



## Suspending an Employee: An Update

Employers became concerned when the High Court allowed the appeal of an employee with regard to the issue of suspension. As reported back in our January 2018 Brief, the case that was decided then made it clear that employers should be very careful before automatically imposing a period of suspension on an employee without full consideration of the facts. The Court of Appeal have recently considered the facts surrounding that case and whether the previous courts had erred in their decisions.

The case involved a school teacher who was alleged to have used unreasonable force towards two of the class. She was suspended pending investigation of these allegations and although the

suspension letter referred to a neutral act and suspension not being a disciplinary sanction, the employee challenged this as being a repudiatory breach of the implied duty of trust and confidence. She did not argue that the allegations against her should not be investigated but that it was not reasonable or necessary to have the suspension whilst the investigation took place. At County Court level, the employer was found to have been bound to suspend her after receiving the allegations and as there had been reasonable and proper cause to suspend her, it had not breached the implied term.

On appeal, the High Court allowed the employee's appeal finding that the County Court had been mistaken in suspending the employee. The suspension had been adopted as a default position, and was

a knee jerk reaction, and therefore was in breach of the implied duty of trust and confidence. The Court of Appeal finally allowed the appeal of the employer and restored the County Court judgment.

Although suspension is often described as a neutral act, it can be perceived as far from neutral. Prior to suspending an employee, an employer must be satisfied that it has reasonable and proper cause for the suspension in order to avoid breaching the implied term in everyone's contracts of mutual trust and confidence. It cannot be used as a routine response. Identifying suspension as a neutral act does not necessarily make it so. It invariably casts a shadow over the employee's reputation and Acas guidance makes it clear that any suspension that can be justified should be as brief as possible and regularly reviewed.



# Workers - Employees or Independent Contractors?

The issues surrounding the definitions between these different categories of people continue to roll in. Most recently, the National Gallery has been the subject of their art experts claiming that they were workers. An employment judge has held that the art experts who worked as educators for the National Gallery were workers when they undertook individual assignments. Between those assignments, they were not employees nor workers. The Gallery's argument that they were independent contractors in business on their own account was in the court's opinion unsustainable.

All of these cases are going to be specific on their facts but in this case the educators undertook training, observed several gallery talks and attended debriefs before delivering two tours under observation in order to be appointed to the team. The educators made themselves available for work that suited their expertise and personal commitments and there was no penalty for declining work. The Gallery did not acknowledge any obligation to provide them with work and did not go beyond assurances that it would offer as much work as it could and distribute the assignments equitably between the group. Either side were able to cancel assignments at any stage and for any reason but this rarely happened. In the contract there was no right and in practice there was no actual substitution and there was no right to swap assignments between educators.

The educators were required to confirm to the Gallery's stipulation in relation to the teaching practice and presentation and there were detailed written guidelines. Although the educators were paid standard fees for each assignment and these were authorised for payment against pay claim forms submitted by the educators, they were paid through the payroll and they were subject to deductions for income tax and national insurance.

The advice on this topic is that if you are going to have a non-standard arrangement you need to make sure there is contractual documentation in place making it absolutely clear. Once that contractual documentation is in place it should be adhered to. A document will not protect you if it does not reflect what happens in reality.

## Possible Changes to Non-Disclosure Agreements

There cannot be many employers out there who have not now heard of Non-Disclosure Agreements (NDAs). NDAs are a type of confidentiality clause normally used in settlement agreements to prevent publication of sensitive information. The reason they have become so contentious as with many things is not so much that they have existed before but they have recently been found to be misused. NDAs that are used to intimidate victims of harassment into silence have now come under the scrutiny of the Government and it has indicated that it will legislate to stop employers from using these clauses in that way.

The proposals being considered are legislation to make it clear that disclosures to the police cannot in any way be prevented by an NDA. Furthermore, requiring a clear description of

the limits of confidentiality within a written statement and ensuring that the worker receives specific independent legal advice on the limits of such clauses. The Government are also considering that any settlement agreement contains set wording which if not used could make the agreement void in its entirety. The consultation runs until 29 April and asks for responses from both workers and employers.

Of course, employees entering into settlement agreements are already under an obligation to get legal advice and it is not uncommon to see whistleblowing exceptions to any Non-Disclosure Agreements. We will be keeping an eye on this fast-developing area and report further in subsequent Briefs.

# Guidance on Gender Pay Gap

In February the Government Equalities Office published two sets of guidance for employers entitled “8 Ways to Understand Your Gender Pay Gap” and “4 Steps to Developing a Gender Pay Gap Action Plan”. These guides are aimed at helping employers close any gender pay gaps that may exist in their organisations.

The first document sets out eight questions that employers should ask themselves to identify the potential causes of any such gap. Are some employees stuck at certain levels within the organisation and is there any gender imbalance in their promotion records? The key issue behind many of the questions being asked is to know what is happening in your organisation. Do men and women leave your organisation at different rates? Another key issue is to identify whether part time workers are managing to progress their careers. Part time workers are more likely to be female than male and there is often a mistaken feeling that they do not have a desire to advance their careers.

The four steps for developing an action plan are to analyse the data that you have and identify the actions to be taken. Then consult and engage with the employees as the best way forward before embedding an action plan. Such steps will not be able to be undertaken overnight but need to form part of the business’ long-term plan.



## Flexible Working and Work Life Balance

We have had a lot of feedback from last month’s article on managing stress and how to balance this with the need for businesses to provide goods or services outside the traditional working hours model. Previously the issue of flexible working was only ever discussed by those returning from maternity leave. In today’s environment it should be something considered by all employers for their employees. Flexible working is not just about how long or short working hours are but also where the employees work. In service sectors such as hotels the use of flexi time and part time workers proves successful in providing a workforce in what is a truly 24/7 environment.

There is no doubt that a happier workforce is a more productive one. Employers will need to consider that just because they have always done something one way, it does not necessarily mean that is the only way going forward. They may also have to accept increasing costs in staffing levels so that those that do not choose

a flexible working option are not overloaded. Flexible working has been shown to provide better retention of employees and also attracts a wider pool of applicants. A diverse workforce with a lower level of sickness absence is going to be easier to manage and could ultimately provide a better customer experience than more standard arrangements.

With developments in technology, the time lost to commuting could be reclaimed for the benefit of either the employee, the employer or both.

The Acas website has some very helpful leaflets with regard to the different sorts of flexible working that you may not have considered. As well as flexi time, there are also such items as job sharing, compressed hours and annualised hours which could be of assistance. If your staff are working long hours, regularly insisting that they need to work at weekends to meet their targets, getting poor customer feedback or being regularly absent due to ill health, it is time to look at how to change this for the benefit of the employee as well as the employer.

## News in brief



### Overworking

TUC analysis has revealed UK workers did over £32 billion worth of unpaid overtime in 2018. The 5 million workers who did this time have in effect worked the first two months of the year for free. Top of the list for those who did in excess of their hours were teachers and educational professionals at 12.1 extra hours per week closely followed by legal professionals at 10.2. The TUC general secretary said, “overworking staff hurts productivity, leaves workers stressed and exhausted and eats into time that should be spent with family and friends. Employers who steal people’s time in this way should face consequences.”

### Seasonal Workers Pilot Opens

The seasonal workers pilot announced by the Home Secretary in 2018 has now opened. Fruit and vegetable farmers are able to employ up to 2,500 non-EU migrant workers for seasonal work for up to 6 months. The pilot will run until the end of December 2020. Two scheme operators have been identified as being licensed to manage the pilot and will be responsible for identifying suitable workers and matching them to UK farmers. They will also be required to ensure the welfare of the workers whilst they are in the UK. This pilot is intended to test the effectiveness of the immigration system and alleviating seasonal labour shortages during peak production periods whilst maintaining immigration control.



# Are new Directors aware of their duties?

Many young businesses are more relaxed in their approach to business life, but how many directors of such businesses fully understand the need to accurately record and minute decision making at a board level and the future consequences if they don't?

Company directors need to be fully aware of their duties as they are accountable for their actions in company law. The company can take enforcement action against company directors and shareholders could also sue company directors.

Directors duties apply to any person who is a director, shadow director, executive and non-executive and in certain situations former directors.

Firstly, there are responsibilities to companies house which includes the confirmation statement, the annual accounts, changes in company's officers or their personal details, changes to the registered office, allotment of shares, registration of charges ie mortgage and any changes in your company's people with significant control. Whilst many businesses hire people such as an accountant to manage some of these things, the company director is still legally responsible.

**The other key directors' duties are:**

1. To act within powers
2. To promote the success of the company considering:
  - The consequences of decisions including the long term
  - Interests of employees
  - Need to support business relationships with suppliers, customer and others
  - Impact of operation on the community and environment
  - Company's reputation for high standards of business conduct
  - Need to act fairly to all members of the company.
3. Act with independent judgement
4. Exercise reasonable care, skill and diligence
5. Avoid conflicts of interest
6. Not accept third party benefits
7. Declare interests in a transaction

Companies should make sure that all directors are aware of their duties. Holding regular board meetings and clearly evidencing decision making and the steps directors have taken helps to demonstrate compliance with the above.

Getting corporate governance right from the beginning should help to reduce the risk of legal issues at a later date.

## Quick reference section

**Statutory minimum notice periods:**  
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more, but less than two years.
- One week's notice for each **complete** year of service for those employed for more than two years.
- Once an employee has more than 12 year's service, the notice period does not extend beyond 12 weeks.

**National Minimum Wage**

	April 2018	April 2019
Apprentices	£3.70	£3.90
16-17	£4.20	£4.35
18-20	£5.90	£6.15
21-24	£7.38	£7.70
25+	£7.83	£8.21

**Statutory Sick Pay (from April 2019)**  
Per week £94.25

**Statutory Shared Parental/Maternity/Paternity/Adoption Pay**  
(basic rate) (from April 2019) £148.68

**Statutory Holiday**  
5.6 weeks for a full time employee.  
This can include bank and public holidays.

**Redundancy Calculation**

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme for dismissals after 6<sup>th</sup> April 2018 at £508.00 and after 6<sup>th</sup> April 2019 at £525.00.



### CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.



**Amanda Finn**  
Tel: 01622 689795  
Email: a.finn@gullands.com  
Twitter: @Gullands\_HR\_Law



**Andrew Clarke**  
Tel: 01622 689733  
Email: a.clarke@gullands.com



**Sarah Astley**  
Tel: 01622 689727  
Email: s.astley@gullands.com



**Dudley Cramp**  
Tel: 01622 689734  
Email: d.cramp@gullands.com



**Jonathan Haines**  
Tel: 01622 689736  
Email: j.haines@gullands.com

Gullands Solicitors are Authorised and Regulated by the Solicitors Regulation Authority. Number 50341

16 Mill Street  
Maidstone  
Kent ME15 6XT  
01622 678341

18 Stone Street  
Gravesend  
Kent DA11 0NH  
01474 887688

www.gullands.com  
info@gullands.com



This newsletter is intended to provide a first point of reference for current developments in various aspects of law. It should not be relied on as a substitute for professional advice.