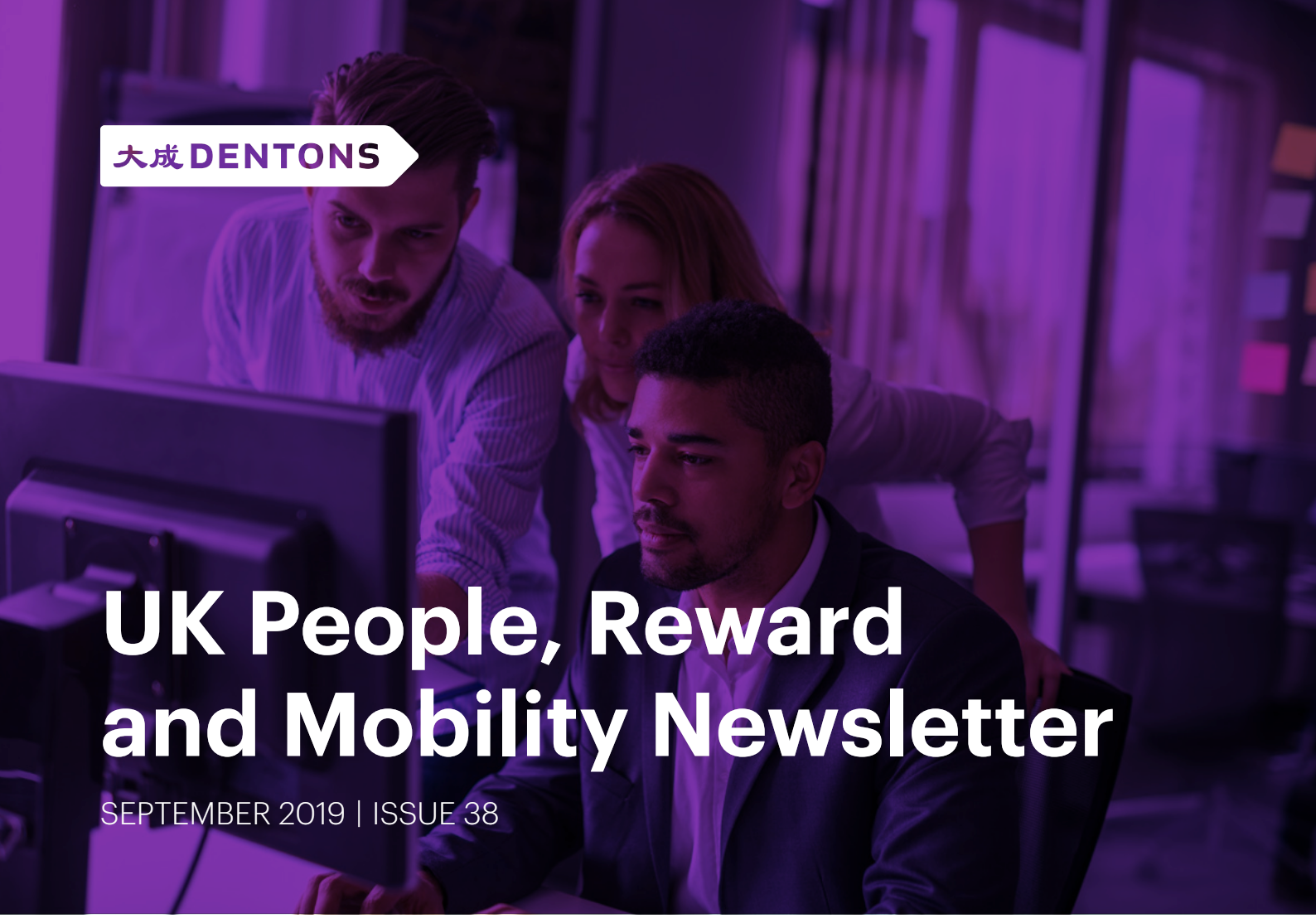

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UK People, Reward and Mobility Newsletter

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IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: the waiver of legal professional privilege, reasonable belief in whistleblowing claims, fines incurred as a result of GDPR breaches and the law around the suspension of employees.

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Update on "cherry picking" the waiver of legal professional privilege

In *Kasongo v. Humanscale UK Ltd*, the EAT has clarified that legal professional privilege cannot be "cherry picked". Even with a break in time between communications, if the advice relates to the same matter or legal question, privilege cannot be selectively waived for some communications related to it, but not others.

What is privilege?

Privilege is a well-known right entitling a person who is involved in legal proceedings, in certain circumstances, to withhold documents from inspection by their opponent during the disclosure process. The privilege in the document belongs to, and therefore can only be lost (or waived) by, the client – for example, if the document ceases to be confidential.

This is important because, in legal proceedings, the parties have to disclose documents relevant to the dispute to their opponents. In most proceedings, the documents to be disclosed will include those the client relies upon as supporting their case, along with any relevant documents which adversely affect it. Privilege protects certain otherwise relevant documents from being seen by an opponent as part of this process.

The main types of privilege are:

- **Legal advice privilege**: This protects any confidential communications, and evidence of those communications, between a lawyer and their clients for the purposes of giving or receiving legal advice. It also protects communications sent by lawyers to their clients as an information update, so they can give (or their clients can ask for) legal advice when necessary. It does not protect documents which are created internally by the client, unless those documents have been created for the purposes of giving or receiving legal advice.
- **Litigation privilege**: This applies where litigation is reasonably in prospect, i.e. it is contemplated but has not necessarily started. It protects all confidential documents created for the dominant purpose of conducting or aiding the conduct of the litigation. Litigation privilege is broader in scope than legal advice privilege. It will extend to protect confidential communications with third parties by both a client and its lawyers, e.g. witnesses and experts. It also covers any adversarial proceedings, not just litigation.
- **Without Prejudice Privilege**: This applies to discussions and documents created while genuinely negotiating in an attempt to settle a dispute. By way of example, without prejudice offers to settle a claim or admissions made during without prejudice negotiations aimed at settling a dispute are protected from disclosure during any continuing or subsequent legal proceedings.

Case update

In *Kasongo v. Humanscale UK Ltd*, the EAT has clarified that legal professional privilege cannot be "cherry picked". Even with a break in time between communications, if the advice relates to the same matter or legal question, privilege cannot be selectively waived for some communications related to it, but not others.

In *Kasongo*, the claimant was dismissed two weeks after informing her manager that she was pregnant. The grounds for her dismissal were her poor performance, attendance and lateness. The claimant alleged, among other points, that the real reason for her dismissal was her pregnancy. During the disclosure process, the respondent disclosed:

- a note, prepared by the respondent's HR manager, of telephone advice which she had received from their external solicitor in relation to the dismissal;
- an email of the same date from the HR manager to the respondent's in-house counsel, summarising the advice, and explaining that they wished to terminate the claimant's employment "based on behaviour (issues with tardiness, attendance and quality of work)"; and
- a draft dismissal letter prepared by the respondent's external solicitor, with comments from the solicitor which were redacted.

Despite the redaction, the claimant was able to read the redacted comments from the solicitor in the dismissal letter. The comments appeared to suggest that the respondent was trying to come up with excuses to avoid a discrimination claim. The claimant sought to rely on these comments as evidence of discriminatory behaviour. However, the respondent contended that the letter was covered by legal advice privilege and therefore could not be relied upon.

As noted above, legal advice privilege is one of three types of privilege, and is intended to enable clients to place unrestricted confidence in their lawyer. The courts confirmed in *Three Rivers DC v. Bank of England (No 5)* that legal advice privilege can also extend to materials which "evidence" the substance of confidential communications passing between clients and lawyers for the purpose of giving or receiving legal advice, as well as any information prepared to be communicated but never actually is. As a result, the judge at first instance accepted the respondent's arguments that the draft dismissal letter referred to above was covered by legal advice privilege.

The respondent also submitted that the draft dismissal letter was not part of the same "transaction" as the note and the email, and that therefore they were not "cherry picking" their waiver of privilege by having disclosed those documents, while still seeking to rely on privilege to redact the draft dismissal letter. Ultimately, the respondent contended that the draft

dismissal letter did not fall within a collateral waiver, whereby a party elects to waive privilege in some documents, and is therefore obliged to disclose documents that form part of the same "transaction". The judge did not comment on the attendance note, but found that the email to the in-house counsel was not privileged in any case, because the advice did not come from a legal adviser.

On appeal, the EAT stated that the tribunal had been wrong to conclude that the email (and note) were not subject to legal advice privilege. Even though the communication had not been between a lawyer and client, the advice provided by the lawyers to the HR manager did not lose privilege just because it was communicated internally in the same organisation (even though it had been paraphrased). Further, the EAT found that the letter was clearly part of the same "transaction" as the note and email, given that it related to advice about the claimant's dismissal. The six-day gap between the advice and the draft dismissal letter did not affect the continuum of the advice being provided to the legal question of whether the claimant could be dismissed. As a result, the decision to invoke privilege with the letter was found to be selective, and was done to obtain a forensic advantage. The EAT stated that the "cherry picking" risked unfairness and/or misunderstanding arising from the fact that the court would only have a partial view of the privileged material. Therefore, the respondent's position was rejected. The claimant was therefore allowed to rely upon the full letter in its complete unredacted form, given the respondent had chosen to waive privilege in respect of the note and email.

Points to note going forwards

This decision is a stark reminder that employers should take care not to inadvertently waive privilege on communications with lawyers, if they relate to advice on a matter, without considering if they would also want to waive privilege in respect of all other communications related to that specific matter (regardless of the time that may have passed between the giving of each piece of advice). When considering whether matters are related in this context, the question is whether the advice given ultimately relates to the same legal question.

Some further takeaway points for employers include:

- exercise restraint in creating documents by communicating orally. It may be more efficient and effective to hold a meeting to discuss any relevant issues face to face, rather than have a chain of emails which may later have to be disclosed in court;
- unless communicating with lawyers in circumstances where privilege can be guaranteed, do not provide opinions about matters such as whether something is good or bad, strong or weak. Instead, only record facts accurately and concisely;
- for disclosure purposes, the term "documents" captures letters, emails, diaries, handwritten notes, CDs, electronic files, photographs, text messages and voicemail recordings, as well as records obtained from hard drives, mail servers and mobile phones;
- ensure that, when reporting on legal advice, any documents recording that advice are separated from any other commercial issues (preferably in a different note); and
- where possible, store privileged documents separately from non-privileged documents.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- Whistle blowing and the "public interest"
- Could a tribunal claimant freeze their employer's bank account?
- References – to give or not to give?
- Are millennials really taking over our workplaces?
- Government uncovering the cover-up culture

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Reasonable belief and whistleblowing claims

What constitutes a reasonable belief that a disclosure has been made in the "public interest"?

In the recent EAT decision in *Okwu v. Rise Community Action*, it was held that protected disclosures in whistleblowing cases meet the public interest test as long as the employee has a reasonable belief that the disclosure would be in the public interest, regardless of whether the disclosure actually does have such value.

Background to reasonable belief in the public interest

The public interest test was introduced as an additional requirement for whistleblowing protection in 2013. In order to be considered a protected disclosure, and benefit from protection under the whistleblowing legislation, the worker blowing the whistle must reasonably believe that his/her disclosure is in the public interest. This test was considered by the Court of Appeal in *Chesterton Global Ltd (t/a Chestertons) v. Nurmohamed*. Essentially, the court concluded that even if the public interest is not the worker's predominant (or any part of their) motive for making a disclosure, he or she can still be protected. This case also made it clear that disclosures relating to a worker's own contract could still potentially be protected.

Okwu

This was precisely the type of disclosure that was in dispute in *Okwu v. Rise Community Action*. Ms Okwu was employed by Rise, a charity which provided support for victims of domestic violence and female genital mutilation. Her probationary period had been extended following a performance review in which a number of issues regarding her work were raised. Subsequently, Ms Okwu submitted a letter complaining of various problems she felt were unaddressed within the organisation. These included the fact that she had to use a shared mobile phone for dealing with clients and the lack of secure file storage available at the organisation. She claimed that these points were in breach of data protection legislation, given the sensitive nature of the client information that she regularly dealt with as part of her work.

Following submission of this letter, the charity dismissed Ms Okwu. The reasons they gave for the dismissal were her poor performance and the fact that she had *"demonstrated [her] contempt for the charity"* by sending the letter.

The employment tribunal dismissed her claim for unfair dismissal on whistleblowing grounds, stating that, as the letter raised only *"personal contractual matters"* that did not relate to anyone but her, the disclosure did not have sufficient public interest.

However, on appeal, the EAT held that the tribunal had erred in its application of the public interest test. It held that even if the disclosure had been made by Ms Okwu in response to the performance issues that had been raised, this did not mean that she could not also have a reasonable belief that the disclosure was in the public interest. Following *Chesterton*, the EAT noted that motivation was irrelevant and what counted was whether they reasonably believed there was a public interest to their disclosure. Given the sensitive nature of the information involved in this case, the EAT sent the case back to the tribunal to reconsider whether Ms Okwu had such a reasonable belief.

Comment

Following this decision, employers should be alive to the possibility that employees may be protected by whistleblower protections, even where the disclosure is made in defence of their own position. The public interest test is satisfied if the employee can show that they had a reasonable belief that their disclosure was in the public interest, irrespective of their actual intention for making it.

The heavy price of GDPR

25 May 2018 is the date likely etched on the hearts of information controllers everywhere: the date the General Data Protection Regulation (GDPR) came into force. Fifteen months on from the introduction of GDPR, what changes have we seen? Have any companies received the dreaded fine of 4% of their annual global revenue?

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As we are likely all aware, the EU GDPR is the most important change in data privacy regulation in 20 years, transforming the way in which personal data is collected, shared and used globally. Most processing of personal data is now subject to the GDPR. The Regulation requires a lawful basis for processing data, incorporates seven key principles (such as accuracy, accountability and data minimisation) and provides various rights for individuals (such as the right of access and the right to object).

Enforcement

So what fines have resulted since the GDPR came into force? The powers of the Information Commissioner's Office (ICO) were bolstered significantly with its introduction.

The biggest fine to date has been for £183.39 million. In July 2019, the ICO announced that it had fined British Airways and its parent company, International Airlines Group (IAG), in connection with a data breach that took place last year – affecting 500,000 customers who had browsed and booked tickets online. This fine was 1.5% of BA's total revenues for the year ending December 2018, but could have been as much as 4%.

A day later, the ICO fined Marriott International £99.2 million. This related to a cyber-breach in another hotel chain that Marriott subsequently bought.

As this breach was reported to the ICO in November 2018 (once GDPR was in force), the fine was substantially higher than it would have been under the previous Data Protection Act. Under that Act the maximum fine would have been £500,000.

Looking to the rest of Europe, a hospital in Portugal was fined €400,000 (roughly £350,000) for a range of failures, including a profile management system which showed the profiles of 985 registered doctors (despite the fact that there were only 296 doctors engaged at the hospital) and gave doctors unrestricted access to all patient files, regardless of the doctor's specialty.

Going forward

We can see that data regulators such as the ICO are not afraid to issue large fines and that data privacy and protection are to be taken seriously. Although the fines highlighted above are at the higher end of the scale, it is likely that more will follow. These have been imposed on a range of companies – such as a hotel chain and a hospital, not just tech companies as you might expect.

Going forward, the ICO has stated that its main areas of focus will be:

- cyber security;
- AI, big data and machine learning;
- web and cross-device tracking for marketing purposes;
- children's privacy;
- use of surveillance and facial recognition technology;
- data broking;
- the use of personal information in political campaigns; and
- freedom of information compliance.

Companies should continue to audit their current compliance and ensure that staff are adequately trained in GDPR. It is worth noting that BA was externally hacked and no customer suffered any financial loss, yet they received a substantial fine nonetheless. Marriott was fined for IT security failings that were present before it even bought the company responsible, so companies need to take every precaution to avoid incurring hefty fines.

Suspending employees

In instances of serious misconduct, an employer may in certain circumstances want to suspend an employee who is being investigated as part of a disciplinary process. It is not normally necessary to consider suspension unless there is an allegation of gross misconduct. Even then, a gross misconduct allegation will not always warrant suspension, as examined in the article.

Suspension: the basics

In instances of serious misconduct, an employer may in certain circumstances want to suspend an employee who is being investigated as part of a disciplinary process. It is not normally necessary to consider suspension unless there is an allegation of gross misconduct. Even then, a gross misconduct allegation will not always warrant suspension, as the case study below highlights.

Suspension may be appropriate where:

- there is a potential threat to the business or other employees;
- it is not possible properly to investigate the allegation if an employee remains at work. This would usually be because there is a risk that the employee may destroy evidence or attempt to influence witnesses; and/or
- relationships at work have broken down. However, in such cases, each individual is likely to have their own view of who is to blame and employers should be careful not to give the impression of having prejudged this issue.

This list is not exhaustive. Each case should be considered, taking into account these and other factors the employer deems relevant.

Suspension: contractual requirement

We recommend standard employment contracts include a right to suspend, along with a method of calculating pay during the suspension. Even where an employer has the contractual right to suspend, it must be exercised on reasonable grounds and so employers should take care that suspension is justified in the circumstances. A record should be kept of the factors taken into account when deciding to suspend.

Avoiding a breach of the implied term of trust and confidence

If someone is suspended from work, there is a risk that the individual treats this as a breach of contract, resigns and claims constructive dismissal. This would be based on a breach of the implied duty of trust and confidence. In order to reduce the risk of employees having a good claim for constructive dismissal, there are a number of steps employers should take. We recommend that employees should be informed as soon as possible that the decision to suspend has been taken and this should be communicated in writing. This letter should clearly state:

- that the employee is suspended;
- how long the employee can be expected to be suspended for;
- what the employee's rights and obligations during the period of suspension are – their employment contract continues, but they are not to report to work, must not contact colleagues and must remain contactable; and
- that suspension is on full pay.

The employer should keep the suspension under review so that it continues for as short a period as reasonable in the circumstances. The reasons for the suspension should also be reviewed, as there may be changes on the ground which need to be taken into account. If continued suspension becomes unreasonable, then the employee may be able to argue that the outcome of the disciplinary process has been prejudged, rendering the outcome unfair.

An employer should also continue to engage with the employee and be clear that the suspension is not punitive. Rather, it is intended to facilitate investigation.

A "knee jerk" decision to suspend gives an employee a much stronger argument that there has been a breach of mutual trust and confidence by the employer. A suspension will be treated as "knee jerk" where it was automatic and the employer did not think through other measures which could have been put in place or whether it could have been avoided entirely.

The case study below illustrates the challenge an employee can make, based on an employer's decision to suspend.

Case study: Upton-Hansen Ltd Architects (UHA) v. Gyftaki

In the recent case of *Upton-Hansen Ltd Architects (UHA) v. Gyftaki* the claimant, Ms Gyftaki, was employed as a senior architect at UHA.

Ms Gyftaki gave notice that she would have to take extra annual leave due to a family emergency. Ms Gyftaki had already used up her holiday entitlement for the year. Due to genuine confusion, Ms Gyftaki was under the impression that she had been granted additional leave.

Late in the evening, the night before Ms Gyftaki was due to travel, her employer informed her that her request had been denied. Despite this, Ms Gyftaki travelled and said she would take the time as unpaid leave. Upon her return, Ms Gyftaki was suspended pending an investigation into the allegation that she had taken an unauthorised holiday. At this point, UHA also told Ms Gyftaki that they would also be investigating issues relating to her previous holiday absence.

Ms Gyftaki resigned when she was suspended. She brought claims against UHA for unfair constructive dismissal and wrongful dismissal. Ms Gyftaki argued that she had been constructively dismissed as both her suspension and the introduction of the issues of previous holiday absence into the investigation amounted to fundamental breaches of the implied term of mutual trust and confidence that was owed to her by UHA.

It was held by both the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) that Ms Gyftaki's suspension amounted to a breach by UHA of the implied duty of trust and confidence. Both held that Ms Gyftaki had been constructively and unfairly dismissed.

In evidence before the ET, one of the directors of UHA said that in view of Ms Gyftaki's seniority, and the fact that she was project lead on three important projects, he felt that suspension was a prudent step to take. He justified this on the basis that it would protect the organisation, preserve the confidentiality of the investigation and protect Ms Gyftaki from embarrassment. Her business email account was also suspended.

The ET described the decision to suspend Ms Gyftaki as being at the heart of this case.

The reasons given by UHA, as found by the Tribunal, will be familiar to many employers and you might have sympathy with UHA. UHA was nervous that Ms Gyftaki would behave inappropriately at work, were she not to be suspended. They thought she was likely to be upset and so would set a bad example to her junior colleagues. There was also a concern that she might possibly breach any confidentiality obligation UHS had placed upon her.

The Tribunal gave no credence to these reasons, finding that there was no real evidence to support the stance of the directors. The ET did not accept that the suspension took place to protect the integrity of any investigation or the business as a whole. The ET accepted Ms Gyftaki's evidence that, given a protracted period of suspension, it was more likely for questions to be asked by colleagues and inferences drawn, rather than Ms Gyftaki simply returning to work and being advised to keep the matter confidential. The length of the suspension (more than three weeks) exacerbated the concerns the ET had over the reason for the suspension, particularly in light of Ms Gyftaki's mental ill health.

The ET found that, whilst the breach of trust and confidence was not the most shocking they had seen, there was indeed a breach and that one of the significant matters leading to that breach was the decision to suspend Ms Gyftaki. The ET, in applying a common sense approach, found that the situation could have been avoided by both parties communicating in a more sensible and timely way about the last minute nature of the request for additional leave. Ms Gyftaki could have asked sooner; UHA could have turned the request around before 8.30pm on the night before the leave.

The EAT agreed with the ET in this case. In relation to the matter of the suspension, the EAT found that UHA's reasons for suspension were not related to Ms Gyftaki's taking unauthorised absence, but rather how she might behave on her return to work when she was told that there would be a disciplinary investigation. It found the ET had been entitled to conclude that the suspension had been an element that had caused the fundamental breach leading to the constructive dismissal finding.

The EAT remitted the case back to the ET for a recalculation of the remedy.

Consistency of treatment

A suspension policy, in the same way as other policies, should be operated consistently. This comes into sharp focus where, for example, two or more employees are involved in an incident of misconduct – one is suspended, and the other is not, without good reason for the difference in treatment. This of itself could give an employee the basis of a claim for breach of trust and confidence. Moreover, if the employee who is suspended has a protected characteristic that the other does not, this might give rise to a case of direct discrimination.

It should always be clear, and should certainly form part of an employer's paper trail, that there has been some consideration given as to whether suspension is necessary in the circumstances and for what reason. The fact that an investigation might be required does not mean that it goes without saying that suspension should also take place.

Employers must remember where an employee resigns during a suspension and claims constructive dismissal because of it, the tribunal will focus very much on the suspension. The tribunal will not focus on whether the employer would have been justified in dismissing or disciplining the employee. The decision to suspend is the material issue and must therefore be given the attention it deserves.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- Scottish Grocer – Rhona Azir and Claire McKee look at the rights of EU nationals working in the UK and how Scottish retailers can avoid discriminating in their business.
- People Management – Helena Rozman assesses the success of national minimum wage legislation so far and how it might develop in future.

If you have ideas for topics you'd like us to cover in a future round-up or seminar, please tell us here.

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