

Suspension: a bridge too far?

We are often asked to advise charities and social enterprises about whether they can or should suspend employees where there are concerns about their conduct.

Lucy McLynn advises charity and social enterprise employers to be very cautious when considering suspension of an employee.



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Lucy is recognised as a leading employment lawyer in both *Chambers UK* and the *Legal 500* directories. She has a particular interest in employment issues affecting charities and social enterprises, such as the status of volunteers and issues around working time and holiday pay entitlement.

Employers have needed to approach suspension with caution ever since the 2000 case of *Gogay v Hertfordshire County Council*. In this case, a care worker was suspended following what was understood to be an allegation of sexual abuse of a child. In fact, the allegation should not have been characterised in that way and it was held by the Court of Appeal that the council had acted without reasonable care in taking the decision to suspend Ms Gogay. The council had accordingly breached the implied term of trust and confidence in its contract of employment with Ms Gogay, entitling her to damages for loss of earnings and clinical depression.

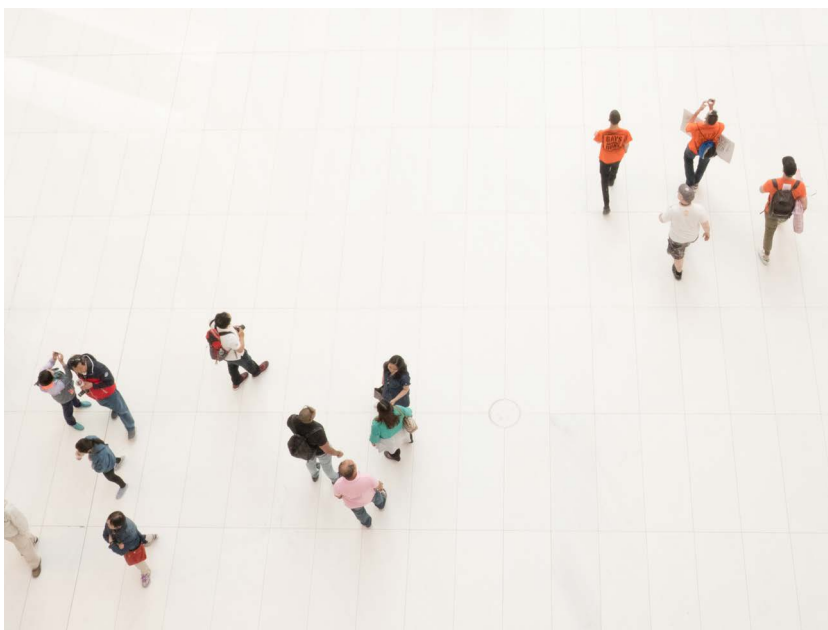
Last year, the Court of Appeal slightly rowed back from this position in the case of *London Borough of Lambeth v Agoreyo*. Here, a primary school teacher was suspended after allegations of having used excessive force against two young pupils. The Court of Appeal held that the employer had acted with 'reasonable and proper cause' in taking the decision to suspend to allow an investigation into the allegations to be conducted fairly. This was the appropriate test in establishing whether there was a breach of contract, rather than asking whether suspension was 'necessary'. This is a helpful development in the law around suspension, making it more likely that a suspension will be found to be lawful.

There are, however, still many pitfalls for employers in suspending employees. Below are our top tips on the appropriate handling of suspension of an employee.

- Do not suspend as a 'knee-jerk' reaction. Always take time to consider the appropriate course of action (even if the employee needs to be temporarily removed from an immediate workplace situation in the meantime).
- Be clear about the specific reason or reasons for suspension in any particular case. Is it because of the seriousness of the allegation? Is there a risk of recurrence? Would the employee's continued presence at work be prejudicial to a fair investigation?
- Consider alternatives to suspension. Could the concern that is giving rise to consideration of suspension be addressed in another way? Could the employee, for instance, be temporarily redeployed to a different role?
- Be clear with the employee about the contractual terms that apply during suspension. Suspension is always going to need to be on full pay.
- Ideally, have an express clause in your employment contracts setting out your right to suspend an employee from their duties. While this will still be subject to an implied term of reasonableness, it will remove any argument that the employer is contractually required to provide work for an employee.
- If an employee provides a sick note and/or says that they are too sick to attend an investigatory or disciplinary meeting during suspension, consider whether it is appropriate to move them onto sick leave instead of suspension. Depending on their sick pay entitlements, this may result in a saving of the salary to which they would otherwise be entitled throughout suspension, and the employee can still be told that on the expiry of their sick leave they may not return to work without prior notification to the employer (at which point suspension could be reinstated). You cannot decide retrospectively to treat a period of suspension as sickness absence.
- Keep the period of suspension as short as is reasonably practicable. If the employee is suspended in conjunction with a police investigation then consider particularly carefully whether the internal disciplinary process can be progressed separately and more speedily. Criminal investigations tend to be very lengthy. In another recent suspension case last year, *North West Anglia NHS Foundation Trust v Gregg*, the Court of Appeal held that the

trust had been entitled to commence disciplinary proceedings against a doctor in respect of patient deaths while a criminal investigation of the same issue was ongoing, as there was no evidence that the internal investigation would give rise to a danger of a miscarriage of justice.

- Actively review the suspension periodically to be clear that there is still reasonable and proper cause for suspension. If, for instance, the reason for suspension was the seriousness of the allegation, and the subsequent investigation has demonstrated that the conduct was not in fact as serious as it had appeared (although still meriting a disciplinary hearing) it might be appropriate to lift the suspension ahead of concluding the disciplinary process. In a 2007 case (*Camden and Islington Mental Health and Social Care Trust v Atkinson*) the Employment Appeal Tribunal held that a failure by the employer to review the period of an employee's suspension and to lift it at the appropriate time was in itself sufficient to give rise to a successful constructive dismissal claim by the employee.
- Communicate with the employee throughout their suspension. Tell them when you have reviewed their suspension, and let them know that suspension needs to continue and why. Keep them informed about the progress of the investigation and/or disciplinary process that is being undertaken and likely timescales and next steps.
- Do not fall into the trap of regarding suspension as a 'neutral act'. While suspension is, of course, not indicative of any predetermined outcome to a disciplinary process, it is far from neutral. The courts have specifically rejected a 'neutral act' as a proper description of suspension. (This was one of the points that arose in the *Agoreyo* case.)



The reality of most suspensions is that it is a devastating situation for an employee and can have a long-term impact on their career and health. This is why suspension requires careful consideration and handling by an employer, and is not something to be undertaken lightly.

FIND OUT MORE

Please get in touch with our employment team if you are considering suspension and we will be happy to advise you on the best course of action. <https://bateswells.co.uk/services/employment>

