



Employee suspension – when can it be done?

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Often employers will find themselves in situations where they feel the need to remove an employee from the workplace. In these situations, it is important that proper processes for employee suspension are followed to avoid allegations of breach of the [employment contract](#) and/or applications for [general protection orders](#).

Serious misconduct grounds for employee suspension

Generally, employers will consider suspending an employee when allegations of serious misconduct have been made against the employee. Where the employer holds concerns that the business and/or employees will be at risk if the employee remains in the workplace or that the employee's presence will hinder an investigation into the misconduct, employee suspension is a reasonable action.

Serious misconduct involves an employee deliberately behaving in a way that is inconsistent with continuing their employment. Serious misconduct includes that which causes serious and imminent risk to the [health and safety](#) of another person or to the reputation or viability of their employer's business.

It can include actions by the employee like:

- theft;
- [fraud](#);
- assault;

- [sexual harassment](#); or

- refusing to carry out a lawful and reasonable instruction that is part of the employee's employment.

Things to consider when suspending an employee

A direction to suspend a person from their employment must be lawful and reasonable. It is important for employers to consider an employee's:

- [employment contract](#);

- [workplace policies](#);

- [modern awards or enterprise agreements](#),

prior to making the decision to suspend an employee.

Whilst an employment contract should always be considered when making the decision to suspend, the Federal Court has previously held that at common law, an employer has a right to temporarily suspend an employee on full pay for as long as is necessary to undertake and conclude a workplace investigation.

Importantly, suspensions in order to investigate an allegation against an employee should be temporary and not indefinite. As a general rule, an employee should also be paid during the suspension period. To withhold pay during a suspension period can have major adverse ramifications for an employer.

You can read more about the processes for workplace investigations, from both an employer and employee perspective, in our earlier articles:

- [6 tips for employers conducting workplace investigations](#)

- [The rights of employees under workplace investigation](#)

- [Workplace investigations involving criminal allegations](#)

When deciding whether to suspend an employee, it is also necessary to consider the impact of the suspension on an employee. Employers should consider whether, instead of a suspension, there are alternative duties that the employee can perform. Often it is easy to discount the impact that a suspension can have on an employee because the employee is being paid during the suspension period. It is important, however, to remember that, to an employee, a suspension can feel like a punishment. It can cause an employee to feel ostracised by their colleagues and can impact their reputation.

If, as an employer, you are unsure whether or not an employee suspension is reasonable or lawful, you should seek advice. Likewise, if you are an employee and feel your suspension from work is unfair and unreasonable, you should seek legal advice about your options, including a breach of your employment contract or a general protections claim.

[Get advice from a workplace lawyer: 07 3361 0222](#)

When might employee suspension lead to a breach of employment contract?

In [*Avenia v Railway & Transport Health Fund Ltd*](#), the court determined that an employer was lawfully entitled to suspend an employee while undertaking a workplace investigation, despite there being no express suspension clause in the written employment contract.

In essence, the court determined that at common law, an employer is able to 'temporarily' suspend an employee on full pay for as long as is necessary to undertake and conclude an investigation.

It is important to note, however, that employees are still entitled to certain rights while suspended and facing disciplinary workplace investigations. This includes a right to procedural fairness during the investigation process.

An employee should also not be suspended for an indefinite period of time. It is important that any directions issued to an employee suspending them from their employment must be reasonable.

Employers should consider:

- the deprivation of the employee's right to work;
- the terms of the contract;
- the circumstances surrounding the decision to suspend the employee; and
- the duration of the suspension.

A failure to consider these matters may result in findings that an employer's suspension of an employee was unreasonable and/or a breach of the employment contract.

When might employee suspension lead to a general protections claim?

General protections are a set of protections for employees which prohibit a range of actions in the workplace, including but not limited to, adverse action, coercion, misrepresentation, unlawful termination and others.

If an employer suspends an employee's employment because the employee has exercised a workplace right, then the employee may have grounds to lodge a [general protections claim](#) at the Fair Work Commission.

In *Avenia v Railway & Transport Health Fund Ltd*, the employee (Dr Avenia) lodged a general protections claim with the Fair Work Commission stating that he had exercised a workplace right by making a complaint to his employer. Further, by subsequently receiving a show cause letter from his employer (following his suspension), the employer had committed an unlawful adverse action against him.

Ultimately, and upon the matter being heard by the Federal Court of Australia, it was determined that the employer had not committed adverse action, nor had it dismissed the employee for exercising the workplace right. Rather, the court found that the employer had lawful grounds to dismiss the employee.

How to suspend an employee

If an employer considers that a suspension is lawful and reasonable, they should explain to the employee:

- that a decision has been made to temporarily suspend their employment while allegations against them are being investigated. The employee should be told the nature of the allegations and why the decision to suspend is necessary;
- that alternative duties have been considered (including what those alternative duties are) and why they are not appropriate;
- that the employee will be paid during the period of the suspension;
- that the employee will not be permitted to attend the workplace or speak with colleagues during the period of the suspension;
- that the employee is still employed and, therefore, must continue to comply with their employment contract and policies. Further, the employee is to remain contactable over the suspension period;
- that the suspension is not a pre-determination of the investigation process, and no decision has been made nor will be made in relation to the investigation until after the employee has been provided with an opportunity to respond to the allegations; and
- that the employer recognises the impact that the suspension will have on the employee's health and well-being and will have access to a support person and/or 'employee assistance program' (if available and possible).

Get help from an employment lawyer

The decision to suspend an employee is difficult and, if not considered properly, can result in adverse consequences for an employer. If you are an employer who requires advice regarding the possible suspension of an employee or an employee who has been suspended and is concerned about the lawfulness of the suspension, please contact us.

Contacting Gilshenan &Luton Criminal Defence Lawyers

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