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Disciplinary Proceedings: Guidance on Suspension and Reports to the Police

The Court of Appeal has recently given guidance on the circumstances in which employers are justified in suspending employees during disciplinary investigation and emphasised that reports to the police should only be made if there is real belief that the allegations, if established, would constitute criminal conduct.

In the case of *Crawford and Another v Suffolk Mental Health Partnership NHS Trust* two nurses employed in a ward dealing with patients suffering from depression, anxiety and dementia were accused of tying a patient to a chair with a sheet. After a preliminary investigation they were suspended for alleged assault and a week later the Trust decided to refer the case to the police and put its own internal investigation on hold. Following investigation the police confirmed they did not intend to take any action but the nurses were eventually dismissed for assault, negligence and professional misconduct. As part of the investigation the Hospital Trust carried out an experiment in the absence of the Claimants to test whether the patient could have been accidently restrained through a sheet being placed on him as they alleged and concluded that he could not and that he had been deliberately tied to the chair. The Tribunal made findings of unfair dismissal based on an inadequate investigation. This included a reconstruction in the absence of the Claimants and the Trust's failure to disclose to the nurses the first statement of a key witness which differed from the account that the witness later gave at the disciplinary hearing. The Court of Appeal upheld the finding of unfair dismissal.

The Court of Appeal held:-

- as the ability of the nurses to pursue their chosen careers was at stake if dismissed, the Tribunal was correct to scrutinise the Trust's procedures particularly carefully;
- it had been open to the Tribunal to find that the experiment carried out in the absence of the Claimant was unfair as it was a key part of the evidence;
- the Tribunal had been entitled to find that the Trust's failure to obtain the first statement of the witness who raised the complaint and which deviated from the account given at the disciplinary hearing was a procedural error a reasonable employer would not have made.

The Court of Appeal rejected the EAT's finding that the procedural defects could have been remedied at an appeal hearing if the employee had raised the issues at the time. This makes it clear that an employer will not be able to evade responsibility by arguing that an employee has failed to alert it to an error during the disciplinary process.

One of the judges added a footnote to the main judgement providing guidance relating to the suspension of the employees and referral to the police. This underlines the finding of *Gogay v Hertfordshire County Council* in 2000 that suspension is only justified in exceptional cases, should never be a "knee-jerk reaction" and that it would be a breach of trust and confidence if it were. The Trust's reference to the police was also criticised and the judge stated that employers should not subject employees to such a burden without very careful consideration as to whether the behaviour identified is likely to be criminal.

This case is relevant to all employers of staff for whom dismissal is likely to be career-ending including employers in the health and social care sectors. Particular consideration must always be given to suspension and, in line with Gogay, an employee should never be suspended pending a preliminary investigation and then only if their presence is likely to hinder the disciplinary investigation or they are likely to commit further offences. Organisations may be tempted to make reports to the police in order to protect their reputation but this case makes clear that the implications of this step should be fully and carefully considered.

Crawford and Another v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138

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