



Employment Law Newsletter - September 2019

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Suspending an employee can breach the term of implied trust and confidence

In [Upton-Hansen Architects Ltd v Gyftaki](#) the Employment Appeal Tribunal (EAT) decided that the employer constructively unfairly dismissed a senior architect when it suspended her before investigating whether she had taken leave without permission.

We know that suspension can cast a shadow over your employee's competence or conduct and you should not use it as the default response to allegations of misconduct.

So how can you avoid the same mistake?

Review your options

This employer, Hansen, suspended because it was nervous about its employee behaving inappropriately while it investigated. The issue was simple: had it given permission or not? Before deciding whether to suspend, consider the matter at issue and whether it is necessary to remove your employee from work while you investigate. If you suspect that your employee will interfere with witnesses or behave badly, what evidence supports that suspicion? If they pose a risk to the investigation or the business, can you transfer them to a different part of the business or alter their duties?

Scratch the surface

Check that the allegations have substance. Take the precaution of asking the employee to respond to the allegations. Their answer may change your initial view. Remember that case law tells us that you need a "reasonable and proper cause" to suspend.

Communication

If you suspend, remember to tell your employee why you have suspended them. That letter will also be evidence of your thought process.

Review

Regularly review whether the initial circumstances leading you to suspend, still apply and write to the employee if their suspension has been lengthy. You're paying full wages so keep suspension to a minimum.

Fair dismissal

Hansen argued that if it had constructively dismissed Ms Gyftaki, that dismissal was fair because she had failed to comply with a reasonable management instruction not to take leave. But that argument couldn't succeed because it hadn't been in the response to the claim. When responding to a claim of constructive unfair dismissal claim, remember to assert a potentially fair reason in your defence.

Are employees entitled to an extra day's pay next year?

2020 is a leap year but how does that affect pay? It depends on whether employees are salaried or are paid according to the hours they work.

A salaried employee who you pay the same basic wage every month will not be entitled to extra pay to account for the extra day in 2020. You pay these people a set salary for the year, and it doesn't matter if that year has an extra working day.

If you pay someone according to the hours they work, or the amount of work they do, they will be entitled to be paid for all work they do, regardless of the date or number of days in the year.

Withdrawing a job offer constituted disability discrimination

In [Birtenshaw v Oldfield](#) the employer withdrew a job offer after a medical report revealed mental health issues, cancer and intermittent back pain. The EAT upheld the tribunal decision that this was discrimination for something arising from disability and was unjustified.

So, you've offered someone a job subject to a medical, but the report suggests that they may be mentally or physically unfit for the job. What can you do?

The law

You can justify discrimination arising from disability if you demonstrate that the unfavourable treatment is a proportionate means of achieving a legitimate aim. This means that you will not discriminate because of something arising from an individual's disability if there is a genuine business need behind the measure and there is no other less discriminatory way of achieving that aim. A legitimate aim could be health, welfare and safety, the needs of your business or economic efficiency, but the need simply to reduce costs will not be sufficient.

Avoid assumptions

Rather than jumping to conclusions about what type of unfavourable treatment may be justified, you should:

- talk to your employee about the effects of their condition so that you can assess their abilities objectively
- obtain medical advice on your employee's abilities and what, if any, adjustments would help.

Take the initiative

- You are under a positive duty to take the initiative and consider what adjustments would be possible and practicable to support a particular disabled employee or job applicant.
- Consider what steps you can take to accommodate your employee's needs and ensure that they perform their job satisfactorily.

- Approach the issue in an open-minded, objective and supportive way.

Is vegetarianism a philosophical belief under the Equality Act 2010?

No, according to a tribunal which suggested that veganism is more likely to be protected under the Act.

In [Conisbee v Crossley Farms Ltd](#) and others, Mr Conisbee claimed that his employer discriminated against him because he is vegetarian, forcing him to resign. In a surprising decision, the employment tribunal held that vegetarianism was not a 'philosophical belief' capable of protection because it is not about human life and behaviour but is simply a lifestyle choice. It decided that while an "admirable sentiment", Mr Conisbee's belief that the world would be a better place if animals were not killed for food could not be described as relating to a weighty and substantial aspect of human life and behaviour.

However, the employment tribunal suggested that it may have come to a different conclusion in relation to veganism because it could see a 'clear cogency and cohesion' in veganism.

This first-instance decision is not binding on other courts and tribunals and may be appealed.

So how can you protect your business?

Whenever reasonably practicable, take the dietary requirements of your workforce into account when arranging social events or catering. Remember that some requirements will be linked to religious beliefs which attract protection under the Equality Act 2010. Practices will vary between individuals and within religions. Some individuals may be unwilling to handle or serve food or drink that their religion or belief forbids them to consume.

You can't pick cherries when waiving privilege

Communications passing between a party and their legal advisers are privileged, provided that they are confidential and were made for the purposes of obtaining or giving legal advice.

In [Kasongo v Humanscale](#), the employer disclosed notes of its legal advice in an attempt to demonstrate that it was unaware that the claimant was pregnant when it decided to dismiss her. It also disclosed a draft dismissal letter, prepared by its lawyers, but with the lawyer's comments redacted. However, Ms Kasongo managed to read the redacted words and sought to rely on them at the hearing.

The EAT decided that the employer waived privilege in advice about dismissal and so could not cherry-pick which parts of the advice it disclosed.

Specifically, this meant that the claimant could rely on the redacted comments at the hearing of the claim. This case serves as a reminder of the potential risks of selectively disclosing privileged material.

'Redundancy – busting the myths'

The latest in our series of short seminars is 'Redundancy – busting the myths'. These sessions, which will be held in Manchester and London, complement our annual employment law updates, which are held in June. I do hope you will be able to join us.

The requirement to save costs means that redundancy is an unfortunate consequence of business. We need to do the same with fewer people.

Our team of experienced employment lawyers will take you through the issues, including answering questions such as:

- Is last in first out a fair redundancy methodology?
- Can low performing employees be made redundant?

- Can absence be used when deciding who should be redundant?
- Do you have to exclude people on maternity leave from the redundancy exercise?
- It is obvious the job has gone so do we need to consult?
- Is it okay to let part timers and those on fixed term contracts go first?

There is no charge to attend. The seminars will start at 9.15am, and finish by 11.15am. Refreshments will be available at 8.45am (with registration) and during a mid-morning break.

To register [click here](#) to choose on your preferred date and location and fill in the registration form. We shall acknowledge your booking promptly and will send you more details on the event. If you have any questions or queries, please contact us on +44 161 703 5611.

They are in [Manchester on Tuesday 15th October](#) and [London on Wednesday 16th October](#)

Places on the seminar are limited, so act early to reserve yours.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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