

A-Z Guide

SUSPENSION



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Overview

Suspension should not be considered lightly in any circumstances. Suspension does not suspend the contract of employment; it merely suspends its *performance*, i.e. the employee's work duties.

An employer may suspend employees who are striking, as well as non-striking employees who have no work because of a strike by other employees. The suspension of striking employees ensures that no wages are payable to those employees. Both striking and non-striking employees may be suspended even if the strike is unlawful.

An employer may also suspend an employee as part of its disciplinary process. A suspension during a disciplinary process is usually suspension on pay. The rules of procedural fairness apply to suspension during a disciplinary process.

Introduction

The issue of suspension arises in two areas of employment – strikes and discipline. However, suspension is only lawful in certain circumstances. This guide will deal with suspension in both areas as isolated topics, but it is recommended you read the other **A-Z Guides** referred to, as they provide context for what is stated in this guide.

Suspension for strikes or discipline should not be considered without professional advice. It is a serious step and should be exercised with care. Depending on the circumstances, it may have serious consequences for the employee.

Procedural mistakes and failings are not viewed kindly by the courts but these are readily avoided with information and advice.

The Adviceline can assist you with understanding the procedural requirements of suspension under the Employment Relations Act 2000 for strikes, and the rules of procedural fairness that the Courts expect employers to abide by, when suspending employees during discipline.

Suspension During Strikes

Employment Relations Act 2000

For the purposes of this guide, at a basic level a strike is an *abeyance* (something put on hold) of the performance of the employment contract. A strike is an action taken by employees. The employees' strike may be lawful or unlawful according to the Employment Relations Act 2000.

Sections 87 and 88 of the Act allow employers to suspend striking employees, as well as non-striking employees where they have no work because of other employees' strike action. In order to suspend employees, there must be:

- An actual strike, rather than a proposed strike
- At the time of the suspension, notification to each individual suspended employee of this section of the Act, and that under it that employee is being suspended
- Suspension cannot be retrospectively applied. It applies from the moment the employer is made aware of the strike and then notifies the employee on strike that they are suspended

It is best practice to give notice in writing to striking employees of their suspension.

Striking employees

Factors to know when considering the suspension of employees who are on strike:

- A strike occurs when any two or more employees partially or wholly cease to perform their contract of employment;
- The strike must be actually taking place, not merely notified or threatened;
- Suspension may be revoked;
- For each striking employee, the mutual duties between them and employer, of trust and confidence, continue in effect;
- You must be certain that an employee is participating in a strike, rather than absent for any other reason;
- A strike ends for an individual employee when they go on holiday;
- A strike may be ended by dismissal;
- A strike may be ended by a general willingness of the striking employees to return to work (the strike ends because the employees then lack the necessary element of concerted agreement to take industrial action under section 81).

Non-striking employees

Factors to know when considering the suspension of employees who are not on strike:

- The strike must be in existence;
- The employees concerned must not be on strike;
- The employer must be unable to provide work as the result of the strike;
- The work, that is not able to be provided, must be work normally performed by the employee concerned;
- Once imposed, the suspension remains in place until the strike ends – it cannot be revoked (this is different from striking employees);
- The inability to provide work does not need to be a physical inability;
- "Unable" to provide work does not necessarily mean unprofitable, insufficient, inconvenient, undesirable or uneconomical – the nature of the work may affect the inability to provide it;
- The inability to provide work for non-striking employees may be the direct result of the employer's suspension of striking employees;
- No employer is required to create work in order to occupy employees – the obligation is that for *normally available* work, the employer does not make it *unavailable*.

Effect of suspension

Striking employees are not ready or willing to work, either fully or in the manner intended by the employee's employment agreement. This applies to lawful and unlawful strikes.

In most instances nowadays, the employee will have no claim for wages lost during the strike. This may be because the employment agreement contains a clause that provides for the rateable deduction of wages in specified circumstances. Alternatively, under the employment agreement, wages are not payable when the employee is not ready or willing to work.

For the purposes of this **A-Z Guide**, whether an employee is entitled to wages while on strike, depends on the circumstances of the individual case. No general rule can be stated about the entitlement to wages during strike action.

When the employer *suspends* employees during strike action, however, the employees are then not entitled to any remuneration – salary, wages, allowances, or any other payments – for the period of the suspension.

The suspension mechanism is powerful. It also ensures that employees are not entitled to payment for any public holidays that occur during the strike, or performance-based allowances, for the duration of the strike.

Suspension

The ability to suspend non-striking employees can be a powerful threat during industrial unrest and for this reason it must be managed carefully.

The Act establishes that on the ending of the strike, any suspension ends, allowing striking and non-striking employees to return to work. When a strike ends, and therefore the suspension, is controlled by the striking employees. Both the strike and suspension end when striking employees return to work.

Upon the resumption of an employee's employment, the employee's service must be treated as continuous, despite the period of suspension, for purpose of rights and benefits of employment that are conditional on continuous service (leave, holidays, and allowances).

Lockouts

The power to suspend is not applicable to lockouts, even when a lockout is unlawful. The Employment Relations Act 2000 provides that employers are not liable for any remuneration during lockouts unless a lockout is unlawful. In section 96, remuneration means salaries, wages, allowances, and other payments related to the period of the lockout.

Refer to the **A-Z Guide on Strikes and Lockouts** for the definitions of "strike" and "lockout".

Suspension During Discipline

In some circumstances, you may need to consider the suspension of an employee against whom an allegation of serious misconduct has been made.

Refer to the **A-Z Guide on Discipline** for a definition of serious misconduct.

Basis

Suspension should be treated very seriously and not imposed lightly. The decision to suspend should only be taken after seeking an explanation from the employee and affording them an opportunity to comment. Once a suspension is imposed, it should be no longer than is absolutely necessary for the purpose it was imposed, such as if it was to carry out an investigation. It should only be imposed where no other alternatives to suspension are feasible.

In order for the employer to have the power to suspend an employee, it must be procedurally justifiable and accord with the rules of natural justice. It is also advisable, though not legally required, to include the employer's right to suspend in the employment agreement. Employers have experienced problems at Employment Relations Authority investigations if they suspend without the right established in writing. Unless the employment agreement permits otherwise, the employee must be suspended on pay.

If there is no express contractual provision authorising suspension, it can only be justified where the employer has good reason to believe that the employee's continued presence in the workplace will/may give rise to some other significant issue. For example, it may be a threat to the health and safety of others, or there is a real risk of sabotage to the company.

If the employment agreement stipulates conditions and/or a procedure required for suspension, not following it is a breach of the agreement.



Suspension

The courts consider the power to suspend an employee during discipline:

... a drastic measure which if more than momentary must have a devastating effect on the officer concerned. The prejudice occasioned the officer by a suspension can never be assuaged even if he is ultimately vindicated at the disciplinary hearing and is then restored to office and paid his arrears of salary. (Birss v Secretary for Justice [1984] 1 NZLR 513)

The decision to suspend an employee during discipline must be considered carefully because:

1. A suspension may and often does hamper the employee's preparations of answers to the charges. Sometimes that may be the very purpose of the suspension. Employers need to consider, in each case, whether it is fair to suspend when no immediate need exists.
2. A prolonged suspension of an employee, on account of suspected misconduct, unfortunately almost always leads to dismissal on account of that conduct. The interim inquiry and the disciplinary process run the risk of being influenced, prejudiced, and sometimes compromised, by a premature and unnecessary suspension, especially if the suspension has been ordered by an officer more senior than those carrying out the inquiry.

Suspicion hardens into firm belief for no particularly good reason other than a desire to protect the status quo represented by the suspended employee's absence from the workplace.
(*Frank v Air New Zealand Ltd (Unreported) AEC 65/95*)

Suspension can be considered where the allegation directly impinges on the employee's ability to carry out their duties, because it involves:

- Unauthorised possession or removal of company property, or
- Violence against another employee, or
- Serious harassment of another employee, or
- Gross negligence, or
- Risk of serious harm to the employee or other employees.

Procedure

The procedure to follow to suspend an employee during discipline should include:

- Putting the serious allegation to the employee and the facts it is based on.
- Advising the employee that you intend to suspend them for a period of the investigation, and the reasons why that suspension is necessary.
- Telling the employee that they are entitled to speak to a legal representative if they wish, and giving the employee the opportunity to call their representative.
- Inviting the employee to address the question of whether or not they should be suspended, and to be heard on any other related matters.
- Considering the employee's views.
- Advising the employee of your decision to suspend (on pay or otherwise as permitted by the employment agreement) and the reasons for that decision.
- Informing the employee that the suspension will be for the shortest period possible.
- Informing the employee that they are required to remain contactable during the suspension, that the employee has not been dismissed, and that they should remain available to return to work or for further interviewing.
- Completing the investigation and proceeding to a disciplinary process, or not.
- Confirm in a suspension letter:
 - The allegation that the employer is investigating
 - Why they are being suspended (to investigate, security etc)

Suspension

- The suspension clause or policy relied on
- That the employee was given the opportunity to comment on the proposed suspension
- Whether the suspension is paid or unpaid
- The requirement to remain contactable
- When the employee will be notified of the disciplinary meeting date
- That no decision has been made on the disciplinary issue

Liability

If an employee is suspended in light of serious allegations that then prove to be false or unsustainable, so long as you have followed a fair and reasonable process and considered the alternatives before imposing the suspension, the suspension should withstand a legal challenge.

If an allegation is found to be false or unsustainable, the suspended employee should be fully informed about that. Consider additional support for that employee; they may feel apprehensive about returning to the workplace, particularly if the allegations were widely known.

An employee who raises a personal grievance in relation to a suspension may be determined to have suffered an unjustified disadvantage in their employment, if that suspension was substantively unjustified or occurred in a procedurally unfair manner.

Refer to the **A-Z Guides** on **Personal Grievances** and **Discipline** for more information.

Conclusion

A number of considerations are required when contemplating suspending an employee. Natural justice demands that your decisions whether or not to suspend employees, in any situation, are justified in the circumstances of the case. Whether you are considering suspension during strike action, an investigation or a disciplinary process, it is strongly recommended you seek professional advice before suspending any employee.

Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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