

OVERVIEW

- A** Appropriateness of suspension
- B** Procedural issues
- C** Contractual obligations and pay

FAQS

A Appropriateness of suspension

1. **When might an employer consider suspending in relation to a potential disciplinary matter?**

Suspension is usually considered where there has been an allegation of serious or gross misconduct.

Suspension should not be an automatic response to all allegations of misconduct, but the result of a carefully considered decision as to whether:

- it is necessary to keep the employee out of the workplace, or whether it can be avoided, for example, by placing the employee in another area of the business whilst the investigation is carried out; and
- the employer has reasonable grounds for suspension in this particular case.

When considering if alternatives to suspension are appropriate, the employer should consider the nature of the allegations against the employee. If, for example, the employee is being investigated for unauthorised access to computer records, it may not be appropriate to move the employee to a different area of the business where they still have access to those records. Other factors should also be considered, including the employee's previous record and length of service.

2. **When might suspension be appropriate and reasonable?**

Suspension may be an appropriate and reasonable approach in the following circumstances:

- where it is not possible to investigate the allegation if the employee remains in the workplace, for example because there is a risk of intimidation of other

employees who are giving evidence as part of the investigation, or if the employer is concerned about evidence being tampered with or destroyed;

- where there is a potential threat to the business or other employees, for example the employee retaliating against the decision to investigate by making inappropriate contact with clients;
- where work relationships have broken down (although given that each party is likely to have their own view of the cause of the breakdown, the employer should be careful not to give the impression of having pre-judged the disciplinary issue by choosing to suspend the employee);
- where there are risks to an employee's or the employer's property or the employer's responsibilities to other parties.

However, it is important to remember that suspension should not be a "knee-jerk reaction" in every case. Case law confirms that this would be a breach of trust and confidence.

3. What are the consequences of wrongly suspending an employee?

- If the employer fails to consider whether the suspension can be avoided and whether it has reasonable grounds for the suspension, it may be a breach of the implied term of mutual trust and confidence between employer and employee (and therefore lead to a potential constructive dismissal claim).
- Where an employee is suspended in circumstances where the allegations were subsequently found to be completely unwarranted, and suffers clinical depression as a result, the employee may be able to claim damages for personal injury.
- Suspension without pay, where there is no clear contractual right to do so, is likely to be a breach of contract, unlawful deduction from wages and constructive dismissal.
- If a right to work can be implied into the contract and there is no contractual right to suspend, in some cases where the employee is deprived of the opportunity to earn remuneration such as a piece-work rate, shift premium or commission, the employee may be able to claim damages, unlawful deduction from wages and constructive dismissal.
- If the job is unusual or unique and there is no contractual right to suspend, a long period of suspension may be regarded as preventing the exercise and maintenance of skills necessary for the performance of the employee's duties. The employee may be able to claim breach of the implied term of mutual trust and confidence and constructive dismissal.

B

Procedural issues

1. What issues should an employer be aware of before suspending an employee?

- Consider whether it is appropriate to suspend the employee and whether suspension can be avoided. The employer must be satisfied that it has reasonable grounds for the suspension.
- Ensure that the decision to suspend and the process followed comply with any relevant provisions in the employee's employment contract (and any other relevant policies).
- Suspension is not a form of punishment or a disciplinary action and the employer must avoid treating it as such. The employer should try to ensure that the employee does not view the suspension as a precursor to dismissal or that a decision has been made.
- Comply with the relevant provisions of the Acas Code of Practice on Disciplinary and Grievance Procedures. Paragraph 8 confirms that suspension (if considered

necessary) should be with pay, as brief as possible and kept under review. It should also be confirmed that it is not, in itself, a disciplinary sanction.

→ Keep records of any decision made and conversations with the employee regarding their suspension.

2. What can the employer tell other employees about the employee's suspension?

As far as possible, the circumstances surrounding the employee's suspension should be kept confidential.

Consider who needs to be told about the employee's suspension and what they should be told. When telling others, be careful that any statement does not appear to assume guilt or prejudice the fairness of any disciplinary hearing. Consider whether it is possible to agree a statement with the employee.

3. How long can an employee be suspended for?

Any suspension should be for as short a period as possible and the suspension should be kept under review, for example to consider whether suspension remains appropriate in cases where some of the allegations have been dropped or dealt with.

Any investigation should be conducted within a reasonable time period, particularly where an employee is suspended.

4. What information should the employee be given about the length of the suspension?

The employee should be given an indication as to how long the employer expects the investigation to last. They should be given updates on the progress of the investigation.

If there is a delay, the employer should inform the employee and provide them with an explanation.

5. What should be included in the suspension letter?

The employee should be notified as soon as possible if they are to be suspended. Usually this should be done orally and then followed up in writing. Typically, the letter would:

- explain that they have been suspended and why, for example while the employer investigates the serious allegations made against the employee;
- provide that they will continue to be paid and receive benefits during any period of suspension (unless this is not the case, but see question A3 above);
- give details of how long the employer anticipates that the suspension will last;
- make clear that they remain an employee during the suspension and are subject to the obligations that they owe to the employer;
- include a provision that they should not report to work, or contact clients, colleagues or others, as appropriate, while on suspension;
- provide a point of contact at the employer for any questions; and
- make clear that the suspension is not an assumption of guilt and is not considered a disciplinary sanction.

6. While the employee is suspended, can they insist that the employer only contact them through their representative?

No. As part of a fair and reasonable investigation the employer should consider such a request, but it does not have to agree to it.

The employer should generally maintain contact with the employee and keep them up to date with the progress of the investigation. It should also tell the employee who they should contact at the employer if they have any questions.

7. **Should an employee be allowed access to the workplace and colleagues during their suspension?**

Generally no, as the reason for the suspension is to protect the employer, its employees, its clients and its property.

Any request should be assessed and the reasons for it considered. It may be reasonable to allow the employee access to the workplace, for example, to retrieve personal possessions or allow the employee to prepare for the disciplinary hearing. Where the employer is concerned that the employee will try to influence colleagues in relation to the investigation, the employee should be warned that any attempt to influence colleagues will be dealt with under the disciplinary process.

8. **Can an employee challenge a decision to suspend?**

Yes. This would normally be done as a grievance raised internally. The employer should deal with the grievance in accordance with its usual grievance policy.

In limited circumstances, the employee could apply for an injunction to prevent their suspension.



Contractual obligations/pay

1. **Does the employer need to have a right to suspend in the employee's contract in order to suspend the employee?**

It is risky to suspend an employee in the absence of an express contractual right to do so. There is analogous case law suggesting there is no implied right to place an employee on garden leave. Accordingly, the starting point should always be to include an express contractual power to suspend for a reasonable period. If no power exists, and suspension is deemed necessary, the employer may elect to suspend anyway. If the employer decides to take this action, it should be done in a reasonable way, but even in these circumstances there will be a risk of a claim for breach of the implied right to work and the implied duty of trust and confidence.

2. **Should the employee be paid when suspended?**

Yes. Unless there is a clear contractual right otherwise, suspension should be made on full pay and benefits. Even if a contractual right to suspend without pay exists, seek legal advice if the employer is considering withholding pay and/or benefits, as this is a breach of the Acas Code.

3. **Is an employee entitled to commission or overtime payments whilst suspended?**

Generally no, unless there is a contractual right to such payments.

However, where there is no right to suspend in the employee's contract, in limited cases, there may be a right to work implied into the contract, for example where the employee is deprived of the opportunity to earn money such as a piece-work rate, shift premium or commission. In these circumstances, suspension on full pay may give the employee a right to seek damages and claim unlawful deductions from wages and constructive dismissal.

4. **Does suspension affect an employee's period of continuous employment?**

No. The employee remains an employee throughout the period of suspension and continuity of employment is preserved.

5. **Can an employee take holiday while suspended?**

It is possible for an employee to take holiday while suspended. However, during a period of suspension, while the employee is not required to attend work, they

should remain available to assist with the investigation, attend meetings or deal with work queries. For this reason, the employer may choose not to authorise holiday, provided it follows its usual procedure.

6. The investigation has finished earlier than expected and the employer wants the employee to return to work before the date it originally anticipated. Can it ask the employee to return to work immediately?

Yes, provided that the employee is not on authorised leave.

Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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