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CAN AN EMPLOYER SUSPEND A NON- UNION EMPLOYEE?

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A suspension without pay is a key element of the progressive discipline process in a unionized workplace. But what of a non-union environment? Can an employer suspend an employee not covered by a collective agreement without pay as a form of discipline?

The general rule is that an employer does not have the power to suspend a non-union employee. An employer who does suspend an employee may be exposing itself to a claim for constructive dismissal. There is, however, a large exception to this general rule.

A suspension can be used as a form of discipline where the right to suspend is an implied or express term of the employment contract.

An express term is one which is specifically set out in the employment contract. Therefore, in order to have the express power to suspend an employee, the employment contract would have to actually state that the employer held such a power. In practice, very few employment contracts contain specific language giving the employer the right to suspend the employee.

The more common situation is where the right to suspend is an implied term of the employment contract.

Terms may be implied into a contract based on custom and usage, or on the presumed intention of the parties to the contract. Thus, in workplaces where there is a history of suspending employees as a disciplinary tool, or where policies exist which indicate that suspensions may be used, the Courts have been inclined to find an implied power to suspend. See for example, *Reininger v. Unique Personnel Canada Inc.*, [2002] O.J. No. 2826, and *Hussey v. Canadian Pacific Hotels Corp.*, [2004] N.J. No. 152

Terms may also be implied into a contract by law. Terms are implied by law where they are deemed necessary to the fair functioning of an agreement. Terms implied by law do not depend upon any agreement or understanding of the parties for their existence. For example, the right to reasonable notice of termination is a term implied by law into employment contracts. To date, the power to suspend has not been implied into employment contracts by law, however the Courts have hinted that this may be a possibility in the future (see *Haldane v. Shelbar Enterprises Ltd.* (1999), 46 O.R. (3d) 206).

In any event, it should be remembered that even in workplaces where there is an express or implied right to suspend an employee, a constructive dismissal can still arise where the suspension imposed is not reasonable in the circumstances.

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Shane Smith is a member of our Labour and Employment Group. He provides legal services and advice to a wide range of clients in the private and public sectors.

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