

Don't Keep Your Employees in Suspense

UK employers should proceed with caution when suspending employees, and always consider carefully whether taking such action is appropriate in the circumstances, as highlighted by the recent case in the Employment Appeal Tribunal (EAT) of *Upton-Hansen Architects Limited v Ms X Gyftaki*.

Ms Gyftaki was suspended by her employer following a period of allegedly unauthorised absence, so that it could carry out an investigation and she subsequently resigned, claiming constructive dismissal. The employer argued that suspension was necessary to protect the confidentiality of the investigation and to protect Ms Gyftaki from "embarrassment". However, the EAT found that the reason for her suspension was in fact her employer's fear about how she may react and behave should she return to work during the investigation, but that there was no real evidence to support these concerns. The EAT found that Ms Gyftaki's suspension had been unwarranted and was not necessary "in order to protect the integrity of any investigation or protect the integrity of the business". Accordingly, by suspending Ms Gyftaki, her employer had breached the implied duty of trust and confidence that exists in all employment contracts, allowing Ms Gyftaki to treat herself as constructively dismissed.

The case serves as a reminder that employers do not have an unfettered right to suspend employees simply because serious misconduct is suspected. Instead, employers should consider on a case-by-case basis whether suspension is necessary and appropriate in the circumstances. For example, there might be well-founded concerns that, should the employee remain at work during an investigatory or disciplinary process, evidence could be lost or tampered with.

The non-statutory Acas Guidance suggests that employers should only consider suspension as part of a disciplinary procedure if there is a serious allegation of misconduct, and:

- working relationships have severely broken down;
- the employee could tamper with evidence, influence witnesses and/or sway the

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investigation into the allegation;

- there is a risk to other employees, property or customers; and/or
- the employee is the subject of criminal proceedings which may affect whether they can do their job.

Getting this wrong can allow a suspended employee – as here – to treat the employer's action as a breach of the implied term of trust and confidence entitling them to resign and bring a constructive dismissal claim.

In light of the potential issues surrounding suspension, we recommend that employers include an explicit right to suspend during an investigatory and/or disciplinary process in their employment contract.

For further information, please contact Bob Cordran or Natalie Taylor.