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STUDENTS' UNION BULLETIN

WINTER 2022

Welcome to the winter edition of Wrigleys' students' union bulletin

We're delighted to bring you the latest students' union newsletter from Wrigleys Solicitors. If you scroll down, you'll find links to the latest articles on our website which are relevant to SUs, including a reminder about the rules for unincorporated SUs on signing contracts, an article about pensions considerations for SUs and a note about the law on campaigning and political activity which governs SUs. You'll also find links to selected articles from our employment team of relevance to the SU sector, particularly the series about handling disciplinary processes, which SUs do unfortunately have to deal with from time to time.

Coming up in May, we have our next webinar series, exclusively for students' unions. Details are below, along with links to recordings of previous webinars we have done for SUs. Please do sign up for those and let us know if there are any legal topics which you would like to see us cover in the future.

In more general news, we are expecting the draft Charities Bill to become law imminently, possibly as early as March. This will have implications for SUs, particularly in relation to changes to governing documents. And of course, we expect to see the much-discussed Higher Education (Freedom of Speech) Bill become law at some point in the not-too-distant future. We will bring you more news about these legal developments in our next update.

The Charity Commission has also published its long awaited official report into Kids Company this month, and there are a number of salient findings in the report that are relevant to SUs (notably comments on leadership, decision-making, record keeping, and reserves planning). The press release is here or if you're short of reading material, you can read the full report here.

The work we do for SUs ranges from incorporations and governance reviews through to employment law and contractual advice. As always, if you have any legal questions, please get in touch with any member of our team.

Best wishes,
Wrigleys Students' Union Team

Forthcoming webinars:

Tuesday 10 May 2022 | 11:00-12:00

Creating change through campaigning and politics: what can student's unions do?

Speakers: *Joanna Blackman & Daniel Lewis, solicitors at Wrigleys Solicitors*

Click here for more information or to book

Tuesday 17 May 2022 | 11:00-12:00

Incorporation

Speakers: *Nat Johnson, partner, Hayley Marsden & Wills Crump, solicitors at Wrigleys Solicitors*

Click here for more information or to book

Tuesday 24 May 2022 | 11:00-12:00

Student complaints

Guest speaker: *Jim Dickinson, associate editor at Wonkhe SU*

Wrigleys speaker: *Laura Moss, partner at Wrigleys Solicitors*

Click here for more information or to book

If you would like to catch up on previous webinars, please follow this link.

– Laura Moss, Editor **laura.moss@wrigleys.co.uk**

Contents

Unincorporated students' unions: who can sign documents?

Article published on 11 February 2022

In this article, we aim to clear up the confusion over who has the authority to sign documents on behalf of an unincorporated students' union.

We regularly see contracts, leases or other important documents, purported to be signed on behalf of an unincorporated students' union, which have not met the legal requirements for execution. They might be signed by a single trustee, a non-trustee or by a couple of trustees without the necessary authority from the whole trustee board.

In many cases, it may mean that the document is not valid. It might also mean that the people who have signed the document have done so in their own personal capacity, rather than in the name of the students' union.

For these reasons, it is really important to make sure that documents are signed correctly.

What is an unincorporated students' union?

An unincorporated students' union usually takes the form of an unincorporated association with the relationship and powers of the members governed by a set of rules.

The management committee of the charity, usually the trustees, will enter into contracts as individuals and will be jointly and severally liable for the debts and other liabilities of the union.

So, if the trustees contract as individuals, does this mean they all have to sign every document? No, not necessarily. This would be impractical, especially as there are often a substantial number of trustees on the board.

Delegated authority

Trustees are able to delegate authority to any two or more trustees to execute documents in their names and on their behalf. This power is found under section 333 of the Charities Act 2011 (the "**ChA 2011**").

Note that this only allows two or more trustees to execute documents. It would not permit (for example) the chief executive to execute documents on behalf of the students' union.

The authority can be general and can mean that any two of the charity trustees are able to sign, or it can be more restricted giving authority to a named few. Once the authority is given, any document signed by those authorised will give effect to the document as though all trustees had signed.

This authority can be given in writing by trustees or passed as a resolution at a trustee meeting. If the authority is given generally, it will remain effective until revoked. There is a presumption that any documents executed using section 333(5) of the ChA 2011 have been duly executed. However, it is important to ensure that the correct procedure has been followed and certain documents (e.g. documents required by the Land Registry) may require evidence of the resolution.

Where there is no delegated authority

If there is no delegated authority under section 333, some students' unions may have specific rules in their governing documents that allows for the execution of documents in a certain way. In very limited circumstances there may also be instructions from the Court or Charity Commission however, these are not common.

In the absence of delegated authority and where there is nothing in the governing document to authorise execution by a certain number of trustees, all trustees should sign as individuals.

Signing deeds in counterparts

It is not uncommon for deeds to be signed in counterpart. When executing a deed, it is important to ensure that each counterpart is complete. If two trustees are authorised to sign on behalf of the charity, they must sign on the same document to ensure that the counterpart is complete to avoid any questions about due execution.

If you have any doubts about how to execute specific documents or what is required in the written authority or resolution, please contact Laura Moss or any other member of our students' unions team for further assistance.

Pensions considerations for Students' Unions

Article published on 2 December 2021

While SUs have a variety of more pressing matters to consider, pensions are often the largest liability a SU carries.

Why should SUs care about pensions?

Pensions are not typically at the top of many Students' Unions (SUs) agendas; we understand there are a variety of pressing issues SUs have to deal with and, like many other employers, pensions naturally take a backseat.

However, pensions often represent one of the largest liabilities on an SU's balance sheet and managing these liabilities is a key responsibility for SU Trustees.

In this article, we consider some of the main pensions issues SUs face including:

· Managing Students' Union Superannuation Scheme (SUSS) liabilities
· Managing liabilities of other defined benefit pension schemes the SU participates in
· Auto-enrolment

What are defined benefit schemes?

Most employers are familiar with the requirement to auto-enrol certain employees into a suitable pension scheme. However, SUs often have additional pension obligations due to the unique way in which they are structured, including participation in defined benefit (DB) schemes.

A common example of a DB scheme is the SUSS. Additionally, it is not unknown for SUs to employ members of the relevant university's DB Scheme and, occasionally, public sector schemes (like the Local Government Pension Scheme).

DB schemes are typically more generous than DC schemes as they provide the employee a guaranteed level of income in retirement, with employers often having to fund former employees' benefits long after they leave or retire. DB schemes are also more highly regulated under both legislation and by the Pensions Regulator (TPR).

SUs are not exempt from pensions legislation governing DB schemes by virtue of their not-for-profit status (or otherwise), and must comply with these provisions in addition to their obligations under the Charities Act 2006, the Companies Act 2006, and the Education Act 1994. The main time compliance becomes an issue for SUs is on incorporation. As discussed below, pensions legislation

can lead to significant liabilities being inadvertently triggered on incorporation.

Pensions issues on incorporation for SUs

Many SUs choose to incorporate as a separate legal entity, because it offers more protection from personal liability for trustees, as well as simplifying administration. To see an outline of the potential benefits for SUs of incorporating, please read our article here.

The key pensions issue for SUs on incorporation is inadvertently triggering a significant debt under pensions legislation. A debt is usually triggered by the transfer of assets and staff to the newly incorporated entity (although it can also arise in other cases too). This issue is relevant for any SU who participates in the SUSS, or any other DB scheme, such as a university's own scheme.

Managing SUSS liabilities on incorporation

There are legal tools built into the legislation to help employers (like SUs) avoid triggering a debt in these circumstances. Every year the Trustee of the SUSS uses an 'easement' in pensions legislation, so that SUs have a window within which to incorporate, without triggering a statutory debt (this year's period ran from 5 July to 1 October 2021).

Certain statutory requirements must be met in order for the easement to apply and care must be taken to ensure each requirement is met in order to avoid a debt being triggered accidentally.

We have recently assisted a number of SUs through the incorporation process, as well as helping with wider issues like considering other stakeholders (e.g. universities) and advising on the correct execution of documents.

We recommend SUs seek legal advice at an early stage of the incorporation planning process, ideally the year before the proposed incorporation. In addition to providing legal advice, we can also support SUs in managing the pensions and other aspects of incorporation too. Please contact our SU team here if your SU is thinking of incorporating.

Other DB schemes

In addition to SUSS, SUs may participate in current or legacy DB schemes run by their university (a "**University Scheme**"). If so, the same issue of triggering a debt is also likely to be relevant in respect of that other scheme too. Ensuring that a debt is not triggered will require engagement with the Trustees of the University Scheme and will require a separate process to be followed. In short, it is essential for the SU to seek further legal advice where the SU participates in a University Scheme and intends to incorporate.

If the SU participates in a public sector pension scheme such as the local government pension scheme ("**LGPS**"), similar issues can arise to those of other DB Schemes. The SU should seek specialist public sector pensions advice (which we can provide) if it suspects its staff has these benefits and it is incorporating.

General statutory pensions issues

SUs will typically be one of several employers in a DB scheme. SUs will therefore typically take the lead from the main ('principal') employer in the DB scheme (e.g. the university or, as in SUSS, the NUS). However, this does not absolve SUs from responsibilities (e.g. to pay contributions to a scheme within statutory timescales). TPR can issue fines in many circumstances, so if you have any issues or queries regarding your SU's participation in a DB (or DC) pension scheme, please get in touch.

Auto-enrolment

All SUs should be aware of their obligation to automatically-enrol (and periodically re-enrol) eligible workers into a suitable pension scheme. Legislation on automatic enrolment ("**AE**") came into effect in 2012 and has applied to all employers since 2017.

AE compliance for SUs can be complicated by the temporary/causal nature of some workers they employ. AE legislation has a broad definition of "workers" and case law since AE was introduced has

potentially affected this definition too. If the SU is in any doubt about whether AE applies to a particular individual, we can provide advice and support to ensure the SU has complied with its AE obligations.

Additionally, SUs must also notify TPR on enrolment and re-enrolment of staff or face escalating penalties. Not all employers get this right and it can be helpful to obtain legal advice on how to address any TPR reporting concerns the SU may have.

Hopefully your SU is aware of the issues highlighted in this article. However, if you have any queries about the points above, or more general legal questions, please get in touch using the details below.

Campaigning and COP26: what are students' unions allowed to do?

Article published on 14 October 2021

How can students' unions make their voice heard?

With the world's leaders descending on Glasgow in November for the latest COP summit, many students' unions and their societies will be gearing up to take action on climate change. This article is a reminder of the activities which an SU may and may not engage with, be that protests, boycotts, campaigns or some other creative way of forcing the world to realise that we need to change the way we do things, urgently, to prevent a global catastrophe from getting any worse.

Excuse the language but…is it ultra vires?

During my year as a sabbatical officer, this phrase was the favourite of a certain type of student politician. Quite why people love this use of Latin is beyond me, but for those who would prefer a simpler approach, we're just talking about what an SU may do, in law.

Before engaging in any COP26-related activity, an SU should ask itself whether it has the power to do it. There are three aspects to consider:

- Is it permitted by the students' union's **constitution**, particularly the charitable objects? Chances are, the objects will say something about the students' union's objects being the advancement of education of students at a named institution. This means that everything the SU does must be with this aim: it must assist with the education of students, at that particular named institution.
- Is it compatible with being a **charity**? Is it for public benefit? Are the trustees complying with their duties in permitting the activity to go ahead, for example is it in the best interests of the SU?
- Is it compatible with the **Education Act 1994**? Does it further the interests of students as students? If you're funding a society activity, does it reflect the fair allocation of resources between societies?

Whatever decision is reached, it should be carefully minuted in writing, with reasons for the decision recorded. This all helps to demonstrate that the trustees have acted reasonably in the circumstances.

Campaigning and political activity

There are strict rules which govern what kind of campaigning and political activity a charity may do. Simply put, any campaigning activity must be justified as furthering the charity's purposes and the Charity Commission is clear that it must not become the sole activity or the reason for the charity's existence. The Charity Commission has useful guidance on this (CC9) (see here) and its Official Guidance for students' unions (OG48) has a handy section on political activity and campaigning (see here). It's well worth reading both of these if your SU is planning something COP26-related.

What about society activity?

Ah, the perennial question of whether an SU's societies are part of the SU or are independent entities. The lawyer's answer, as always, is 'it depends'. We sometimes see societies which are separate registered charities: they are not part of the SU. In contrast, where a society has a constitution prescribed by its SU, has no separate bank account and isn't affiliated to any external organisations, it's highly likely to be part of its parent SU. For these purposes, it's safest to assume that societies are part of the SU and that any activity a society engages in must be possible for the SU itself to do.

If you have any doubt about whether or not your SU can engage with a particular activity, please get in touch with any member of our SU team. We'd be happy to help.

Wrigleys' Essential Employment Guide The Disciplinary Process

Article published on 14 February 2022

How do you conduct a disciplinary hearing?

In this series of articles, Wrigleys' employment team explores the disciplinary process, offering guidance on key steps for employers.

In this article, we look at key considerations around how to conduct a disciplinary hearing.

By the time a hearing has been organised, the employer will have determined that there is a misconduct case to answer.

The purpose of the hearing is to allow all of the available evidence to be weighed in order to reach a fair and reasonable decision. Employers also need to take care with how the hearing is conducted to ensure the hearing itself is fair.

The burden of proof for upholding allegations at a disciplinary hearing is on the balance of probabilities – in other words, it only has to be more likely than not that the allegation is true – and it is at the hearing where the employer decides whether or not that burden of proof is met.

1. Who attends the hearing?

At a disciplinary hearing then any of the following may attend:

- The hearing will be presided over by someone usually called either the chair or hearing

manager. Sometimes, a hearing panel of three or more people will preside over the hearing. Ultimately, it will be for the chair, manager, or a decision of the majority of the panel, which decides whether any allegation is proved (or upheld) on the balance of probabilities.
- There will often be a note-taker to take accurate minutes or notes of the hearing. This person will usually be a part of the employer's HR team, but may be another employee or even someone external.
- It is considered best practice for the investigation manager to be present so that they can explain the investigation report findings and answer any questions about the investigation which may come up.

Where the employer is a small organisation, the chair, notetaker and investigation manager may be the same person. Although this is not ideal, it is recognised that not all employers have the resources to fully separate out these roles. Smaller employers may wish to consider appointing, for example an HR consultant as, an external investigator or even an external decision maker but these are not required; the requirement remains that whoever undertakes these important roles does so fairly.

- Also attending the hearing will be the employee who is alleged to have committed misconduct and their representative. The representative is usually either a trade union representative or colleague of the employee accused of misconduct, but may, on occasion, be a close friend or family member if a union rep or colleague is not available or appropriate.

Very rarely are employees represented by solicitors or barristers – this is usually only where the allegations being proven true could result in a professional effectively being barred from working again (e.g. where a doctor faces being struck off for malpractice by the General Medical Council).

- Depending on the evidence to be presented, witnesses may also attend the hearing. Often this will not be necessary as a thorough investigation should ensure any relevant witness evidence has been collected and is considered. Written witness evidence can be used. There is no 'right' to call witnesses so that their evidence can be questioned at the hearing; it will be for the chair of the meeting (in agreement with any panel) to determine whether they will need to speak direct with any witness in the case of any issue arising around their evidence.

On occasion the employee will not show up at the hearing. With planning this should be known in advance, with a reasonable explanation given and alternative arrangement made, including rescheduling the hearing. If the employee simply does not show, the employer must make enquiries and, if this is the first occasion of non-appearance it is likely that the meeting will need to be rescheduled. If this is a rescheduled hearing (following previous non-attendance or agreed rearranging) then the employee should have received a warning that the meeting may go ahead in their absence, in which case it can do so.

2. The setting

Meetings can take place remotely as well as in person, but it is important that if doing so the equipment has been tested and will withstand the process. As with face-to-face meetings, some consideration needs to be given to when and where the meeting will take place, with a view to making it as accessible as possible by all those taking part, including any appropriate reasonable adjustments to take account of any relevant disability.

Any in-person hearing room must be in a quiet area where disruptions are avoided and privacy can be maintained. A break-out area may be required, to allow an employee the opportunity to speak with their representative, or companion, in private or to take a break should the need arise.

3. The procedure of a hearing

We recommend that the chair, manager or panel open the hearing by introducing everyone who is

present and explaining their roles. It is then a good idea for the chair to set out what the complaint is against the employee and for the chair to confirm what the highest sanction is if it is upheld (for example, allegations of theft or dishonesty may amount to gross misconduct which, if proven, may result in immediate dismissal without pay in lieu of notice).

It should be made clear that the employee will be able to challenge evidence and present their own case. If they are accompanied by a colleague or trade union representative it should be made clear the companion can assist the employee in this but cannot answer questions on the employee's behalf.

Before getting into the detail of the hearing, it is a good idea for the chair to check the employee has received copies of all the evidence, including the investigation report and witness statements, and that they have read them before proceeding. If the employee has not read them, it is worth the chair considering allowing the employee reasonable time to do so.

From this stage the hearing will then consider evidence. Depending on the nature and complexity of the allegations, it may be most useful to go through the timeline of events first to establish key events and witnesses before more detailed evidence is considered. An employer should ask questions with the aim of establishing all facts, allowing the employee to explain their alleged misconduct or unsatisfactory performance. An employer should keep their approach formal and polite and encourage the employee to speak freely to establish the facts.

4. Employee's reply

The employee accused of misconduct should be allowed to put forward their own case and answer any allegations made. They should be permitted to ask questions and present their own evidence and witnesses.

Incorporating the employee's evidence can be one of the more tricky aspects of the hearing. For example, it may or may not be better to allow the employee to respond to each event and issue in turn, or it may be more helpful to allow the investigation manager to set out all of their evidence first and allow the employee to present their case after, with the chair asking follow-up questions to test evidence on key areas of difference.

Practically speaking, the vast majority of employees will not have pages and pages of documents or witness evidence and will likely spend much of the hearing trying to find problems and discrepancies in the evidence against them.

If the meeting is proceeding in the employee's absence it is of great importance that the chair, or panel, is able to evidence that they have taken account of any written representations which have been received from the employer and have given appropriate challenge to the evidence presented against the employee.

5. Summation and adjournment

On occasion it is necessary to adjourn the meeting before all the evidence has been heard. This may be to allow time-out, e.g. for short break to allow the employee to have a private discussion with their representative or companion, or something longer from a matter of hours, days or even weeks, for example where a hearing may run into another day, or to allow the chair (or panel) to make separate enquiry into any issue that has arisen.

Long adjournments should best be avoided if possible, and could reflect badly on the employers investigation and strength of their case. Issues arising can include unfairness in the delay in resolving matters, as time passes individual recollections may change, and the potential for allegations of bias where the chair or panel members may be perceived to have contact (and communications about the disciplinary matter) with the employer.

When all of the evidence has been presented and discussed, the chair should summarise the key points. This stage helps all parties to be focus on what the allegations are and what the key pieces of evidence both for and against them is. The chair should check whether the employee has anything further to say.

It is not always necessary for the chair to adjourn the hearing before making a decision, though best practice is for the chair to do so for at least a short time to ensure they cover off everything before coming to a decision. It is also a good idea for the chair to remove themselves from the room or ask other participants to do so, so that they can consider the evidence privately.

In complex cases the disciplinary hearing will be adjourned for the chair, or panel, to consider the evidence before coming to a decision. The chair will tell the employee that they will write with the outcome and their reasons within a set time period.

By conducting a hearing along the lines set out above, an employer will be better able to evidence that they clearly set out the hearing to the employee and allowed both sides' arguments to be heard when coming to a decision. This in turn will help to show a fair decision was arrived at. We will consider how employers can take steps to ensure the decision and applied outcome are fair, as well as how any appeal should be handled, in our next article in this series.

For further guidance, see Acas guidance: Discipline and Grievances at work.

Wrigleys' Essential Employment Guide The Disciplinary Process

Article published on 3 December 2021

How thorough should an investigation be?

In this series of articles, Wrigleys' employment team explores the disciplinary process, offering guidance on key steps for employers.

In this article, we look at the steps an employer should take to ensure the initial investigation of a disciplinary matter is fair.

If a disciplinary issue arises an employer cannot proceed straight to disciplinary action. Employers must take reasonable steps to identify relevant facts and evidence that will allow them to decide whether to proceed to a formal disciplinary hearing and, if so, that will allow the hearing manager to determine whether the allegations are upheld or not.

For this reason, conducting a thorough investigation is key to an employer being able to demonstrate that they acted fairly in coming to a disciplinary decision, which will be important if the matter is ever subject to tribunal proceedings.

Striking the right balance can be difficult for employers – just how thorough is thorough enough?

1. Preparation and setting up the investigation

The investigator must ensure they are clear about the allegation(s) they are tasked to investigate. They should also consider in advance what type of information will be needed to allow them to decide if there is a case to answer and create an investigation plan to structure the investigation process.

Investigators should not set out to 'prove' or 'disprove' a specific allegation, but rather seek out and

gather the facts and evidence which will allow them to weigh up whether there is a specific case to answer. Remember, it is the disciplinary hearing manager(s) who will ultimately decide if the allegations are upheld or not.

Where it is clear that the misconduct complained of could result in serious disciplinary consequences, such as dismissal, the investigator should prepare from an early stage to go into detail on the facts and events surrounding the alleged misconduct. The more serious the potential consequences, the more thorough the investigation needs to be (more on this below).

2. Gathering evidence

i) Witnesses

Most disciplinary investigations will involve at least one meeting with the employee accused of misconduct but may include meetings with witnesses. Investigation meetings should record the date, place and time of the interview, those present and an accurate record of the key points that arose. This will usually be better served by either having a note-taker present at the meeting or an employer might consider taking a recording of the meeting, providing the parties present are happy with this. Witnesses should be asked to sign an agreed copy of the minutes / transcript of the interview, or a written statement setting out their evidence.

The investigator should carefully consider who to call as a witness. For example, asking every employee in the team risks wasting time and spreading rumours about the employee that can cause problems for both the employer and employee. For this reason, witnesses should be carefully selected for their relevance to the facts which need to be established.

Investigators should also stick to relevant topics and questions with a witness and draw upon any other evidence gathered prior to the meeting. An investigator should always consider following up on any leads or claims made by a witness and can invite witnesses back for further meetings to test any evidence arising during the investigation. Witnesses referred to in the investigation meeting with the employee should usually be interviewed, unless it is reasonable to conclude that their evidence would not be relevant.

ii) Other evidence

An investigator should gather all the relevant evidence they can, including witness evidence, documentary evidence, digital evidence and physical evidence in the time available. Thought should be given to the type of evidence likely to be needed, whether it is available and how it can be accessed. What type of evidence will be collated will depend on the nature of the allegation. For example, some misconduct will only be apparent after reviewing documentary evidence (e.g. timesheet fraud or accounting misconduct) whereas other forms of misconduct may rely more heavily on witness evidence (harassment, bullying or violence).

It is also important to make sure that an investigator has taken steps to gather evidence that would undermine the allegations and clear the employee of wrongdoing, where this exists.

iii) Thoroughness

A good investigator should seek to establish facts with multiple sources of evidence. Multiple sources of evidence of different types which support one another can provide context and strengthen the case. For example, witness evidence can be biased and unreliable, and individual written documents may be partial or misleading, but witness evidence and written documentation which are consistent with each other are likely to be more reliable in establishing facts.

Precisely how thorough an investigator should be will in part depend on the seriousness of the misconduct. For example, if misconduct were upheld, will it result in dismissal or, as in some cases,

disbarment from a professional body or regulated activity (e.g. nurses, carers or teachers) putting their future career at risk. Where the potential consequences are this serious, investigators should make extra efforts to gather all relevant evidence they can.

3. Making findings of fact

An investigator should go in search of evidence that shows the employee did not commit the suspected allegations. For this reason, it is common that investigators will find contradictory evidence. Where possible, an investigation report should make findings of facts on the balance of probabilities. This means drawing conclusions about where the weight of the evidence points and, if possible, determine which versions of events or pieces of evidence are preferred and on what basis. Where there is contradictory witness evidence, this will often mean taking into account evidence which supports or undermines a witness' credibility.

It is not for the investigator to reach conclusions about culpability or appropriate sanctions, and so the investigator should not give an opinion or view about this.

4. Is there a case to answer?

Once all evidence has been collected, an investigator should review and weigh the evidence and consider whether the facts established by the investigation suggest there is a case to answer.

An investigation report should be put together to summarise the evidence collected, highlight key evidence and set out the specific misconduct allegations the evidence points towards before providing a recommendation of whether or not to put the allegations to the employee in a disciplinary hearing.

The result of a good disciplinary investigation should be an investigation report that clearly sets out:

- Whether there are any disciplinary allegations to answer
- What those allegations are
- What the evidence for and against those allegations is, with an indication of the key evidence supporting and (if any) undermining the allegation is
- Where the evidence was found or gathered from

This will assist the hearing manager to identify early where the key matters of a disciplinary hearing will be and thus help them to prepare a fair hearing and, ultimately, come to a fair outcome.

For further information, please refer to Acas guidance: Conducting Workplace Investigations.

If you would like further information on how to carry out a thorough investigation, it is always a good idea to speak to a professional HR adviser or employment law specialist before carrying out your investigation.

Wrigleys' Essential Employment Guide The Disciplinary Process

Article published on 18 November 2021

To suspend or not to suspend?

In this series of articles, Wrigleys' employment team explores the disciplinary process, offering guidance on key steps for employers.

In this article, we look at key considerations when suspending an employee as part of a disciplinary

process.

Employers sometimes assume they have a right to suspend staff as they please, but the reality is more complicated

Employers may be faced with disciplinary situations where suspending an employee may seem like a sensible step whilst investigations are carried out, or sometimes for the duration of the disciplinary process. However, doing so has implications that can catch employers out and may lead to employees having claims against them.

Suspension should not be an automatic part of any disciplinary process. It may not always be required, and alternatives to suspension should be considered first. We consider the main issues around suspension below.

1. Could suspension be a breach of contract?

In some cases, a decision to suspend could be a breach of the employment contract.

If an employer is considering suspension, the first thing they should check is whether there is a contractual right to suspend the employee. This may be set out in the contract itself, but it could be included in a contractual disciplinary policy.

If there is no contractual right to suspend, an employee could argue that there is an implied contractual right to work and that the suspension was in breach of this right. Particular care in this regard should be taken when dealing with senior managers and/ or employees who have performance-related bonuses where suspension may affect their ability to achieve targets, or where keeping someone out of work may result in a loss of public profile, skills or currency, or undermine their status within the workplace.

Whether or not there is a contractual right to suspend, the employer will need to have solid grounds to suspend the employee.

Even where there is an express contractual right to suspend an employee, the courts have found that this right is subject to an implied term that it be exercised on reasonable grounds.

Suspension has also been found in the courts to be conduct by an employer which is likely to destroy or damage the mutual trust and confidence between employer and employee. The key question will be whether the employer has reasonable and proper cause to suspend in the particular circumstances of the case.

See our article from March 2019 (available on our website), Teacher's suspension was not in breach of contract, for more detail on how the courts approach this question.

We set out below some of the key factors in considering whether it is reasonable to suspend.

It is also important to note that employees who are suspended are usually entitled to their normal pay and benefits. Failure to pay the employee may be a breach of contract and/ or result in a claim for underpayment of wages.

2. Grounds for suspension during a disciplinary procedure

Whether or not there is a contractual right to do so, most disciplinary procedures do not require suspension. Suspension may also be avoided by considering alternatives (see below) so that the employee can continue working while an investigation progresses.

An employer should avoid rushing to a decision to suspend and in all circumstances have

reasonable grounds for doing so.

However, there will be times when it is necessary to suspend. This is usually where there has been a serious allegation of misconduct and where one or more of the following apply:

- where there is a risk of an employee influencing witnesses/the disciplinary process or tampering with or destroying evidence
- there is a genuine risk to other employees, customers, service users, property, or other business interests if the employee were to stay in the workplace
- the employee is subject to criminal proceedings that inhibit their ability to perform their duties
- where there are medical grounds or other risk-based reasons to suspend

3. Consider alternatives to suspension

It is important to consider practical alternatives to suspension because of the potential effect it may have on the employee, including reputational damage and protecting them from unwanted 'office gossip'. Alternatives to suspension may include:

- reassignment elsewhere within the organisation
- home working
- a change of duties
- a change of working hours
- working under supervision

4. Considering the wider context

Having considered all the above factors and decided suspension is appropriate, an employer should still stop to consider what the suspension means in the wider context. For example, they should take into account any precedents set with other employees in similar situations and consider whether any difference in treatment could be considered discriminatory (if the employee in question has a protected characteristic). They should also consider whether the suspension might be connected to whistleblowing or other legally protected acts.

5. Taking the decision to suspend

Ultimately, an employer needs to come to a conclusion by weighing up the factors for and against suspension and deciding on which side of the line to fall. This may be a very easy decision (for example, where an employee is accused of violent acts in the workplace) but in most cases there will be nuances.

Keeping a written record of the reasons for the suspension and why alternatives were not feasible in the circumstances can provide useful evidence where grievances or claims are raised by suspended employees.

6. That is not the end of the matter!

Having made the decision to suspend, that is not the end of the matter. The suspension must be kept under review; to ensure it remains reasonable particularly should any underlying investigation becomes drawn out.

If you feel uncertain about whether to suspend an employee, it is always a good idea to seek legal advice before making a decision.

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