

EMPLOYMENT BRIEFING

Suspending employees: avoiding a knee-jerk reaction

When potential employee misconduct comes to light, and an employer needs to find out what happened, it may decide to suspend one or more employees while it carries out an investigation. The principal legal risk for employers is that the employee may claim that the employer has breached the implied duty of mutual trust and confidence, therefore repudiating the employment contract and entitling the employee to bring a claim for damages.

The recent decision in *Agoreyo v London Borough of Lambeth* should act as a timely reminder to employers and advisers about the risks of suspending employees as a knee-jerk reaction to potential misconduct ([2017] EWHC 2019 (QB); www.practicallaw.com/w-010-4868).

Why suspend?

The question of suspension arises most frequently when potential misconduct has come to light. The reasons for suspending employees who may have been involved in the misconduct are typically practical in nature:

- The employer may have concerns that the employee will destroy or tamper with evidence, therefore impeding its ability to conduct a thorough and accurate investigation.
- The employee may take steps to intimidate or coach witnesses. This may be a particular concern if the witnesses report into the employee or the employee is very senior within the organisation and has some direct or indirect influence over the witnesses' careers.
- The employer operates in a regulated or sensitive environment, such as the financial services sector or healthcare, and the potential misconduct has cast doubts over the employees' suitability to carry on their role.
- There are reasons to believe that the alleged misconduct might continue if the employee remains in the office.
- Working relationships have broken down.

- The employer has other concerns about the employee staying at work; for example, the impact on its reputation, business or property.

The law on suspension

Gogay v Hertfordshire County Council remains one of the key cases in this area ([2000] IRLR 703). In *Gogay*, the Court of Appeal made it clear that suspension is not automatically justified simply because there is evidence that would support an investigation. Suspension should not be a knee-jerk reaction, as this may breach the employer's duty of trust and confidence towards the employee. The court emphasised the practical consequences for the employee of a suspension: he may feel belittled and demoralised by being excluded from work and his colleagues, many of whom will be friends, and this can be psychologically damaging. Even if the employee is later cleared of the charges, suspicion is likely to linger, particularly as the suspension might seem to add credibility to the charges (see box "Protecting the employee's position"). The court's comments in *Gogay* were endorsed by the Court of Appeal in *Crawford v Suffolk Mental Health Partnership NHS Trust* ([2012] EWCA Civ 138).

Agoreyo concerned the suspension of a teacher, Ms Agoreyo, who had used a degree of force to get two pupils to behave. Despite the school's statement in the suspension letter that the suspension was a neutral rather than a disciplinary act, the High Court found that suspension is never a neutral act, particularly where it relates to qualified professionals with a vocation. The court therefore determined that Ms Agoreyo's suspension had repudiated the employment contract by breaching the implied duty of mutual trust and confidence. Before suspending Ms Agoreyo, the school should have: spoken to her about what had occurred and asked her for her response to the allegation; given sufficient time for various teaching supports to be put in place, as had been discussed with her previously; and considered whether there were any appropriate alternatives to suspension.

This is not to say that suspension will never be justified. The High Court in *Macaulay v Newham London Borough Council* found there to be

no breakdown of trust and confidence where an investigation took place that was lengthy but not inordinately or disproportionately so ([2012] EWHC 4371 (QBD)). The Acas Code of Practice on Disciplinary and Grievance Procedures states that where suspension is considered necessary, the period of suspension should be as short as possible and be kept under review. In addition, the employer should make it clear that the suspension is not considered a disciplinary sanction.

The courts therefore accept that suspension is permitted; however, it is for the employer to demonstrate that it turned its mind properly to whether suspension was justified in the particular case at hand.

Practical tips

Employers and their advisers should be aware of how the legal principles applying to suspension might play out in practice.

Power to suspend. As suspension is not an automatic right, employers need to have a power to suspend employees. Employers should identify whether there is an express power to suspend in the employment contract or in an employee handbook or other internal policy. However, employers should remember that an express right to suspend is not a panacea; the courts will examine the way in which the employer exercised its discretion to suspend.

Where the employee handbook or other internal policy is non-contractual, but it contains a power to suspend and the employee's attention has been drawn to that handbook (for example, he was given a copy when he joined or it is referred to in the employment contract), the employer should be able to establish that it has a prima facie right to suspend.

If there is no reference to the right to suspend in the employment contract or employee handbook, the employer will need to argue that there is an implied power to suspend. As a matter of general principle this should be possible, but in certain cases employees may be able to establish that they have an implied right to work. This might be the case where the

suspension would deprive employees of the ability to earn money on top of their normal salary, such as commission, or where their professional skills would become stale by virtue of the suspension. However, this is not an easy argument for employees to run successfully.

Alternatives to suspension. The failure to consider whether there were alternatives to suspension undermined the employer's case in *Agoreyo*. Alternatives to suspension might include:

- Permitting employees to continue in their normal roles where this is compatible with the investigation.
- Assigning employees to a special project that will keep them away from the area under investigation.
- Having employees report into a different person, or having their direct reports assigned to someone else for a short period.
- Temporarily transferring employees to a different area of the business. Acas sets this out as an example of an alternative to suspension in its guidance on conducting workplace investigations (www.acas.org.uk/media/pdf/q/O/Conducting_Workplace_Investigations_Nov.pdf).

Where alternatives have been considered, the employer should document these so that it has evidence of its thought process should its decision to suspend be challenged. The employer should also aim to act consistently as between different employees who may be involved in the alleged misconduct. There is a risk that employees might claim discriminatory treatment if they feel that they have been treated differently from others without justification.

Gathering initial evidence. It can be tempting to conclude that the suspension is necessary to enable the employer to get an initial sense of what happened in the alleged misconduct. However, employers should be cautious and consider conducting a limited investigation to establish some key facts without suspending employees.

Protecting the employee's position

As the Court of Appeal made clear in *Gogay v Hertfordshire County*, suspension can damage an employee's position within an organisation ([2000] IRLR 703). The employer should take steps to mitigate any damage and should:

- Consider what it will say to the suspended employee's colleagues or clients. If possible, this should be agreed with the employee in advance and should aim to be neutral. Employers should try to have one point of contact within the business for addressing any questions about the suspension so that the messages are consistent.
- Make the period of suspension as brief as possible, including by lining up the investigation team and arranging any witness interviews promptly.
- Ensure that the employee remains informed by receiving regular updates.
- Keep the suspension under review, asking itself at regular points during the investigation whether the original reasons for suspension still apply; for example, if the employer suspended the employee to ensure that documents were not tampered with, but is now confident that it has gathered all relevant documentary evidence, the employee may be able to return to work.

Having made preliminary enquiries, including asking the employees in question to put forward their side of the story, the employer is likely to be in a much stronger position to determine whether suspension, pending a full investigation, is warranted. Again, the employer failed to do this in *Agoreyo*. However, conducting a limited investigation will not always be appropriate; for example, asking employees for their accounts of events may tip them off that their misconduct has been discovered and they may seek to destroy evidence.

Informing the employee. If the employer decides to suspend an employee, it should notify the employee in writing and:

- Explain why the employer has taken the decision to suspend.
- Tell the employee not to attend work or to contact any colleagues or clients, unless told otherwise.
- Confirm that suspension will be on full normal pay.
- Confirm how long the suspension is anticipated to last.
- Remind the employee that he owes a duty to co-operate with the investigation.

- State that the suspension is not a disciplinary action in itself.
- Give the employee a point of contact, often someone in HR, with whom he can raise any questions or concerns.

Returning to work. If the employee returns to work after suspension, the employer will need to communicate with colleagues and clients about the return to work. As with the initial suspension, employers should seek to agree the terms of the communication with the employee. Where no misconduct was established, the employee is likely to want a strong statement of exoneration to be made. Employers should also consider whether the employee needs to be compensated for missed remuneration. This might include catch-up share plan awards being made, hours targets for bonuses being adjusted or average commission payments being made. These steps may not be appropriate where disciplinary action resulted from the investigation; for example, where the employee had to forfeit his bonus entitlement. Additional resources or training may also be required to remedy any misconduct or cultural issues identified as part of the investigation.

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