



## HR Broadcast – To Suspend... Or Not?

One of the most difficult decisions an employer may have to make is whether or not to suspend an employee while significant allegations or circumstances are investigated.

A suspension is a very significant step in the employment relationship particularly as perceived by the employee. How will this be seen by other members of staff? How will customers and suppliers understand what has happened?

If the employer mis-handles the situation the employee could resign and claim constructive unfair dismissal on the basis of a breach of contract. All contracts of employment have implied into them a term of trust and confidence that the employer will not act in such a way that this term is breached. By the way, this term is mutual and so the employee must equally not act in breach of this implied term.

The problem for the employer is that the question, whether or not to suspend, often arises in a situation of some urgency and the employer may be under some considerable pressure to remove an apparently errant employee from the scene while considering their next steps.

A case which has just been decided in the Court of Appeal has made the employer's task a little easier but does not change the need to act in a calm and reasoned way. This case involved a teacher, Ms Agoreyo, (A), and her employer, the London Borough of Lambeth. A had been teaching groups of children with very

challenging behaviour and had become involved in three incidents where she allegedly physically restrained them, including on one occasion dragging a child across the floor. When this came to the head teacher's attention she suspended A pending a full investigation. In the subsequent letter the Head said that suspension was a neutral action and not a disciplinary sanction and the purpose was to allow the investigation to be conducted fairly.

A resigned and went to the County Court alleging a breach of contract by the employer. An interesting side issue was that A could not use the Employment Tribunal system because she did not have the relevant amount of continuity of service to claim constructive unfair dismissal. This was therefore an attempt to avoid the statutory structure in the Employment Rights Act.

The County Court judge decided that the employer had "reasonable and proper cause" to suspend given the need to investigate the allegations and to protect the children.

A successfully appealed to the High Court. Relying on existing authorities, the High Court Judge concluded that this was a "knee jerk reaction", that the suspension was not "reasonable and/or necessary" and that the suspension was not a neutral act.

The employer appealed to the Court of Appeal where the High Court decision was reversed and the employer succeeded once again.



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This Court concluded that the correct test to apply was not whether or not the suspension was “reasonable and/or necessary” but, more simply, whether the employer in all the circumstances had acted reasonably. There was no need to prove necessity.

The Court felt it did not need to deal with the question of whether suspension was or was not a neutral act as applied to this particular case but judges in other cases have certainly taken the view, as stated above, that from the perspective of the employee this could hardly be neutral even if the subsequent letter said so.

The ACAS Code of Practice dealing with disciplinary procedures and on the question of the neutrality of a suspension does not suggest the use of the word “neutral” but rather that suspension is not part of the disciplinary process.

This was no doubt seen as an emergency situation for the school. However, it appears that the allegations were not actually put to the teacher to invite her response as part of an early stage in the necessary investigation. This was a factor for the High Court Judge in considering whether or not this procedure amounted to a breach of contract.

The standard which the employer will be judged by is now whether or not it was reasonable to suspend in all the circumstances which is something less than “reasonable and/or necessary”. Employers must still be careful that they comply with the ACAS Code and their own

disciplinary procedure or risk a claim of constructive dismissal.

### Checklist on whether to suspend:

1. Who will be the decision maker about suspension?
2. Check what the contract of employment says about the right to suspend.
3. Check your relevant procedure dealing with suspension, possibly part of your disciplinary procedure, and ensure that you follow the steps.
4. You must carry out at least the most basic of investigations in order to form a preliminary view that it will be reasonable to suspend.
5. Ask the employee for their comments before the decision maker concludes whether or not it is reasonable to suspend.
6. What are your grounds for deciding that it is reasonable to suspend? You may need to defend this decision later. An obvious reason for suspension is that the continued presence of the employee would make a full investigation difficult or that they might impede an investigation or destroy evidence but you must have reasonable grounds for taking this view.
7. Is there any alternative to suspension? Could the employee be moved to another department temporarily?



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8. Carefully document the purpose and reasons for suspension. Write to the employee as soon as possible explaining these reasons. Suspension must be reviewed regularly, perhaps weekly or at most fortnightly and any further decision communicated to the employee. Too long a suspension without good reason could give rise to an argument of a breach of the implied term mentioned above.
9. Take care with the language used in any letter of suspension. Avoid labelling suspension as being neutral but you should say that suspension is not considered to be a disciplinary action.
10. Explain that normal pay and benefits will continue while the employee is suspended.
11. Consider at an early stage who would deal with any disciplinary hearing or subsequent appeal remembering that as far as is practically possible different people should be involved at each stage to avoid the appearance of pre-judgement.
12. Decide what will be said to other employees or other people with whom the employee comes into contact such as suppliers or customers. Language used must again avoid any suggestion of pre-judgement.