KensingtonSwan LAWYERS

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EMPLOYMENT NEWS >>UPDATE

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Suspending an employee without the need for an express provision to do so

Deciding to suspend an employee from their employment (the right to work) can be tricky for employers.

Frequently employers want to suspend an employee while it conducts an investigation into allegations of serious misconduct. However, the courts have held that in the absence of an express contractual term authorising suspension, it will only be in unusual cases that it is justifiable.

The fact that an employer may have reason to suspect that an employee has engaged in misconduct, or even serious misconduct, does not, of itself, justify suspension while those concerns are investigated. To justify suspension, employers must have good reasons to believe that the employee's continued presence in the workplace will, or may, give rise to some other significant issue.

The case law tells us that the justification for suspension must take account of both broad principles of procedural fairness and the particular circumstances of the employment, including the consequences of suspending and not suspending for the employee and the employer.

There is also the statutory duty of good faith that requires an employer contemplating suspension to provide access to appropriate and relevant material about the proposed suspension and give the employee an informed opportunity to be heard on the proposal before a decision is made.

In a recent case, B&D Doors Ltd v Hamilton, the Employment Court held that an employee can be suspended without an express suspension provision in the employment agreement, and even in exceptional circumstances, in the absence of consultation. However, in each case, the fairness of the decision must be assessed on the facts.

In this case the Court found that there were substantive reasons for the suspension. There had been three instances of what appeared to be industrial sabotage within the space of a week. There was some evidence suggesting that Mr Hamilton might have been involved in two of the most recent events. There were no health and safety issues raised, but there was the potential for economic damage to the employer. While there were prima facie grounds for suspension, those grounds were not so strong, or the risk of danger so imminent that suspension without consultation was justifiable. Neither were there circumstances such as to mitigate the unfairness inherent in failing to consult with Mr Hamilton.

What does this mean for my business?

The important point to be taken from this case is that, while it is possible to suspend an employee for serious misconduct, in the absence of any contractual authority, it will only be in rare circumstances where this decision will be justified. In each case, the fairness of the decision will be assessed on the facts, and a prudent employer will first consult with the employee before deciding to suspend.

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Employees can sue before starting work

Even though an employee has not yet started working for your business they can still successfully sue for a personal grievance.

Therefore, if you decide that your business no longer requires the employee (who has not yet started working), you need to make sure you terminate the employment relationship the same way as you would an employee, who has already commenced work.

When does a candidate become an employee?

Under the Employment Relations Act, an employee is defined as 'a person intending to work'. In other words, a person who has been offered, and who has accepted an offer to work, is an employee. All employees have the right to claim a personal grievance if they believe they have been unjustifiably dismissed or disadvantaged.

A recent Employment Relations Authority ('ERA') decision illustrated this legal point. Akaroa Cinema was successfully sued by an employee, who had been offered work, but had not yet commenced working. The employer sought to end the employment agreement with the employee because they no longer required the employee's services.

The ERA determined that the employee had been offered work by the Akaroa Cinema because of the wording of emails between the employer and the employee. In particular, the ERA found that the employer's behaviour at an initial meeting with the employee, the employer's subsequent email traffic to the employee, and the employer's telephone discussions with the employee were all factors indicative of an employment relationship.

What does this mean for my business?

Employers need to treat the ending of an employment relationship with a ‘person intending to work’ in exactly the same way as an employer would deal with terminating an employment relationship of an employee, who has already commenced work. Employers need to be aware that an employment agreement can still be enforced even if the agreement is not in writing. As soon as an offer of employment is accepted, the employment relationship is on foot.

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