

**ADVISORY**
Industry Information

Suspension of Employment

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This Advisory considers the circumstances in which it may be appropriate for an employer to suspend an employee, when a suspension may amount to a breach of contract, factors that should be taken into consideration before making the decision to suspend and what to include in a suspension letter. It is intended to assist HR practitioners and managers to avoid claims that the suspension may have been in breach of contract or outside the 'range of reasonable responses' test applied by the employment tribunals when considering whether a fair procedure has been followed prior to taking the decision to dismiss.

Can I suspend?

Employers are frequently uncertain whether they can lawfully suspend an employee when a potential gross misconduct issue first comes to light. The answer is, it depends.

In cases involving serious misconduct, or where the employee's continued presence at work could prejudice an investigation, the answer is usually 'Yes, you can suspend'.

However, because an unwarranted or badly handled suspension can backfire and lead to a claim by the employee for breach of contract, we recommend that you think carefully about the following four things before taking any decision to suspend:

- » whether or not the terms of the employment contract allow you to suspend;
- » whether suspension would amount to a breach of the implied term of trust and confidence;
- » whether suspension might constitute unfavourable treatment giving rise to a discrimination claim; and
- » whether the employee's contract, or the nature of their work, creates the express or implied right to work.

Contractual Right to Suspend

Employment contracts often include the right to suspend. To have the right written into the contract can be helpful, but it is not conclusive. If the right to suspend is not reserved in the contract, you can still suspend; and even if the right is reserved, you still have to be careful how you exercise it. If you exercise the right to suspend arbitrarily or capriciously, you could find yourself facing a claim for breach of the implied term of trust and confidence (below).

Trust and Confidence

The courts have the power to imply a term into an employment contract in circumstances where they think consider it is right to do so. This can be a specific term implied into an individual contract as a "gap filler" (such as the requirement for a school caretaker to occupy premises in the school's grounds), or a more generic term, implied across all employment contracts, such as the duty on all employers to take reasonable care in the preparation of a reference.

The courts have used their power to imply a term into all employment contracts to require an employer not to act in a way that is calculated or likely to destroy or seriously damage the trust and confidence required for the employment relationship to continue, unless the employer can show reasonable and proper cause for acting in the way it did. The following three cases are good examples of how the courts approach a suspension against the backdrop of the duty of trust and confidence.



Case 1: Mr Milne was suspended from work for performance and conduct issues. He resigned and claimed constructive dismissal shortly after he had been suspended, but before the disciplinary hearing (which was scheduled to take place 5 days later). He claimed that the allegations against him had been fabricated as a means to get rid of him because he had raised concerns over an Employee Benefit Trust which he later referred to in a whistle blowing claim. This, he said, amounted to a breach of trust and confidence entitling him to resign and claim constructive dismissal. The court found that the employer had genuine concerns about Mr Milne's performance and conduct and that it had been entitled to commence disciplinary proceedings. It also found that Mr Milne's resignation was not a response to a breach of trust and confidence, but rather motivated by his concerns, as a senior employee, not to be disciplined. The court went on to say that there was no implied term in an employment contract that suspension would automatically breach the implied term of trust and confidence. Rather, a court will consider all the surrounding circumstances, including what was said to the employee to justify the suspension, the length of the suspension, any loss of income during suspension, whether the employee was replaced, and whether there was an express or implied right to work under the contract.

Case 2: This case involved a young teenager with learning and communication difficulties who had been taken into care. Over time it became clear that the teenager had been abused by both her parents. Her case workers came to believe that she associated liking a person, and them liking her, with them wanting to sexually abuse her. This led her to behave in a sexually provocative manner towards someone she liked. She later became obsessed with Mrs Gogay who was a female care worker at her residential home. Following various comments made by the teenager, and a request from Mrs Gogay that she should not be left alone with her, a pre-investigation was carried out. This pre-investigation determined that a full investigation was needed and a strategy meeting was then held to plan the full investigation. Importantly, it was agreed at the strategy meeting that the information collected during the pre-investigation was difficult to evaluate and that a full investigation was needed to try to clarify things as far as possible. Mrs Gogay was suspended immediately following the strategy meeting and before the full investigation began. The letter suspending her described the issue to be investigated as *"an allegation of sexual abuse made by a young person in our care"*.

The Judge found that the implied term of trust and confidence had been breached in this case:

- » firstly, because the employer itself had found the information 'difficult to evaluate' and was looking to explore it further; and
- » secondly, because the letter referred to an allegation of sexual abuse having been made, despite there having been no such allegation. The alleged justification for the suspension could not, therefore, be supported.

Case 3: Mrs Agoreyo was suspended pending an investigation into an allegation that she had used unreasonable force in dealing with two challenging pupils aged 5 and 6. The allegations set out in the suspension letter were that (i) on a particular date she was seen to *"drag a child, very aggressively a few feet down the corridor whilst shouting at him"* (ii) on another day she was seen to drag a child on the floor, out of the classroom, in the presence of another staff member and the other children and the child was heard to cry *"help me"* and (iii) on a third day she was heard to say to one of the two children that he should leave the classroom because he could not follow instructions. When he refused, she told him *"If you don't walk then I will carry you out"* which she proceeded to do. The judge found that there was a breach of trust and confidence on the grounds that the first two allegations had already been investigated and discounted by Mrs Agoreyo's line manager. Added to this was the fact that she had been requesting help to deal with the children for some time and had been told only a few days before she was suspended that support was being arranged. The judge went on to say that an employer who is thinking about suspending an employee should take the time to consider the employee's version of events before making a final decision.

Avoiding a 'discriminatory' suspension

The surrounding circumstances in any particular case may support an allegation that, by suspending the employee, the employer has treated them unfavourably on the grounds of a protected characteristic such as gender.

Express/Implied Right to Work

If the express right to work is set out in the employment contract, suspending an employee will almost certainly put an employer in breach of contract. Even if the right is not expressly set out, the right to work has been implied by the courts in the following cases:

- » where the employee would otherwise be deprived of the opportunity to earn a living, for instance, where they work on a pure commission basis;
- » where the employee needs to work to maintain their public profile, such as an artist or performer; and
- » where the skills needed to do the job might be lost or affected by the suspension, for example in the case of a surgeon or a certain type of financial analyst where the skills necessary to do the work have to be exercised frequently.



Practical pointers from case law

Taking into account decisions of the courts, we recommend that you:

- » Think carefully before taking the decision to suspend. Suspension should not be a knee jerk reaction;
- » Take the time to frame the allegations carefully and make sure you are not including anything which has already been investigated and discounted;
- » Take time to meet with the employee after an issue has come to light and discuss with them your intention to suspend (if that is what you are thinking of doing). Ask the employee if they have anything to say which may have a bearing on your decision and think about anything they do say before confirming your decision. It may change your view;
- » Think about possible alternatives to suspension whilst the investigation is being carried out (this could be, for example, a transfer to other duties or a period of paid leave);
- » If you do suspend, avoid referring to it as “a neutral act”, particularly if the employee is employed in a professional capacity. Say instead that the suspension does not pre-suppose that the employee is guilty of the offence and is not a disciplinary penalty;
- » From a practical perspective, any decision to suspend should be confirmed in writing and the suspension letter should:
 - refer to the pre-suspension meeting with the employee and your view of anything they may have said;
 - state clearly and unambiguously the allegations which are being investigated;
 - state clearly and unambiguously what the allegations may amount to if proven (eg, ‘misconduct’ or ‘gross misconduct’);
 - state who will conduct the investigation and their position;
 - inform the employee that they are required to co-operate with the investigation and attend an investigatory interview, and that they will be contacted by the investigator to arrange this;
 - clarify the position with regard to pay and benefits during suspension. Unless your contracts provide otherwise, pay and benefits should continue to be paid during suspension;
 - make clear that the employee should not attend work or contact colleagues, clients etc whilst suspended, unless requested to do so, but that they should be available to answer any questions;
 - name a person as a point of contact for the employee to give them a line of communication during suspension;
 - keep the period of suspension as short as possible and ensure communication is maintained with the employee so they do not feel isolated or that the matter has been pre-judged;
 - confirm that the suspension does not constitute disciplinary action or assume guilt; (but avoid referring to it as a “neutral act”);
 - deal with any housekeeping matters such as return of keys or co-tags or suspension of access to business systems during suspension;
 - if you have agreed a statement which can be used to explain the employee’s sudden absence, include this in the letter. It could be as simple as “So and so is on paid leave”; and
 - enclose the Disciplinary Procedure;
- » Do not hire in a replacement if you can possibly avoid doing so. If you do have to bring someone in, inform the employee in advance and make clear that this is a temporary state of affairs and why you need to do it;
- » If the contract includes the right to work, or if the right can be implied, be aware that suspension could support a breach of contract claim; and
- » Be consistent in how you treat your employees.

Contacts

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