

Pioneering — Bahrain — Construction — Public sector — Energy — Real estate — London — Tax — IT — Dubai — Manchester — Connecting — Knowledge — Pragmatic — Malaysia — Exeter — Thought leadership — Housing — Agile — Creative — Connecting — Pri...
Local government — Manchester — Environment — Focused — Islamic finance — Projects — Abu Dhabi — Corporate finance — Passionate — G...
Employment — Regulation — Procurement — Expertise — Specialist — Planning — Investment — Committed — Delivery — IT — G...
IP — Corporate — Infrastructure — Value — Development — Private wealth — Oman — Governance — Birmingham — Corporate finance...
Dynamic — Pensions — Dispute resolution — Insight — Banking and finance — Arbitration — Diverse — Regeneration — Care — Commun...

Following the High Court's recent decision that a teacher's suspension was in breach of contract, it's worth taking a quick look at the law surrounding suspension and the practical issue of when it constitutes an appropriate course of action.

When to suspend

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.

Don't breach the implied duty of mutual trust and confidence

It is essential for an employer to ensure that it has reasonable and proper cause for any suspension. If it does not, then it risks breaching the implied term of mutual trust and confidence. As the Court of Appeal pointed out in *Mezey v South West London* and *St George's Mental Health NHS Trust* (a case in which the Court granted an injunction to prevent the NHS Trust disciplining a consultant forensic psychiatrist) suspension "is not a neutral act", and so serious consideration needs to be given to whether it can be avoided.

Any period of suspension should be kept as short as possible and the decision to suspend should be regularly reviewed. The suspension should be handled sensitively and it should be made clear to the employee that the outcome of any subsequent disciplinary hearing is not in any way pre-determined.

Don't discriminate

Suspension policies should always be operated consistently and care should be taken to make sure that discrimination is avoided. In *Aziz v Crown Prosecution Service* the Court of Appeal found that the claimant's suspension had been discriminatory on grounds of race.

The claimant was a solicitor who was employed by the Crown Prosecution Service (the CPS) in Bradford. Her family originated in Pakistan. Shortly after the attacks on the World Trade Centre in September 2001 she was involved in conversations about those events with members of staff at the Bradford Magistrates Court. A written complaint was made, disciplinary proceedings were commenced and the claimant was suspended from duty. Shortly afterwards her suspension was lifted, but by that time the claimant was unwell and unfit for work.

In suspending the claimant the CPS had acted in breach of its disciplinary code. It failed to make preliminary enquiries to establish whether misconduct had taken place and whether a formal investigation should be instigated. The claimant was also entitled under the code to receive advice and be represented from the time that she was subject to any formal disciplinary action, but she was denied such representation at the suspension interview.



Source: Shutterstock

The Court of Appeal agreed with the tribunal's and the Employment Appeal Tribunal's decisions, in reaching the conclusion that the CPS would not have done the same had the person under investigation been a white solicitor rather than an Asian. The CPS had been unable to advance an adequate explanation for their treatment of the claimant, and in the absence of such an explanation (particularly given the events under discussion and that feelings against Muslims were running high in some parts of the local community), the tribunal had been correct to infer that the CPS had been

Published by
Trowers & Hamblins

Trowers & Hamblins LLP
3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001

www.trowers.com

Trowers & Hamblins LLP is a limited liability partnership registered in England and Wales with registered number OC337852 whose registered office is at 3 Bunhill Row, London EC1Y 8YZ. Trowers & Hamblins LLP is authorised and regulated by the Solicitors Regulation Authority. The word "partner" is used to refer to a member of Trowers & Hamblins LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Trowers & Hamblins LLP's affiliated undertakings. A list of the members of Trowers & Hamblins LLP together with those non-members who are designated as partners is open to inspection at the registered office.

Trowers & Hamblins LLP has taken all reasonable precautions to ensure that information contained in this document is accurate but stresses that the content is not intended to be legally comprehensive. Trowers & Hamblins LLP recommends that no action be taken on matters covered in this document without taking full legal advice.

improperly influenced by racial considerations throughout the disciplinary process.

Care should also be taken where two or more employees are involved in an incident of misconduct and one is suspended and the other is not, without a good reason for the difference in treatment.

Avoid a "knee-jerk" reaction

Gogay v Hertfordshire County Council demonstrates the importance of avoiding a "knee-jerk" reaction. Here the issue for the Court of Appeal to determine was whether the defendant local authority acted reasonably in suspending the claimant from her post as a residential care worker in a residential children's home while they investigated an allegation of sexual abuse (which was, it turned out, totally unfounded). The allegation was made by a very troubled child whose story was "difficult to evaluate". It was against that background that a decision was made to suspend the claimant pending an investigation.

It was found that the local authority's conduct amounted to a breach of the implied term of trust and confidence. The Court was critical of the letter sent to the claimant by the local authority which stated that "the issue to be investigated is an allegation of sexual abuse made by a young person in our care". As it pointed out the allegation was a very serious one, and to be told by your employer that you had been accused of abuse was clearly calculated to seriously damage the relationship between employer and employee.

In place of suspension the Court argued that it would have been possible to transfer the claimant to "other useful work" for the very short time that it ought to have taken to make the further inquiries needed. Another possibility might have been for the claimant to take a short period of leave. The Court found that the authority's own guidelines flagged that "child sexual abuse rarely needs to be responded to as a crisis, but calls for a cool, clear, structured response". What had happened instead was "an immediate 'knee-jerk' reaction".

Gogay was considered in the case of *Crawford and anor v Suffolk Mental Health Partnership NHS Trust* where the Court of Appeal held that the two nurses dismissed for gross misconduct following the restraint of an elderly dementia patient had been dismissed unfairly. Following complaints by a staff nurse the two nurses were suspended pending further investigation and then, six months later, dismissed.

The Court made some important obiter observations in this case. It was critical of the Trust's decision to suspend the nurses. Laws LJ noted that suspension "appears to be the almost automatic response of many employers to allegations of this kind" and referred to

Lady Hale's decision in *Gogay* that, even where there is evidence supporting an investigation that does not mean that suspension is automatically justified. Laws LJ stressed that suspension must not be a "knee jerk reaction" and that it would be a breach of the duty of trust and confidence towards the employee if it were.

Suspension was a breach of contract

In the most recent decision in this body of case law, *Agoreyo v London Borough of Lambeth*, the High Court has held that the suspension of a teacher to enable a misconduct investigation to be carried out fairly constituted a repudiatory breach of the implied term of trust and confidence.

The teacher was hired to teach a class of children, two of whom were particularly challenging and had behavioural problems. 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 did not have any training in how to deal with such children. She was suspended because of the force she used in three incidents involving the two children.

Prior to the last incident the teacher sent an email which the judge found to have "all the hallmarks of a genuine plea for help, combined with a hint that other members of staff were not being particularly supportive". 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 judge's opinion suspension against this particular background was sufficient to breach the implied term relating to trust and confidence, particularly given that the teacher's line manager had investigated two of the incidents and not considered them worthy of disciplinary action. He was also critical of the fact that the suspension occurred within a few days of a support plan being put in motion. He emphasised "the need to avoid a "knee jerk" reaction, with suspension as the default position without a consideration of the alternatives.

Best practice: the process to follow

Once a decision has been taken to suspend the employee should be informed as soon as possible. A letter should be written to confirm that the decision has been taken to suspend and should set out how long the suspension is anticipated to be. The employee's rights and obligations during the suspension should be set out, and it should be made clear that, although the contract of employment continues, the employee should not report to work and should not contact colleagues or clients. The employee should also be given a point of contact during their suspension.

An employer will not be able to suspend an employee without pay (unless there is a clear contractual right to do so), so while the suspension takes effect the employee should continue to receive their normal pay and benefits.

Learning points

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

- Avoid suspending as a knee-jerk reaction unless it is a genuinely necessary course of action.
- Consider putting an express right to suspend in your contracts of employment in the event of serious misconduct.
- Consider alternatives to suspension.
- Before imposing a suspension always ensure that you have thought it through with care and have reasonable grounds to suspend.
- Operate any suspension policy consistently to avoid potential discrimination claims.

September 2017 © Trowers & Hamlins

For more information please contact

Emma Burrows
Partner
t +44 (0)20 7423 8347
e eburrows@trowers.com

Nicola Ichnatowicz
Partner
t +44 (0)20 7423 8565
e nihnatowicz@trowers.com

Rebecca McGuirk
Partner
t +44 (0)121 214 8821
e rmcguirk@trowers.com

John Turnbull
Partner
t +44 (0)1392 612370
e jturnbull@trowers.com

Helen Cookson
Senior Associate
t +44 (0)161 838 2081
e hcookson@trowers.com