



XpertHR Podcast

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- Fiona Cuming: Hello and welcome to this week's XpertHR podcast with me, Fiona Cuming. In the spotlight today is an issue that can sometimes prove tricky, which is when is it appropriate to suspend an employee from the workplace? Helpfully, a recent High Court decision has given some guidance on the approach that employers should take when they're faced with an employee suspected of wrongdoing, as well as highlighting the perils of rushing too quickly to suspension. Joining me on the phone to discuss this case and the issues that can arise around suspension is Nicky Green, a professional support lawyer at Capsticks. Hi, Nicky. [0:00:50.5]
- Nicky Green: Hi.
- Fiona Cuming: Right. So I suppose I should start by naming the case, really. So the High Court case we're talking about is *Agoreyo v London Borough of Lambeth*. So it would probably be helpful if you could briefly give us the facts of the case. [0:01:03.3]
- Nicky Green: Sure, yes. Miss Agoreyo (who I am going to refer to as the Claimant from this point on) was a teacher at a primary school. She started work on 9 November 2012 and was placed in a classroom where there were two children who had behavioural difficulties. The pupils were very disruptive and the judgment refers to incidents of them spitting, hitting, kicking other pupils and teaching staff. The claimant, when she started, was having trouble dealing with these individuals and she asked other teachers to help her in dealing with them and she was told that help would be put in place, but it wasn't forthcoming. And on three occasions there were allegations that were made against her, that she had manhandled the pupils, she had apparently dragged them out of the classroom and carried one out when they were being particularly disruptive. And the school took the decision, on 14 December, really only a month after she had started, that she was to be suspended while the allegations were investigated, in response to which the Claimant resigned and she brought a claim for damages in the county court arguing that the suspension was not reasonable and had therefore breached her contract of employment.
- Fiona Cuming: Okay. So this case is in the county court and normally we're used to cases like this in the employment tribunals. So why did she go down that route? [0:02:09.8]
- Nicky Green: Well she'd only been there just over a month when she was suspended, so she didn't have the requisite two years' continuous service which she needed to bring a claim in the employment tribunal.

If she had had her two years' continuous service I expect the claim would have been brought in the employment tribunal.

Fiona Cuming: But the county court didn't find in her favour, it found that the school had been bound to suspend her and its rationale was because it had a duty to protect the children pending an investigation. So she wasn't successful at the county court, and then she went to the High Court. So what view did the High Court take? [0:02:39.2]

Nicky Green: The High Court actually overturned the county court decision. They found that the employer, in suspending the claimant, had breached the implied contractual term of trust and confidence, and that was really based on the fact that suspension had been adopted as a default position. They referred to it as a "knee-jerk" reaction, which is how it has also been termed in other cases on suspension. The Claimant hadn't been asked for a response to the allegations that she had manhandled pupils before they suspended her and there wasn't any evidence that the school had considered alternatives to suspension. The High Court went on to comment that suspension isn't a neutral act, especially for professionals such as teachers, and the judge referred to a case called *Mezey*, that suspension inevitably casts a shadow over an employee's competence and therefore employers really need to tread very carefully when they take the decision to suspend.

Fiona Cuming: And that's why there's a tension, really, isn't there, because we often advise employers that suspension is a neutral act and that's the way they think of it themselves, but clearly the courts don't view it like that and that came across very strongly in this case. [0:03:35.5]

Nicky Green: That's right. I often see policies now which still refer to suspension as a neutral act and letters of suspension which refer to it being a neutral act. And that certainly was the case a while ago, but we've got a lot of case law now and decisions which say that no, it isn't, it's not a neutral act at all.

Fiona Cuming: Yes. So this case really isn't a new direction for the courts, it's just in line with the authorities that we've had and it's bringing it into the spotlight really, the issue again. [0:03:56.4]

Nicky Green: That's right. The cases of *Mezey* and *Gogay* confirm that it's not a neutral act. This case is really just a very good reminder of that fact.

Fiona Cuming: Yes. So here the suspension, because the High Court found that it was unjustified, found that it amounted to a breach of the implied term of trust and confidence. [0:04:13.8]

Nicky Green: Yes, in this case that's right. And we need to be careful because it's not in every case that the suspension will lead to an implied term of trust and confidence, it really does depend on the facts of the case.

Fiona Cuming: But, basically, employers really need to give careful consideration before they make any decision? [0:04:25.2]

Nicky Green: Yes, that's right.

Fiona Cuming: So any other problems employers might face if they unreasonably rush into suspending an employee? [0:04:33.0]

Nicky Green: Suspension could be a breach of contract if there are express terms dealing with suspension and the result of that could be injunctive proceedings to prevent the suspension, and they're really time-consuming and costly. It's therefore essential that employers comply with any contractual terms regarding suspension and make sure they check them carefully first.

Fiona Cuming: Rightly so. They need to give careful consideration and they must make sure that they don't suspend as a knee-jerk reaction. [0:04:55.3]

Nicky Green: Yes.

Fiona Cuming: But what advice do you give your clients, because I'm sure the issue of suspension comes up quite a bit in your working life. What advice do you give your clients about other steps they need to take when considering suspension? [0:05:06.7]

Nicky Green: Well I think that point about checking the contract is obviously the first step they need to take and then the second one, which came through through the judgment of this case actually, is to check any statutory guidance which might impact their decision. In this case, the school hadn't paid attention to the local authority guidance, which states that suspension should not be the default option and that other options should be explored first. So check the contract and check any statutory guidance.

Fiona Cuming: And also Acas I suppose? [0:05:30.5]

Nicky Green: Absolutely. The Acas disciplinary code of practice is definitely an important point they need to check. It sets out that suspension should be for as short a period as possible, for example, and it should be kept under review. So definitely check that as well. Employers also need to consider whether there are less severe options which are available to them. For example, an employee could be moved to another department or they could work from home, for instance. Just consider other options which are less severe. Also the allegations should be put to the individual so they've got an opportunity to respond to them before the decision is taken and lastly I think it's important that employers document the decision to suspend...

Fiona Cuming: So you've got the paper trail. [0:06:04.5]

Nicky Green: Absolutely, so they can refer back to it at any point in the future.

Fiona Cuming: So, in short, if you've got an employee that you suspect of wrongdoing, even if you think that it's very serious, you still need to consider all of these aspects before making that decision? [0:06:16.8]

Nicky Green: Yes, absolutely. It's almost a checklist employers should run through and check off each point before they come to the decision to suspend.

Fiona Cuming: Okay. Now I've just got a couple of questions about what happens during suspension, assuming that the employer has reasonably

decided to suspend the employee, because I know one of the questions that often comes up is, what happens if an employee has got pre-planned holiday or if they haven't can they take holiday during that period?' [0:06:40.4]

Nicky Green:

So an employee can take holiday during a period of suspension and certainly you could allow a pre-booked holiday to continue, but I think employers need to be careful that they remember that obviously the suspension is to allow a reasonable investigation to take place and that will involve speaking to the employee, asking them questions in the investigatory process and potentially calling them in to a disciplinary meeting. And of course if that individual is on annual leave, they are not going to be able to do that. So I think I certainly wouldn't recommend that an employee is allowed to take annual leave for the entire period of suspension, but you may be able to come to an agreement of perhaps part of the period of suspension being taken as annual leave.

I think it's important for employers to remember also that they can cancel pre-booked holiday if it happens to coincide with a period of suspension, they have that right under reg.15 of the Working Time Regulations, provided they give the correct notice, which is equivalent to the amount of annual leave to the employee, they can cancel pre-booked holiday.

Fiona Cuming:

One of the issues as well and I was often asked this by employers when I was in practice, once an employer has made a decision to suspend an employee, how do they communicate that employee's absence to the rest of the members of staff? Because clearly they'll notice that that employee is not at their desk and the rumour mill may be running. [0:07:51.0]

Nicky Green:

Yes, that's right. People are bound to ask questions and notice that someone isn't there. I think employers need to remember to handle this very carefully, because they still owe the suspended employee a duty of trust and confidence and an announcement could, potentially, breach the term of trust and confidence, which exists between the suspended employee and the employer. They've got to be very careful that there is no suggestion of guilt in any announcement.

I would normally recommend that an employer tries to agree the announcement to colleagues with the employee. Perhaps they are going to come up with an agreement that they're on a period of leave not suspension, for instance. So where possible speak to the employee about that.

Fiona Cuming:

So you've now got an employee, the investigation has concluded and the suspension is being lifted because they found that there was no basis to the allegations, so similar to what we discussed previously, how does an employer cope with that employee returning to the workplace? [0:08:42.7]

Nicky Green:

In the same way as when the employee left, an announcement should be made that the allegations were unfounded; an investigation has been carried out and the allegations are unfounded if colleagues are aware that they have been suspended rather than on an

alternative period of leave. And also I guess if they've missed anything during their period of suspension, so any training that might have taken place, then the employer needs to make sure that they're up-to-date with that when they come back.

Fiona Cuming: This case has been dealing with somebody that the courts were viewing as a professional because she was a teacher and they stress the importance, even more so, of giving careful consideration if someone is in a vocational role. This case isn't just limited, is it, to professionals and people working in a vocation, it really has ramifications for all employees. [0:09:26.5]

Nicky Green: It does and some of the cases that we have on suspension – so the *Mezey*, the *Gogay*, these cases are all about professionals, but I think employers would be best advised to stick to it regardless of whether the employee that they're dealing with is a professional or not. I means this is just best practice, I think, really when dealing with suspension. So, yes, regardless of whether they are professional or not, I would recommend that they have that checklist in front of them before they take the decision to dismiss.

Fiona Cuming: And particularly given the robust view that this particular court took on this case. [0:09:55.5]

Nicky Green: Yes.

Fiona Cuming: That's been very helpful, thank you very much.

Nicky Green: You're welcome.

Fiona Cuming: You can find lots of resources on our site that will help you in this area. In particular a how to guide on how to deal with suspension pending the result of a disciplinary investigation.

And that brings us to the end of this week's podcast. Thanks for listening. We'll be back next Friday, but until then it's goodbye from us.