

Group Briefing
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Employers required to consider whether factors other than the seriousness of allegations justify suspension

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

In *Upton-Hansen Architects Ltd v Ms X Gyftaki*, the UK Employment Appeal Tribunal found that the decision to suspend an employee was a breach of the implied duty of trust and confidence resulting in her constructive dismissal.

BACKGROUND

In September 2017, the employee, a senior architect, had exhausted her annual leave but needed to urgently travel to Greece for personal reasons and booked a flight. She requested additional holiday leave the day before she was due to fly and, due to a misunderstanding, assumed her request had been granted. However, at 8:30pm the same day, she received an email from her manager stating that her request for leave had been denied. She responded that her arrangements had already been made so she would have to take it as unpaid leave.

The employer contacted their advisers who took the view that this was gross misconduct and, as such, a suspension pending investigation was warranted.

Upon her return, the employee was suspended from work pending investigation for taking unauthorised leave and failure to comply with line management instruction. The employer also referred to a previous incident of taking more annual leave than she had actually booked, which had occurred in

July 2017 but had been retrospectively approved by the employer.

She subsequently resigned and brought claims for unfair and wrongful dismissal.

Both a UK Employment Tribunal and the UK Employment Appeal Tribunal held that the employee's suspension (and the employer's decision to include the claimant's July holiday issue in the investigation) amounted to a breach of the implied duty of trust and confidence. Both held that she had been constructively and wrongfully dismissed and made basic and compensatory awards.

DECISION OF THE UK EMPLOYMENT TRIBUNAL

The UK Employment Tribunal described the decision to suspend the employee as being at the heart of this case. The reason given by the employer was that it was concerned that the claimant would behave inappropriately at work, were she not to be suspended. The employer considered she was likely to be upset and so would set a bad example for

her junior colleagues. There was also a concern that she might possibly breach any confidentiality obligation that the employer had placed upon her. The Tribunal did not accept these reasons, finding that there was no real evidence to support the stance of the directors. It did not consider that the suspension took place to protect the integrity of any investigation or the business as a whole. However, the Tribunal did accept the claimant's evidence that, given a lengthy period of suspension, it was in fact more likely for questions to be asked by colleagues about her absence, than if she had returned to work and been advised to keep the matter confidential. The Tribunal found that there was a breach of trust and confidence and one of the key reasons for this breach related to the decision to suspend the claimant.

DECISION OF THE UK EMPLOYMENT APPEAL TRIBUNAL

The UK Employment Appeal Tribunal ("EAT") agreed with the Employment Tribunal in relation to the suspension issue. The EAT found that the employer's reason for suspension was not related

to the employee's taking unauthorised absence, but rather how she might behave on her return to work when she was told that there would be a disciplinary investigation. It found that the Employment Tribunal was entitled to conclude that the reason for suspension was not for a reason relating to the employee's conduct, and this was the element that had caused the breach of the employer's duty of trust and confidence to the employee, leading to the constructive dismissal finding.

ADVICE TO EMPLOYERS

This case serves as a reminder for employers about the dangers associated with suspension. Under Irish law, the suspension of an employee pending investigation should always be paid and is justified in limited circumstances only. Recent case law has established four scenarios in which suspension will normally be justified:

- a. to prevent repetition of the conduct complained of;
- b. to prevent interference with evidence;

- c. to protect individuals at risk from such conduct; or
- d. to protect the employer's business and reputation.

The Irish courts have noted that suspension can have a detrimental effect on an employee's reputation and, as such, should only be imposed following a full consideration of its necessity.

If the employee is to be suspended pending an investigation of misconduct, he/she should in advance receive a letter outlining the reasons for potential suspension in advance of any investigation meeting, along with a copy of employer's disciplinary policy. The employee should be permitted to make any representations in relation to his/her contemplated suspension before any decision is made. The suspension must be for a stated reason and that reason must be a permissible one, along the lines of those outlines above.

The ensuing investigation and/or disciplinary process should then be conducted without delay to avoid a period of protracted suspension.

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