



Notable case

Suspension—factors that affect the fairness and reasonableness of a suspension without pay

Date of decision: 15 January 2019

Overview

This case is concerning a fair treatment appeal regarding the suspension of an employee without pay.

Timeline of events:

- The employer wrote to the employee advising they had become aware they had been charged with a serious criminal offence – relating to alleged conduct in their role as a Queensland Government employee.
- The employer advised they had formed the view that the employee was liable to discipline, and that no alternative duties were available. In those circumstances the employee was suspended from duty on normal pay. At the same time, the employee was asked to respond advising why they should not be suspended without pay.
- The employer and employee exchanged correspondence over a five month period concerning the:
 - seriousness of the allegations
 - public interest
 - financial, emotional and physical hardship to the employee should they be suspended without pay.
- The employer considered the employee's submissions and decided not to transfer the employee to suspension without pay due to:
 - the infancy of the investigation
 - the employee's legal advisors' inability to respond to the allegations, as the prosecutors had not supplied a brief of evidence
 - the committal hearing anticipated to commence shortly.
- The employee was charged with additional criminal offences that related to the employee's alleged conduct in their role as a Queensland Government employee.
- The employer issued a second request for the employee to show cause why they should remain on suspension with pay. The show cause notice to the employee outlined a change in factors which influenced the original decision, including that:
 - the matter had been in progress before the courts for over a year
 - the brief of evidence had now been provided to the employee's legal advisors



- the committal hearing had not commenced when initially anticipated, and no date had been set for a hearing.
- The employee responded to the show cause notice. The employer wrote to the employee advising that they had decided to suspend the employee without pay.
- The employee appealed against the employer's decision to suspend them without pay including grounds that:
 - the decision was based on factors completely outside of the employee's control (i.e. the length of time the legal process was taking)
 - the decision-maker determined the employee was liable to discipline in the absence of any evidence or information in respect of the charges, and it was unfair and unreasonable for the decision-maker to use the assumption of guilt, based on absolutely no evidence whatsoever, as a key decision-making factor
 - the employee was asked to respond to the show cause process in a manner that would prejudice the employee's right to a fair trial.
- The employee also maintained that being suspended without pay had made it impossible to fund legal representation in the criminal matters the employee was facing. They maintained that being without income denied them the opportunity to secure the best possible legal representation, or indeed any legal representation, and this would prejudice the employee's right to a fair trial.
- In support, the employee referred to paragraph 12.3(a) of the [Commission Chief Executive Guideline 01/17: Discipline](#)

Decision

The Queensland Industrial Relations Commission Commissioner (the QIRC Commissioner) did not accept the employee's submission and found that:

- the decision-maker acted reasonably and fairly in commencing a second show cause process – particularly given the period of time that had lapsed since the employee was first charged, and that there was no end date in sight for the resolution of the relevant criminal matters
- when considering the public interest, and weighing up whether to alter the status of the employee's suspension, it was reasonable and fair for the decision-maker to consider factors such as:
 - the passage of time that had lapsed since the employee was first suspended on pay
 - the lack of certainty around the resolution of the criminal proceedings
- in light of the charges levelled against the employee and the setting in which they arose, it was reasonable for the decision-maker to believe that the employee would be liable to discipline under a disciplinary law.

Note: It is clear section 189 of the *Public Service Act 2008* (PS Act) allows a chief executive to suspend a public service employee from duty if they reasonably believe the employee is liable to discipline under a disciplinary law.

- it was not unreasonable or unfair for the employer (during the show cause process) to request information from the employee to assist in its consideration of the nature and the seriousness of the allegations and/or criminal charges.

- it was entirely a matter for the employee as to whether they chose to respond and provide information in response to the show cause process dealing with suspension, or not. In those circumstances, and with no end in sight in respect of the criminal matters, there was nothing unreasonable or unfair about the employer proceeding to rely on the information that was available to them in respect of the nature and seriousness of the allegations against the employee (i.e. the known charges), in conjunction with other factors, in making the decision.

Note: Section 190 of the PS Act requires a decision-maker to apply the principles of natural justice when determining whether to move an employee from paid suspension to suspension without pay. As part of that process, the employer was required to provide the employee with the opportunity to respond to the proposed suspension without pay.

- it was reasonable for the decision-maker to determine that the balance of considerations (including the public interest and the seriousness of the allegations) lent itself to an outcome whereby it was no longer appropriate for the employee to continue being paid. In particular, consideration had been given to the fact the employee:
 - had been on suspension with pay for a period in excess of a year
 - was first put on notice in respect of the employer's concerns about the employee's paid suspension a year prior to the decision to suspend without pay was made
 - had ample opportunity to respond to the proposal to alter the employee's suspension status.

Messages for managers

The following two guides from the Public Service Commission (PSC) can be considered before action is taken to suspend an employee without pay:

- [employee suspensions](#)
- [managing employee suspensions](#).

It is reasonable and fair for the decision-maker to consider the factors outlined in the PSC guides, particularly given the absence of any such criteria within the *Public Service Act 2008* or in any other existing Directives or guidelines within the Queensland public service, including but not limited to matters such as:

- the nature and seriousness of the allegation or allegations
 - whether the employee is subject to criminal charges or other external considerations not under the control of the agency that will delay the agency's investigation and disciplinary process
 - the emergence of significant new factors relevant to the decision to suspend from duty which require consideration.
- Employers do not need to wait until criminal proceedings have concluded, or legal action has ended before they can decide to suspend an employee without pay. However, as noted above, the decision-maker needs to have formed a reasonable belief that the conduct or behaviour in issue may lead to disciplinary action or could attract disciplinary action.

More information

If you are a Queensland public service human resources or industrial relations professional and want to know more contact the Public Service Commission, CaPE and HR assist team on 3003 2777 or via our [online enquiry form](#).