

Is Suspension Always a Neutral Gear?

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In the wake of the recent suspension of Jeremy Clarkson, Laytons Solicitors LLP conducts a timely review of the topic of suspension and asks; is suspension always considered a neutral act?

Background

Suspending an employee is sometimes the first step to investigating serious misconduct (and in less serious cases where it is deemed appropriate) and is referred to by the ACAS Code of Disciplinary and Grievance Procedures ("the Code"), which sets out the basic requirements for fairness in misconduct cases. Whilst the Code is not legally binding on employers, it can result in an adjustment in compensation of up to 25 per cent, should an employee issue an employment tribunal claim.

Is suspension a neutral act?

Most people will be familiar with using the words, 'suspension does not imply a finding of guilt', to an employee who is suspended to prevent them arguing their suspension was unlawful. Indeed, the Code expressly states that employers should make it clear when suspending employees that suspension is not considered a disciplinary action.

Nevertheless, there have been cases in which employees have asked the courts to intervene when they allege they have been unlawfully suspended. For example, a general concern was raised over the 'automatic response' of some employers to suspend employees in a case involving nurses who, in order to administer medication, had tied a patient suffering from dementia to a chair.

Suspension as a 'knee jerk' reaction is often argued by employees in claims of unfair dismissal but it can equally be cited in breach of contract claims, for example a breach of the implied term of trust and confidence.

An 11 year old resident in a children's home run by the council had been subjected to sexual abuse by her father. During a therapy session the girl made comments that suggested the care worker may have sexually abused her. The care worker was suspended but exonerated after an investigation. However, the care worker was unable to return to work because the suspension had brought on clinical depression. The care worker brought proceedings and succeeded. The court found that, suspension had not been considered properly, and, together with the manner in which the care worker was suspended, it amounted to a breach of the implied term of trust and confidence and she recovered substantial damages.

Similarly, employers who have contractual disciplinary procedures can find an employee arguing their employer's actions have breached the procedure. A consultant psychiatrist was suspended on allegations of clinical incompetence. The consultant sought to argue that suspension was not permitted by the terms of the applicable disciplinary policy. The court was willing to intervene and injunct the Trust from suspending the consultant. The judgment found the following 'suspension changes the status quo from work to no work and it inevitably casts a shadow over the employee's incompetence; thus it was not a neutral act'.

What Laytons say:

The above demonstrates that there are situations where suspension is not always seen as a neutral act and employers have to be careful to exercise suspension carefully after giving the matter proper consideration

As an employer I am concerned that if I don't suspend an employee I may be criticised if I later dismiss the employee.

It is perhaps understandable, but a misconception by employers that, unless they suspend an employee, they cannot later summarily dismiss an employee. In an Employment Appeal Tribunal case ("the EAT") this issue was considered.

The EAT found in a case involving a dismissal of a nurse who had admitted to misuse of a hospital's internal telephone system that a lack of suspension did not preclude the employer from later fairly dismissing for gross misconduct. The EAT went on to say that 'suspension is undoubtedly a stigma....it would be extremely unwise, save in obvious cases, to draw any inference or conclusion, from the suspension or a lack of suspension.'

What Laytons say:

It is not always lawful for employers to suspend employees simply because the allegation against the employee is serious and they believe not suspending will prohibit a later summary dismissal.

When is it reasonable to suspend?

Whether a suspension is reasonable or not will depend on the specific case but the Code does help employers by giving guidance on situations where suspension may be considered appropriate:

- Where relationships have broken down;
- Where there are risks to an employee's property;
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- To preserve evidence; prevent witness intimidation or victims being harassed

Practical tips for employers who are considering suspending an employee

- A period of suspension should be with pay, unless there is provision in the employee's contract to suspend without pay.
- Employers should consider alternatives to suspension such as a period of leave, working from home, redeployment, or temporary transfer to another department or office.
- Suspension should be reviewed to ensure it is not unreasonably length. Some employers expressly provide for regular reviews in their disciplinary policy, for example, every 2 weeks to consider whether suspension is still justified.
- Whilst the Code does not dictate time limits for how long an employee should be suspended, employers should inform employees how long the period of suspension will be before the next review.
- Employers should state in writing to the employee that suspension is not an assumption of guilt and is not a disciplinary sanction.
- Employers should consider the guidance from the Code and their own disciplinary procedure when considering suspension.
- The fact an employee has been suspended should be kept confidential and confined to only those responsible for the matter in the workplace.
- The manner in which employers communicate the suspension should be carefully considered to avoid the employee arguing the implied term of trust and confidence has been breached.

Laytons final say:

It is clear that suspension is not always a neutral act and the courts are willing to question the decision and the manner of suspension in employment cases, with dire consequences for the employer if they get it wrong. It is therefore key for an employer to act reasonably by having reasonable grounds for suspending and keeping the period of suspension as short as possible.

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As a trained and experienced advocate Michelle has conducted complex multiple day cases including, amongst other matters, unfair dismissal, all elements of discrimination, and breach of contract claims. Michelle also specialises in ensuring clients' have appropriate internal procedures and documentation in place to avoid or at least minimise the liability of employers to Employment Tribunal claims.

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