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# SUSPENDING EMPLOYEE'S – NOT SO EASY ANYMORE

***Special Interest Article:***

- **Suspending employees**

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Until recently, the suspension of an employee has been relatively easy and without any legal interference.

Employers have generally suspended employees as a matter of course particularly if the employee is alleged to have committed a serious offence that could result in his or her dismissal.

The principle behind suspensions has generally been to remove the person from the workplace to:

- Ensure that he/she does not commit the offence again prior to the enquiry;
- Interfere with the investigation;
- Intimidate witnesses;
- Remove or compromise the evidence.

In such cases, the suspension will be with pay given that the employee is presumed innocent until proven guilty at a disciplinary enquiry.

*This should be distinguished from suspension without pay. This form of suspension sometimes forms part of the penalties or sanctions that employers have included in their disciplinary procedures. Suspension without pay is usually offered to employees as an alternative to dismissal.*

The LRA does however include suspensions under section 186(2)(b) – Unfair Labour practice means any unfair act or omission that arises between an employer and employee involving –

a)...

b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.

**Latest approach**

Suspension with pay prior to a disciplinary enquiry has always been done by simply notifying the employee that he has been suspended. This approach was found by the Labour Court to be incorrect.

The labour Court outlined the preferred position in the case of **Mogothle v Premier of the North West Province & another** (2008) 17 LC 11.5.4 .

Brief case summary:

The applicant, the deputy director-general of the Department of Agriculture, Conservation and Development of the North West Province, was suspended from duty after publication of a newspaper article in which it was alleged that he was involved in corruption. Initially, the applicant agreed to take leave of absence for a month during which it was anticipated that an investigation would be concluded. However, the Legislature then resolved that a further investigation be conducted by the auditor-general, and the applicant's "leave of absence" was extended indefinitely pending the conclusion of that investigation. The applicant then launched an urgent application, contending that he had been unlawfully suspended because he had not been afforded a hearing before his suspension was extended.

The Court noted that the suspension of an employee pending an inquiry into alleged misconduct is equivalent to an arrest, and should therefore be used only when there is a reasonable apprehension that the employee will interfere with investigations or pose some other threat. The Court noted that there have been two approaches to "preventive" suspension – one holding that a hearing before suspension was not necessary, the other holding that it is. The second approach is regarded as the fairer of the two in the

# CASES AND COMMENTS

***SHORT NOTES:***

**Andre Rabe has been appointed as Chairman of the Guardian Employers Organisation from April 2010.**

**You are welcome to contact him directly on 0824910708.**

**………………………**

**Many cases are lost by employers through lack of Labour Law knowledge.**

***EMPLOYERS NEED TO KNOW:***

**The LRA;**
**The BCEA;**
**How to investigate an incident;**
**How to draft charges;**
**How to prepare and present a case;**
**The Rules of evidence;**
**How to chair an enquiry;**
**What documents are required when hiring or firing staff members;**
**What policies and procedures need to be in place;**
**The types of contracts required… Etc.**

**Contact Andre Rabe at 0824910708 or our office on 0861436436 for training courses.**

employment context.

This approach requires that an employee should not be suspended unless there are *prima facie* grounds for believing that the employee has committed serious misconduct and there is some objectively justifiable reason for excluding the employee from the workplace. The employee must also have been given an opportunity to make representations.

The Labour Court said about suspensions:

"[39] In summary: Each case of preventative suspension must be considered on its merits. At a minimum, though, the application of the contractual principle of fair dealing between employer and employee, imposing as it does a continuing of fairness on employers when they make decisions affecting their employees, requires first that the employer has a justifiable reason to believe, prima facie at least, that the employee has engaged in serious misconduct; secondly, that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy; and, thirdly, that the employee is given an opportunity to state a case before the employer makes any final decision to suspend the employee."

The court had essentially stated that the employee must be given an opportunity to be heard and state a case or present an argument before the employer makes its final decision to suspend the employee. This obviously makes the onus of procedural fairness more onerous for the employer. Not only does this new requirement complicate matters for the employer, it creates a situation where the employer must hold two meetings or hearings with the employee. The first hearing would be to hear the employee's objections to the suspension and give reasons for the company wanting to suspend him. The second hearing would obviously be the disciplinary hearing.

**What to do?**

Decide whether suspension is really necessary using these criteria:

- A serious act of misconduct has ben committed – prima facie evidence standard;
- That there is an objectively justifiable reason to deny the employee access (tamper with evidence, commit the offence again, intimidate witnesses, hamper the investigation, etc).
- If there is no need in terms of the above to suspend the employee, allow the employee to continue working. Allowing the employee to continue working does not affect your decision to dismiss the employee after the disciplinary enquiry.
- If you believe that there is justification to dismiss the employee, notify the employee to attend a suspension hearing.
- Inform the employee that you believe that he has committed an offence and that you intend to hold a hearing in this regard. This does not have to be a formal hearing. Inform the employee that you are of the opinion (and state the reasons) that you believe that he will commit the offence again and/or tamper with evidence and/or intimidate witnesses and/or interfere with the witnesses. A mere suspicion is insufficient. So some form of evidence backing your concerns should be available. The employee should be given an opportunity to respond and state why he should not be suspended. The company then makes the final decision.

**An employer should have a suspension policy that is communicated to all supervisors and managers involved in the handling of discipline.**

***IR survival tip: When faced with an IR problem make sure you get advice on what to do. Call Andre Rabe on 0824910708 or the GEO on 0861436436.***

***Email Andre at***

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