



Suspension Pending Disciplinary Hearings

Introduction

Most disciplinary procedures provide for an employee to be suspended on full pay while a disciplinary investigation against them is underway. They will usually say that suspension is not a disciplinary action but designed to help the individuals concerned.

However, despite what might be said either in the procedure or to the individual concerned, suspension is a serious step. This short briefing looks at the growing legal implications of suspension and considers the narrow circumstances when its use might be justified.

The impact of suspension

There is no doubt that removing someone from a workplace in order to conduct an investigation into their conduct is convenient. But will it make an investigation proceed more quickly, be any more thorough, or be any more impartial? Indeed, anecdotal evidence from the many cases we handle on behalf of members suggests that if anything, having an individual barred from the premises can slow things down.

The often visible removal of an individual from the premises will lead to speculation and rumour. There is also a big impact on trust and confidence. It undermines the individual in front of colleagues, and it can undermine morale. Add in the forced isolation and the probable anxiety, and you also have a recipe for ill health.

The law

Although lawful, the serious impact of suspension has been recognised by the courts; and a plethora of case law is developing.

In *Eastwood v Magnox Electric plc (2005)* the House of Lords confirmed that financial losses flowing from suspension, where an employer has acted unfairly in suspending an employee, can be claimed separately from any claim for unfair dismissal. Financial losses could for example arise from damage to the reputation of an employee who was unfairly suspended after having been accused of serious misconduct.

The courts have also acted to lift a suspension. Awarding an injunction a Court of Appeal judge said: 'Suspension changes the status quo from work to no work, and inevitably it casts a shadow over the employee's competence. Of course this does not mean it cannot be done but it is not a neutral act' (*Mezey v South West London and St. George's Mental Health NHS Trust 2007 EWCA Civ 106*).

Perhaps most significantly, the act of suspending someone could result in a breach of contract. In *Gogay v Hertfordshire County Council (2000) IRLR 703 CA*, the Court of Appeal held that the council was in breach of the implied term of trust and confidence because it had no reasonable and proper cause to suspend the employee. It had failed to carry out any preliminary investigations to determine the exact nature of the allegations

More recently in *Crawford v Suffolk Mental Health Partnership NHS Trust (2012) EWCA Civ 138*, a postscript was added to the judgement. The case concerned care workers accused of assault by the Trust for using a form of restraint that was unauthorised, although in fact no more extreme than other authorised procedures. The judge said as follows:

“This case raises a matter which causes me some concern. It appears to be the almost automatic response of many employers to allegations of this kind to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established.”

In this particular case the Trust also called in the police and another comment from the judge was particularly damning when he said that “defensive management responses which focus solely on their own interests do them little credit.”

The Government’s Own Advice

More evidence that suspension should only be used only after very careful consideration is found in the government’s statutory guidance to schools and colleges on dealing with allegations against staff accused of abusing children. The guidance states that suspension must not be an automatic response to the allegation; and that consideration should be given to alternatives. It says suspension should only be considered if there is a ‘risk of significant harm’ to a child or the allegations warrant investigation by the police.

What do Acas say?

In their guidance booklet on *Discipline and Grievances at Work* (April 2011) Acas gives the following examples of when suspension may be appropriate:

- for cases where relationships have broken down,
- for allegations of gross misconduct, and
- where there are risks to an employee’s or the company’s property, or to third parties.

They go on to say that suspension may also be considered where the employer has reasonable grounds to believe that evidence may be tampered with or witnesses pressurised before a disciplinary hearing.

However, Acas do point out that “Suspension with pay should only be imposed after careful consideration and should be reviewed to ensure it is not unnecessarily protracted.” Unfortunately, the statutory code of practice issued by Acas says very little indeed about suspension, simply reiterating the need for it to be brief and reviewed.

Acas do not explain what is meant by a breakdown in relationship, but common sense suggests that it is much more than a disagreement or simple falling out. Indeed, we would argue that if suspension is genuinely to help all parties then there must be some benefit for the employee as well as the obvious convenience to the employer.

When could suspension be considered?

Given all of the above, you might expect employers to be frugal in their use of suspension. Sadly they are anything but. Indeed, suspension has long been the default response in schools and colleges for any employee suspected of misconduct. The seriousness of the allegation makes little difference with the result that suspension is common place. Worse still, suspension is often protracted, continuing well beyond the completion of the investigation in some cases.

In our view, employers should consider suspending an employee only where the alleged misconduct is of a serious nature, and only when:

- there is a potential threat to property or other employees;
- it is impossible to properly investigate the allegation if the employee remains at work (for example because they may destroy evidence or attempt to influence witnesses);
or
- relationships at work have broken down to such an extent that suspension is required to keep individuals apart,

AND

- the employer has conducted a preliminary investigation to establish that there is prima facie evidence of the alleged misconduct; and
- it is not possible to place the employee in another area of the organisation whilst the investigation is carried out.

Consideration should also extend to the impact of the suspension on the individual and other employees. Extreme care must be taken to avoid any inference of "guilt" as this may prejudice any future disciplinary process. It could also cause the accused employee distress and may harm that employee's reputation. If possible, the suspension should be kept confidential.