



A-Z OF EMPLOYING

Suspension

Our guide for Employers and Managers

**SUPPORTING,
FACILITATING &
REPRESENTING
BUSINESS**

Business**Central** 

Suspension

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Contents

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It should not be a
substitute for
professional advice.

Please seek advice
from our AdviceLine
Team if you require
specific assistance.

| | |
|-------------------------------------|---|
| Overview | 3 |
| Introduction | 3 |
| Suspension During Strikes..... | 3 |
| Employment Relations Act 2000 | 3 |
| Striking employees..... | 4 |
| Non-striking employees | 4 |
| Effect of suspension | 4 |
| Lockouts | 5 |
| Suspension During Discipline | 5 |
| Basis | 5 |
| Procedure | 7 |
| Liability | 7 |
| Conclusion | 8 |

Suspension

Our guide for Employers and Managers

Overview

Suspension should not be considered lightly in any circumstances. Suspension does not suspend the contract of employment; it merely suspends its performance.

An employer may suspend employees who are striking and an employer may suspend 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 and 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 and 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 distinct areas of employment - strikes and discipline. In both areas however, suspension is only lawful in certain circumstances. This guide will deal with suspension in both areas as isolated topics; however it is recommended that you read the other **A-Z Guides** referred to as they provide context for what is stated in this guide.

Suspension, whether in regard to 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 viewed dimly by the courts but these are readily avoided with information and advice.

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

Suspension During Strikes

Employment Relations Act 2000

For the purposes of this guide it is sufficient to understand that a strike is an abeyance (it is put on hold) of the performance of the employment contract. A strike is an action taken by employees and it may be lawful or unlawful within the meaning of the Employment Relations Act 2000.

Sections 87 and 88 of the Act allow employers to suspend striking employees and, non-striking employees where there is no work for those employees because of other employees' strike action. In order to suspend striking and/or non-striking 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 the section of the Act under which that employee is being suspended.
- ▶ Suspension cannot be retrospectively applied, it applies from the moment the employer is made aware of the strike and notifies the employee on strike that they are suspended.

It is best practice that the notice to striking employees that they are suspended is in writing.

Suspension

Our guide for Employers and Managers

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;
- ▶ In respect of each striking employee, the mutual duties 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 in respect of 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 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 need not be a physical inability;
- ▶ “Unable” to provide work may not equate to 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 to not make normally available work unavailable.

Effect of suspension

When an employee strikes, whether or not that strike is lawful, the employee is not ready or willing to work either at all, or in the manner intended by the employee’s employment agreement.

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, or it is clear that under the employment agreement wages are not payable when the employee is not ready or willing to work.

It is sufficient to state, for the purposes of this **A-Z Guide**, that whether or not an employee is entitled to wages for the period during which that employee is on strike, is a matter that must be

Suspension

Our guide for Employers and Managers

determined on the circumstances of the individual case. No general rule can be stated about the entitlement to wages during strike action.

The Employment Relations Act 2000 provides employers with the power to suspend striking employees. The effect of suspension is that any striking employee (or non-striking employee as the case may be) who is suspended is not entitled to any remuneration by way of salary, wages, allowances, or any other payments in respect of the period of the suspension.

The power to suspend employees during strike action is a powerful mechanism; it ensures that employees are not entitled to payment for any public holidays that occur during the strike or, allowances that are performance based for the duration of the strike.

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 provisions of the Act make it clear 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 any suspension ends, is controlled by the striking employees. Both the strike and suspension end when striking employees return to work.

The Act stipulates that 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 in respect of 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 be imposed lightly. The decision to suspend should only be taken after seeking an explanation from the employee and affording the employee an opportunity to comment. Once a suspension is imposed, it should be no longer than is absolutely necessary for the purposes of carrying out the investigation if that was the reason it was imposed. It should only be imposed where no other alternatives to suspension are feasible.

Suspension

Our guide for Employers and Managers

In order for the employer to have the power to suspend an employee it must be procedurally justifiable and accords with the rules of natural justice. Furthermore it would be advisable, albeit not legally required, to include the employer's right to suspend in the employment agreement. The reason for including in the employment agreement is because in the past, employers have experienced problems at Employment Relations Authority investigations if they suspend without the right 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 or 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 to be followed for suspension, it will be a breach of that agreement for which the employer may be liable, if they are not followed. The power to suspend an employee during discipline is considered by the courts to be:

... 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 in the preparation of an answer 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 to do so 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 who are entrusted with the task of 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.

Suspension

Our guide for Employers and Managers

Procedure

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

- ▶ Putting the serious allegation to the employee and the facts upon which it is based, and
- ▶ Advising the employee that you intend to suspend them for a period of the investigation and the reasons why that suspension is necessary, and
- ▶ 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, and
- ▶ Considering the employee's views, and
- ▶ Advising the employee of your decision to suspend (on pay or otherwise as permitted by the employment agreement) and the reasons for that decision, and
- ▶ 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, and
- ▶ 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)
 - 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 regarding 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. It is recommended that additional support for that employee be considered at that time; the employee may experience apprehension 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 his or her employment if that suspension was substantively unjustified, or the employee was suspended in a procedurally unfair manner.

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

Suspension

Our guide for Employers and Managers

Conclusion

There are a number of considerations 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 that you seek professional advice before suspending any employee.

Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact 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.
- ▶ Visit our website www.businesscentral.org.nz regularly.
- ▶ Attend our member briefings to keep up to date with all changes.
- ▶ Send your staff to Business Central courses and conferences designed for those who manage employees.

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