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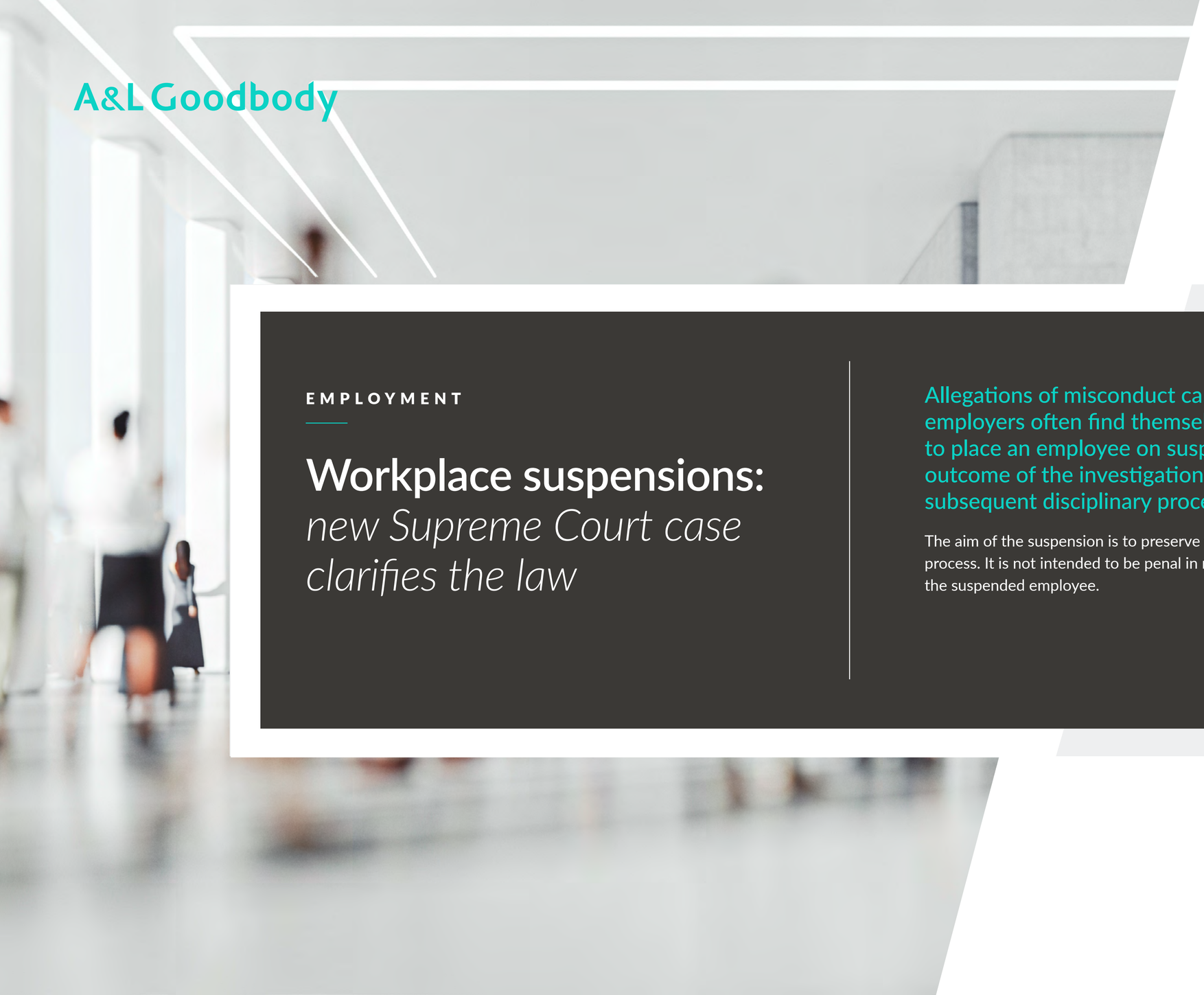

EMPLOYMENT

Workplace suspensions: *new Supreme Court case clarifies the law*

Allegations of misconduct can arise in any workplace and employers often find themselves having to consider whether to place an employee on suspension, with pay, pending the outcome of the investigation into those allegations and/or subsequent disciplinary process, i.e. a “holding” suspension.

The aim of the suspension is to preserve the status quo pending the outcome of the process. It is not intended to be penal in nature but is frequently perceived as such by the suspended employee.

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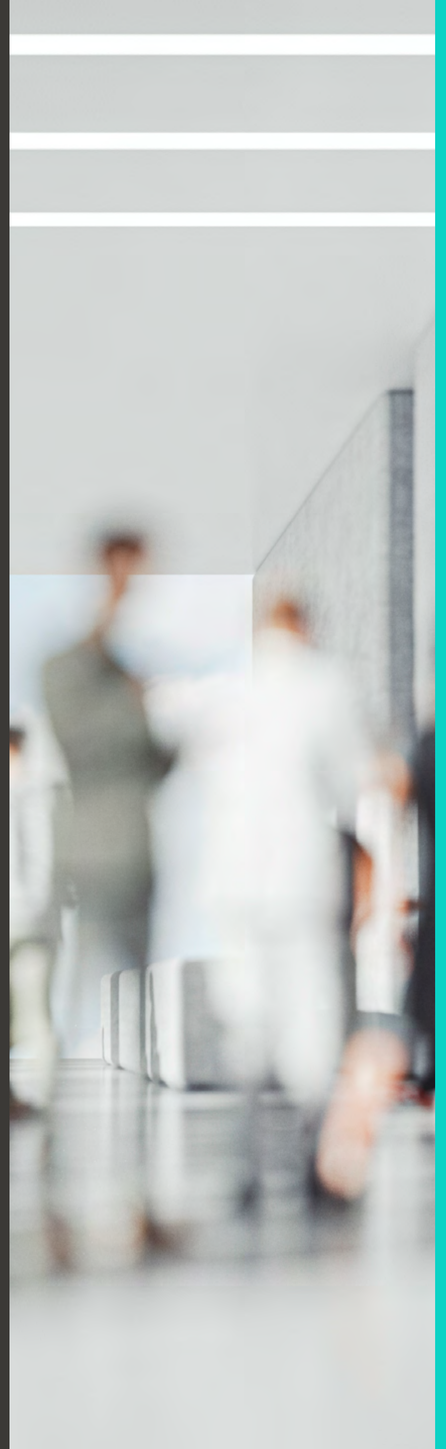
Up until very recently, the leading High Court case on suspensions was from 2015[1]. In that case, the court commented that suspending an employee is a serious step to take which can cause irreparable damage to the reputation and standing of an employee in the workplace.

It is undoubtedly the case that employers need to tread carefully when deciding whether to suspend an employee, and not engage in "knee jerk" reactions, whenever there is cause to investigate allegations of misconduct.This view has been reinforced by the recent Supreme Court judgment in *O'Sullivan v HSE*[2], which has clarified the law surrounding holding suspensions. In this Publication, we take a look at the recent decision of the Supreme Court and outline the do's and don'ts for employers when it comes to implementing a holding suspension.

[1] *Bank of Ireland v Reilly [2015] IEHC 241*

[2] *[2023] IESC 11*



What happened in O'Sullivan v HSE?

Professor O'Sullivan was employed as a Consultant Obstetrician and Gynaecologist at St. Luke's General Hospital with an unblemished disciplinary record. In 2018, as part of what he described as a "feasibility study", he decided, in furtherance of research, to insert a small balloon catheter into five women during the course of a hysteroscopy procedure they were undergoing. None of the patients were informed that this was being done, nor was their consent sought. The matter was reported by nursing staff to management.

Once management became aware, a decision was taken to commission an independent expert report regarding the conduct of Professor O'Sullivan. The experts concluded that the study was not carried out ethically and did not accord with good practice, but did not suggest that Professor O'Sullivan was a danger to the safety of patients.

A further report, known as the Systems Analysis Review (**SAR**), was commissioned and took six months to complete. The report found that there were failings on Professor O'Sullivan's part, but that he did not pose a risk to patients. The report made a recommendation that Professor O'Sullivan undertake additional consent training and good clinical practice training. Professor O'Sullivan accepted the recommendations made.

After receiving the SAR report, management sought the view of Dr Peter McKenna, Clinical Director of the National Women and Infants Health Programme. In a letter dated 28 June 2019, Dr McKenna expressed reservations about the continued involvement of Professor O'Sullivan in practice.

The relevant disciplinary procedure provided that "*where it appears to the CEO, secretary/ manager of a hospital or other health agency or his authorised representative, that by reason of the conduct of a consultant there may be an immediate and serious risk to the safety, health or welfare of patients, the consultant may apply for or may be required and shall, if so required, take administrative leave with pay for such time as may reasonably be necessary for the completion of any investigation into the conduct of the consultant in accordance with the provisions hereof.*"

On 1 July 2019 management referred the matter to the CEO of the HSE with a letter expressing concern that Professor O'Sullivan's conduct may pose an immediate and serious risk to the safety, health and welfare of patients and staff. The CEO then wrote to Professor O'Sullivan setting out particulars of alleged misconduct. Correspondence then took place between the CEO and solicitors for the Professor. The CEO communicated his decision that Professor O'Sullivan was required to take administrative leave with pay with effect from 6 August 2019.

The CEO then sought and obtained an additional report from Dr Michael O'Hare, an Obstetrician and Gynaecologist of international renown, on whether the matter was a serious matter, before initiating disciplinary action. Dr O'Hare found that Professor O'Sullivan's actions fell below, but not seriously below, the standard of conduct that was expected of a consultant.

The CEO disagreed with Dr O'Hare regarding the seriousness of the conduct and wrote to Professor O'Sullivan proposing the termination of his employment, which would have to be considered by a committee before being implemented. Professor O'Sullivan brought legal proceedings in the High Court seeking to challenge his continued enforced administrative leave and to restrain his dismissal. He was ultimately unsuccessful in those proceedings and appealed to the Court of Appeal.

What did the Court of Appeal decide?

While the Court of Appeal did not quash the decision proposing Professor O'Sullivan be dismissed, it did hold that his suspension was unlawful and should be rescinded.

The Court of Appeal found that there was insufficient evidence available to the CEO which justified his conclusion that Professor O'Sullivan presented an "immediate and serious risk" to the safety, health and welfare of patients. The Court of Appeal took into account that at the time Professor O'Sullivan was placed on administrative leave, approximately ten months had passed since the allegations first arose and the investigation commenced. It also took account of the reputational damage to Professor O'Sullivan of being placed on administrative leave.

The Court of Appeal also found that the CEO was required as a matter of law, upon receipt of Dr O'Hare's report, to immediately review the necessity for a continuation of Professor O'Sullivan's suspension and to reach the only reasonable conclusion on the evidence (i.e. that its continuation could not be justified). The HSE appealed the Court of Appeal's decision to the Supreme Court.

What did the Supreme Court decide?

The Supreme Court, by a majority of 4:1, took a different view to the Court of Appeal, in particular when considering the issue of the delay in placing Professor O'Sullivan on suspension. The Supreme Court took the view that as the CEO was only requested to review Professor O'Sullivan's conduct on 1 July 2019 and placed him on suspension on 6 August 2019, there was no culpable delay.

The Supreme Court found it hard to accept the views of the Court of Appeal to the effect that there was no evidence that could be relied upon to justify the CEO in reaching a conclusion that Professor O'Sullivan presented an immediate and serious risk to

the safety, health and welfare of patients. According to the Supreme Court, the key test was whether or not it "*appears*" to the CEO that there "*may*" be an immediate and serious risk to the safety, health or welfare of patients.

In considering whether the CEO was justified in placing Professor O'Sullivan on administrative leave, the Supreme Court concluded the correct test to be applied is whether the discretion to suspend an employee has been exercised in good faith and that the decision is not arbitrary, capricious or irrational. Applying this test to the facts, the Supreme Court found that it could not be said that the approach of the CEO was anything other than careful and considered.

With regard to there being an obligation to review the suspension, the Supreme Court commented that it is difficult to disagree with a proposition that if a report or other information came to light after a suspension had been implemented that completely changed the underlying basis for the suspension, a reconsideration of the continuation of the suspension might be required.

O'Donnell CJ issued a separate, but concurring judgment. In it he offered some further reflections on the legal issues which can arise in disciplinary proceedings, particularly those involving professional employees or those occupying senior positions.

He commented that a decision to suspend has an impact on an individual, may affect their reputation, and where that person is engaged in a highly skilled occupation, may have the effect of making it more difficult for them to resume their occupation, even if the disciplinary proceedings do not result in their dismissal. He also observed that fair procedures must be applied before making a decision to suspend and adopted and endorsed the statement of *Noonan J. in Bank of Ireland v. Reilly*. That statement noted that that while it may be correct to say that although "*the full panoply of fair procedures may not have been engaged at [this stage of suspension], […] basic fairness [required] at least a rudimentary explanation of the reason for suspension which admitted of the possibility of some exculpatory response*".

What does this decision mean for employers?

The Supreme Court decision provides further clarity on the law relating to holding suspensions. The fact the Supreme Court overturned the Court of Appeal's decision on the lawfulness of the holding suspension in this case serves only to highlight that whether or not a suspension is justified in a particular case necessitates a case by case assessment, with often very fine margins between when a holding suspension is justified and when it is not.

The decision has, however, put to bed any suggestion that holding suspensions can be implemented in misconduct cases without ensuring appropriate fair procedures are afforded to the employee whom it is proposed to suspend.

Employers should:

- Check the employment contract and disciplinary procedure. The provisions regarding placing an employee on suspension should be carefully followed.

- Give full consideration to the necessity for the suspension. Are there other viable alternatives? The decision to suspend should not be taken lightly and only following full consideration of whether it is actually necessary in order to facilitate the investigation/disciplinary process.
- Acknowledge the bar is high when seeking to justify a suspension and that, ordinarily, suspensions will only be considered justified
  a. to prevent repetition of the alleged misconduct
  b. to prevent interference with evidence
  c. for the protection of other persons, or
  d. for the protection of the employer's business reputation.
- Consider asking an employee to take paid leave as an alternative to the employer being forced to make a unilateral decision on whether suspension is necessary.
- Meet with the employee and explain the reasons for the proposed suspension, the necessity for it and afford the employee an opportunity to respond. Give due consideration to their response prior to making a decision.
- Be prepared to re-visit the decision to suspend if new information/evidence comes to light which undermines the rationale for the suspension.
- Confirm the decision in writing and outline the restrictions that apply during the period of suspension.
- Let the employee know what support is available while suspended (e.g. an Employee Assistance Programme) and encourage them to avail of it.

Employers should not:

- Stop or reduce the employee's pay for any period of the holding suspension.
- Suspend without giving consideration to the necessity for the suspension and/or without first engaging with the employee in relation to the proposal.
- Treat employees differently, unless there are objective grounds for doing so. If more than one employee is subject to the same allegation of misconduct, all or none of them should be placed on suspension pending investigation unless there are compelling objective grounds for treating any individual employee differently.

For further information in relation to this topic, please contact Michael Doyle, Partner, Triona Sugrue, Knowledge Consultant, or any member of the ALG Employment team.

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