

ASPECTS OF UNFAIR SUSPENSION AT WORK

1 Introduction

The suspension of employees happens frequently in the work environment in different contexts. It has several contractual and other legal consequences. In the present note the meaning of suspension is considered and the legal consequences of suspension are explained and evaluated. In the discussions both the common-law and statutory provisions of suspension are considered. The interaction between the principles of the two systems is also highlighted. The constitutional validity of certain legal provisions of statutory regulation of suspension is also commented upon.

2 The common-law position

Suspension is a situation in the employment arena where the employer does not accept an employee's services for a period of time, but neither does the employer terminate the services of the employee (Grogan *Dismissal Discrimination & Unfair Labour Practices* (2005) 61). Despite the employer's reasoning for suspending an employee, the employer is not generally relieved of its contractual duty to pay the employee (Grogan *Dismissal Discrimination* (2005) 62).

At common law, the employer may only suspend an employee without pay if a contract has been concluded to that effect, either when the employment contract was first concluded, or if a collective agreement or regulation provides for such penalty, or if the employee faces dismissal and agrees to suspension without pay as a penalty. Where the employee agrees to suspension without pay as a penalty, the employer must prove that the employee has agreed to the variation of the original contract freely and without duress (Grogan *Dismissal Discrimination* (2005) 62).

Under the common law, employees are obliged to work as long as the contract remains in existence, but the employer is not generally bound to provide the employee with work. Whether they are provided work or not, workers are entitled to be paid as long as they tender service. If the employer is prepared to pay the employee for the period of suspension, the employee has no remedy unless he or she can show that the denial of the opportunity to work affects the right to remuneration detrimentally or, more rarely, the right to professional development.

Suspension without pay is a breach of contract, but, in the absence of an agreement to the contrary, payment of remuneration during the suspension of an employee accordingly satisfies the employer's contractual obligations, unless there is a right to work in a given instance. Brassey ("The Contractual Right to Work") suggests, correctly is submitted, that whether an employee has a right as well as an obligation to work depends on the terms of the agreement. Whether such a right exists must be determined by a proper construction of the contract. In *Marbe v Georg Edwards Daly's Theatre* ([1928] 1 KB 269) the court held at 288 that it depends "particularly on the express words of the contract, but may also depend on the character of the employment and possibly the amount and nature of the remuneration" (see Brassey 1982 *ILJ* 253).

A typical instance where an employer and an employee will agree to the right to work is where an employee is paid by results. That is where the employee is paid on commission or by the piece, for example. A further instance may be where the preservation of the status of the employee is important to such an employee. The fact that the employee holds a position of certain status is relevant to determine whether such an employee has contractually agreed to the right to work but it is not decisive in itself (Brassey 1982 *ILJ* 255).

Where an employee concludes a contract with an employer not only to receive remuneration but also to acquire or maintain certain expertise the parties would normally have impliedly agreed to the right to work. Apprentices and candidate attorneys fall within this category. In *Muzondo v University of Zimbabwe* (1981 4 SA 755 Z) the court concluded that a university lecturer had the right to work, because, although he was paid during a suspension he could not make use of university funds or facilities to conduct research in his field of study during the suspension.

In instances where an employee seeks to enhance or maintain his or her reputation by concluding a contract of employment there would generally also be an agreement to the right to work. An example of a right to work based on the maintenance of reputation is to be found in the English case of *Fechter v Montgomery* ((1863) 55 ER 274), where an actor concluded to perform exclusively for an acting company but was not given any role to act in for a period of five months although he was paid in full. The relevant court held that the actor was justified in cancelling the contract of employment with the acting company on the basis that the latter had been in material breach of contract by not providing him with work.

If a right to work is accordingly present even a suspension *with* pay will amount to breach of contract in the absence of the agreement with the employee. Such agreement may be obtained immediately prior to the suspension on an *ad hoc* basis or may be agreed upon when the contract is concluded and can become part of the terms and conditions of employment of the employee. Where there exists no contractual right to work, the

employer may freely suspend an employee lawfully, in terms of common law; provided the agreed upon remuneration is paid to such an employee.

In terms of the law of contract a suspension without pay will amount to material breach of contract in all instances, unless the employee agrees to such a suspension. The contractual position as set out above remains applicable, even in the face of the development of statutory labour law, particularly the unfair labour practice concept contained in section 186(2) of the Labour Relations Act (66 of 1995, hereinafter "the LRA").

In this regard the judgment of *Fedlife Assurance Ltd v Wolfaardt* (2001 12 BLLR 1301(A)) is instructive. The Supreme Court of Appeal concluded that the LRA "does not expressly abrogate an employee's common-law entitlement to enforce contractual rights" (1306C). In this case the employee sought to enforce the terms of a fixed-terms contract of employment when he was selected to be retrenched based on the criteria of "last-in-first-out" during the period of the contract. The selection criteria were fair, but the contract did not make provision for dismissal on notice. Similarly, where an employer imposes unpaid suspension as a sanction for misconduct, it follows that the employee has to agree to the suspension without pay. The employee will only do so when offered as alternative to dismissal as a sanction, or when it is agreed to at the conclusion of the contract. If, for instance, the disciplinary code of the employer is incorporated into the contract, and it makes provision for an unpaid suspension as sanction, such general agreement will probably be present, and, if the employer imposes such a suspension it will not amount to breach of contract.

3 Legislation

Although not universally accepted, it can generally be said that the common-law contract of employment confers no inherent right to fairness (*South African Maritime Safety Authority v McKenzie* 2010 5 BLLR 488 (SCA); and Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@Work* (2008) 165). Section 23 of the Constitution provides that everyone has the right to fair labour practices. Ngcobo J in *NEHAWU v University of Cape Town* ((2003) 24 ILJ 95 (CC)) assessed the fairness component of the right to fair labour practices, which he defined in terms of a balancing or accommodation of often competing interests (*Van Niekerk et al Law@Work* 39):

"In my view the focus of s23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed" (*NEHAWU v University of Cape Town supra* par 40).

The LRA and other legislation such as the Basic Conditions of Employment Act (75 of 1997) (hereinafter "BCEA") and the Employment Equity Act (55 of 1998) (hereinafter "EEA"), were enacted to give effect to this constitutional right (Van Niekerk *et al Law@Work* 165; and see too *South African Maritime Safety Authority v McKenzie supra*).

Section 186(2)(b) of the LRA specifically deals with unfair suspension as an unfair labour practice and reads as follows:

- "(2) Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving –
- (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee."

This section requires that there is a labour practice that arises between an employer and an employee and that the conduct (whether act or omission) is unfair. The specific unfair labour practice (that is, suspension in this instance) occurs during the currency of employment (Van Niekerk *et al Law@Work* 167-168).

There is no definition in the LRA of "labour practice", but it is necessary at least that the practice (the suspension) must arise within the employment relationship (Van Niekerk *et al Law@Work* 168). By including unfair conduct relating to suspension as part of section 186(2), the legislature clearly recognizes that in some circumstances suspension may be fair. That would be for instance when a punitive suspension without pay as alternative to dismissal is a fair sanction for particular misconduct, or when a preventative suspension with pay has no punitive effect.

4 Payment vs Non-payment

Section 34 of the BCEA prohibits deductions from employees' remuneration unless by agreement or following due process of law. Suspension without consent would amount to breach of contract (Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw *Labour Relations Law: A Comprehensive Guide* 5ed (2006) 497 fn 151). Thus, unilateral deductions from employees' wages are prohibited (Grogan *Dismissal Discrimination* 62).

Certain statutory employees (for example policemen, some public servants and municipal employees) may be suspended without pay pending an enquiry because their statutory conditions of service expressly provide for suspension without pay (Grogan *Dismissal Discrimination* 62).

Suspension without pay pending a disciplinary enquiry has been held to be unfair by the CCMA in *Tsaperas v Clayville Cold Storage (Pty) Ltd* ([2002] BALR 1225 (CCMA)). The Labour Court in *Harley v Bacarac Trading 39 (Pty) Ltd* ([2009] 6 BLLR 534 (LC) 539) held that suspension without pay and the fairness thereof are self-evidently linked to the payment of remuneration, especially where, as is the case here, an employee is suspended without pay. Where suspension is effected as a measure pending a disciplinary

hearing, as is the case here, suspension without pay is a material breach of contract (see above).

The CCMA found in *Joubert v Ground Crew (Pty) Ltd t/a First Catering SA* ([2009] 12 BALR 1284 (CCMA)) that, while the suspension itself was lawful, the employer had also stopped the applicant's petrol allowance, to which he was contractually entitled. This was unlawful and unfair.

5 Preventative suspension

A preventative suspension occurs where disciplinary charges are being investigated against an employee and the employer suspends the employee pending the outcome of the disciplinary enquiry. The reasoning behind this action is to remove the employee from the workplace so as to prevent interference from the employee with the investigation or intimidation of witnesses by the employee.

A preventative suspension has been held to be

“a practice universally followed by employers, [to suspend] employees until serious charges against them are properly investigated and, if they are found to have substance, permitting the employee to answer them” (*Ortlieb v Khulani Springbok Patrols* [1994] 4 BALR 423 (CCMA) 425).

Suspension could be effected pending a disciplinary enquiry. The suspension is effected in order to conduct an investigation and to enable the smooth and timeous completion of such proceedings (*Van Niekerk et al Law@Work* 183). The Labour Court in *Phutiyagae v Tswaing Local Municipality* ([2006] JOL 17477 (LC)) stated that, as the applicant had been suspended on full pay and the suspension was necessary to conduct the investigation into the alleged misconduct, the application to have the suspension set aside, had to be dismissed.

A suspension pending a disciplinary enquiry is not meant to be punitive as the allegation of misconduct has not been proved (*Van Niekerk et al Law@Work* 183).

Du Toit et al indicate that an employee may be suspended as a “holding operation”, pending a disciplinary hearing (*Du Toit et al Labour Relations* 498).

When is preventative suspension unfair? This occurs where preventative suspension is used for purposes for other than those for which preventative suspension is intended, for example to punish the employee (*Grogan Dismissal Discrimination* 63). In *Sajid v Mohamed NO* ((2000) 21 ILJ 1204 (LC)) the Labour Court ruled the suspension of the employee unfair because the employer had withdrawn all charges against the employee and there was no evidence that the employer intended to convene an enquiry into the allegations against the employee (*Grogan Dismissal Discrimination* 63). For preventative suspension to be fair, the employer must be able to prove that

the employee has committed some form of misconduct and that, objectively speaking, there is a sound reason to keep the employee away from the workplace (Grogan *Dismissal Discrimination* 63).

In *Harley v Bacarac Trading 39 (Pty) Ltd* ([2009] 6 BLLR 534 (LC) 539) the Labour Court held that in the absence of any apparent apprehension that the applicant's continued presence in the workplace prejudiced a legitimate business interest, and in view of the demonstrated psychological and financial prejudice to the applicant, the applicant's suspension was unfair.

A preventative suspension may also be unfair in instances where there is a right to be heard prior to the suspension. It has been held for a long time that administrative law requires that an employee working for a public authority and who is suspended pending a disciplinary enquiry, must be given the opportunity to be heard (see *Bucarac Trading 39 (Pty) Ltd supra*). It may be argued that such a suspension would also be unfair.

6 Punitive suspension

In the case of punitive suspension, the suspension is imposed as a penalty or a disciplinary measure short of dismissal after the disciplinary enquiry has been held and the employee found guilty. Initially, the view was taken that only punitive suspensions fell within the ambit of unfair labour practices, but this view was rejected by the Labour Court (*Ndlovu v Transnet LTD t/a Portnet* [1997] 7 BLLR 887 (LC) 894J-895A; and *Sappi Forests (Pty) Ltd v CCMA* [2009] 3 BLLR 254 (LC)) and held that there could be an unfair labour practice even where the suspension precedes disciplinary action (that is, a preventative suspension). The CCMA and bargaining councils support this view and assume jurisdiction over both punitive and preventative suspensions.

Suspension could be a disciplinary sanction, that is, the outcome of the disciplinary enquiry could result in suspension as the punishment or penalty for the employee (Van Niekerk *et al Law@Work* 183).

The Labour Court has held that suspension without pay is allowed as a disciplinary penalty in appropriate circumstances (Du Toit *et al Labour Relations* 499). Mlambo J in *South African Breweries Ltd (Beer Division) v Woolfrey* ([1999] 5 BLLR 525 (LC) par 11-12) that the prohibition of deductions from an employee's remuneration in terms of the BCEA does not prevent an employer from imposing the penalty of suspension without pay and that the employer's duty to pay remuneration under such circumstances is suspended by the fact that "no tender of services ... by the worker takes place or is required" (Du Toit *et al Labour Relations* 499).

If suspension is imposed as a disciplinary sanction or penalty, the ordinary requirements of substantive and procedural fairness should apply (Du Toit *et al Labour Relations* 499).

7 Preventative suspension and substantive fairness

Considerations of substantive fairness relate to the reason for the suspension. The employer must have a justifiable reason believing that the employee is involved in serious misconduct and that suspension is necessary, such as: where the seriousness of the misconduct may create a state of affairs (such as rumours and suspicion) necessitating a suspension of the employee so as to ensure work carries on smoothly; or where the employer has a reason to believe that the employee may interfere with the investigation or witnesses; or it may be where the employer fears recurrence of the misconduct; or where the seniority and authority of the employee has bearing on the matter.

In *Koka v Director-General: Provincial Administration, North West Government* ((1997) 18 ILJ 1018 (LC)), the court distinguished between a suspension as a holding operation (preventative) and a suspension as a form of discipline. The court pointed out that the context of the working in section 186(2)(b) seems to indicate that the suspension contemplated in the item is one which is imposed as a disciplinary measure. However, in the court's view a suspension imposed primarily as a holding operation could be tantamount to suspension for disciplinary reasons. It is submitted that such a suspension will not generally be meant to be punitive.

The purpose of such a suspension is normally to conduct an investigation and to ensure that the employee does not interrupt the investigation or influence witnesses.

Another purpose may be that the charge to be preferred against the employee is of such a nature, that the employer takes precaution of this type of situation is when the charge involves fraud and the employee is entrusted with the safekeeping of money.

In *Mabilo v Mpumalanga Provincial Government* ((1999) 20 ILJ 1818 (LC)) the head of the Department of Public Works of a Provincial Department was suspended on full pay pending a disciplinary enquiry. He sought to interdict the suspension although he had been afforded the opportunity to set out reasons why he should not be suspended. Instead of making use of the invitation the employee sought detailed particulars of a charge sheet which was not available then.

He also sought 21 days within which to furnish reasons. It was the court's view that the employee would be entitled to these particulars once charges had been brought, but not at the stage when a decision is to be taken concerning the suspension.

The court opined that an employer must not be allowed to abuse the suspension process, and that an employee is entitled to a speedy and effective resolution of the dispute. The investing action must be concluded

within a reasonable period and unnecessary disruption to the employee's life must be prevented.

It is submitted that a lengthy delay in bringing charges which leads to an unreasonably long suspension may cause the preventative suspension to become substantively unfair.

A factor to be taken into account when evaluating the fairness of a suspension is whether the employer has followed the provisions of the applicable disciplinary code or regulation. This is of particular importance in the case of statutory employers. In *Marcus v Minister of Correctional Services* ([2005] 2 BLLR 215 (SECLD)) the High Court set aside a preventative suspension on review because the employer had not proved that the employee was guilty of "serious misconduct", for which suspension was reserved by the applicable regulation. Furthermore, it was evident that the employee's presence at the workplace would not affect the investigation into the alleged offence (*Grogan Dismissal Discrimination* 63).

8 Suspension and procedural fairness

8.1 Preventative suspension

Although a formal enquiry is not required prior to suspension pending a disciplinary enquiry, the *audi alterem partem* principle should be observed (*Du Toit et al Labour Relations* 499). Summary suspension with pay is fair if the employer has a reasonable concern that a legitimate business interest would be harmed by the employee's continued presence in the workplace. If there is no good reason for the suspension, or if the employee is not given an opportunity to be heard, the suspension will be unfair (*Du Toit et al Labour Relations* 499). Little or no guidance has been given by the courts regarding the scope of an enquiry afforded to an employee prior to preventative suspension. Logic indicates that employees must be given an opportunity to state their case as to whether they should be suspended or on the terms of the suspension (*Grogan Dismissal Discrimination* 63).

Molahlehi J in *Dince v Department of Education North West Province* ([2010] 6 BLLR 631 (LC) par [38]) held that

"there is no doubt in my mind that there is no reasonable possibility that any other court in South Africa may come to the conclusion that the *audi* rule does not apply in suspension cases."

Another interesting factor to consider is the need for self-esteem and a sense of self-worth by the employee.

"The freedom to engage in productive work – even where that is not required in order to survive is indeed an important component of human dignity ... for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and sense of self-worth – the fulfilment of what is to be human – is most often bound up with being accepted as socially useful" (*Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA) par [27]).

What impact would a preventative suspension have on these needs of the employee? Although an enquiry is not required before suspension pending a disciplinary enquiry, where suspension damages an employee's reputation, the employee is entitled to be heard before being suspended (Van Niekerk *et al Law@Work* 184). The High Court in *Muller v Chairman of the Minister's Council: House of Representatives* ((1991) 12 ILJ 761 (C)) accepted that the *audi alterem partem* principle is applicable to cases of suspension because it has adverse effects on the career prospects and reputation of the employee (Grogan *Dismissal Discrimination* 63).

Molahlehi J, in *SAPO Ltd v Jansen van Vuuren NO* ([2008] 8 BLLR 798 (LC) par [40]) opined as follows:

"There is, however, a need to send a message to employers that they should refrain from hastily resorting to suspending employees when there are no valid reasons to do so. Suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfilment. It is therefore necessary that suspensions are based on substantive reasons and fair procedures are followed prior to suspending an employee. In other words, unless circumstances dictate otherwise, the employer should offer an employee an opportunity to be heard before placing him or her on suspension."

The Labour Court in *Mogothle v Premier of the North West Province* ([2009] 4 BLLR 331 (LC)) held that:

"In summary: each case of preventative suspension must be considered on its own merits. At a minimum though, the application of the contractual principle of fair dealing between employer and employee, imposing as it does a continuing [duty] 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 the opportunity to state a case before the employer makes any final decisions to suspend the employee."

The employee should also be notified (preferably in writing) of the suspension, the reasons for the suspension and the conditions of the suspension. The employee should also be informed of matters such as payment, whether the employee is relieved of any or all of their duties and whether the employee is prohibited from entering the workplace as well as when the suspension will be lifted.

For a suspension pending a disciplinary enquiry (preventative suspension) to be considered procedurally fair, it is accordingly necessary that the employee should be: informed of the reason for the suspension and of the length and duration of the suspension; and paid for the period in full (Van Niekerk *et al Law@Work* 183). As a general rule, the employer must continue remunerating the employee during the course of the preventative suspension. It has been held that where an employee requests a

postponement of a disciplinary enquiry, an employer does not have to pay an employee who has been suspended pending the disciplinary enquiry from the date of such postponement (Van Niekerk *et al Law@Work* 183). Employees who are suspended pending a disciplinary enquiry are normally entitled to their full pay for the duration of the suspension, however, it would not be fair to the employer to apply this principle in situations where the employee has requested the extension of the suspension (Van Niekerk *et al Law@Work* 183).

8.2 Punitive suspension

Since suspension as a penalty is usually imposed as an alternative to dismissal, it would be advisable to follow the guideline of the Code of Good Practice: Dismissal which provides that the employer should conduct an enquiry, except in exceptional circumstances, before resorting to dismissal [item 4(1), (4)], when deciding to suspend an employee (Du Toit *et al Labour Relations* 499). Because punitive suspension is a disciplinary sanction, it must be imposed for a fair reason and in accordance with a fair procedure. The requirements for a fair enquiry in cases of punitive suspension are the same as the requirements for any other form of disciplinary action (Grogan *Dismissal Discrimination* 64). Procedural fairness seems necessary in those cases where an employer is allowed to suspend an employee without pay. It must be remembered that the contractual requirement that an employee should agree to a suspension without pay remains.

9 Suspension period

In his concept paper, Cheadle suggests that suspension pending disciplinary enquiries should be aimed at curing two forms of abuse which are prevalent especially in the public sector: arbitrary suspensions and inordinate periods of suspension (Cheadle "Regulated Flexibility: Revisiting the LRA and the BCEA" 2006 *ILJ* 663). Cheadle argues that appropriate protection against the former would be provided by judicial scrutiny supplemented by a Code of Good Practice and the latter should be dealt with by (Du Toit *et al Labour Relations* 498)

"(a) the creation of a statutory obligation to conduct and conclude disciplinary hearings within a reasonable time and a power to strike down tardy disciplinary hearings; and (b) institutional reform in the public service, namely an expedited process and [an] independent institution to conduct disciplinary hearings" (Cheadle 2006 *ILJ* par 74).

Suspension pending a disciplinary enquiry (preventative suspension) should not be unreasonably prolonged, otherwise the effect of the suspension would be disciplinary in nature and not "a holding operation" (Du Toit *et al Labour Relations* 498).

Criteria for judging the fairness of suspension was laid down by the Labour Court in *Mabilo v Mpumalanga Provincial Government*:

“[T]he employee is entitled to a speedy and effective resolution of the dispute. Employers must not be allowed to abuse the process. The investigation must be concluded within a reasonable time taking all the relevant factors into consideration and the employee must be informed without undue delay about the process that the employer is initiating. This may take the form of allowing the employee to return to his or her work or alternatively furnish this individual with a charge sheet summoning the individual to a properly constituted disciplinary hearing. The disciplinary hearing must be initiated within a reasonable time of the individual being suspended” ([1999] 8 BLLR 821 par 17).

The Labour Court in *Minister of Labour v General Public Service Sectoral Bargaining Council* ([2007] 5 BLLR 467 (LC)) held that a suspension for an unreasonably long period is an unfair labour practice. In a review application, the Labour Court considered the suspension of an employee for a period far in excess of that permitted by the relevant disciplinary code. The Labour Court held that the suspension was unfair. The employee was the Assistant Director: Information Technology and was suspended in 2002 and he faced charges of alleged nepotism, sexual harassment and “self enrichment”. Two years later the suspension was lifted and he returned to work. Two months later, the employee was again suspended pending the investigation of allegations of fraud and corruption. The arbitrator ruled that the suspension was unfair and ordered the applicant to uplift the suspension with immediate effect. The applicant failed to do so and instead convened a disciplinary enquiry, called that enquiry off, and then launched an application for review of the arbitration award. The court could find no reason why the suspension should not constitute an unfair labour practice. The court considered the disciplinary code which stated that if an employee is suspended pending disciplinary action, an enquiry should be convened within 60 days and the presiding officer must then decide whether a postponement should be granted (*Van Niekerk et al Law@Work* 184).

In *Ngwenya v Premier of Kwa-Zulu Natal* ([2001] 8 BLLR 924 (LC)) the court held that an employee may not be kept indefinitely on suspension, even with full pay, pending disciplinary action.

Bhoola J, in *Mapulane v Madibeng Local Municipality* ([2010] 6 BLLR 672 (LC)) the court noted that a clause in the applicant’s contract provided that, if the employee was placed on “precautionary suspension”, a disciplinary hearing had to be convened within 60 days, failing which the suspension would lapse unless the chairperson of the hearing extended the suspension. The court rejected the applicant’s submission that this provision meant that the suspension could not be extended beyond a period of 60 days.

In *Israel v Department of Correctional Services* ([2009] 6 BALR 540 (GPSSBC)) the commissioner found that, while the respondent was entitled to suspend the applicant, it had a corresponding duty to ensure that the disciplinary proceedings should be finalized within the period prescribed by the code or, if it could not do so, within a reasonable time. It had not done so. The whole process had taken more than two years. Given the fact that

the applicant was accused of a single count of misconduct, this was far too long.

The commissioner in *PSA obo Blose v Department of Education, KwaZulu-Natal* ([2009] 6 BALR 584 (GPSSBC)) noted that the applicable disciplinary code (PSCBC Resolution 1 of 2003) provides for the possible suspension of employees on full pay if they are alleged to have committed “serious misconduct”, and the employer believes that their presence at work might jeopardize investigations or endanger persons or property. However, the code also provides that disciplinary action should be taken within “a month or 60 days”, depending on the complexity of the investigation. No hearing had been held; thus the suspensions were unfair.

10 Remedy

In *SA Post Office Ltd v Jansen van Vuuren* ((2008) 29 ILJ 2793 (LC)), the employee, a senior systems programmer, was suspended on full pay pending a disciplinary enquiry. The alleged misconduct related to a power outage. The employee was suspended for being the cause of the outage simply because of his presence in the server room. The commission concluded that the final written warning amounted to an unfair labour practice. Concerning the suspension the commissioner concluded that an independent unfair labour practice had been committed. Compensation equal to six months’ remuneration was awarded.

The court’s view was that in dealing with compensation ordered (in s 194(a) of the LRA) the determination of the appropriate relief requires a balancing of the interests of both the employee and the employer.

The following objectives are to be considered: the wrong should be addressed, future violations should be deterred, an order that can be complied with should be made and everyone affected by the award should be accorded fairness.

The court pointed out that in granting compensation equal to six months’ remuneration the commission had not taken into account that the suspension period was not long and that it had been with pay. The reason for awarding this amount of compensation were *inter alia* that the employee had been unaware of the nature of the offence he had allegedly committed. He was also not afforded the opportunity to make representations prior to the suspension.

In essence, the suspension was both substantively and procedurally unfair. It was the commissioner’s view that the suspension had prejudiced the employee socially as well as psychologically and in regard to future job prospects.

The court held that the commissioner’s conclusion concerning the unfairness of the suspension was correct, but that the amount of the compensation was too high. No financial loss was suffered by the employee.

It was clear that compensation in the form of *solatium* is generally granted as a remedy. It is submitted that just and equitable relief may also include an order to uplift a suspension still in operation.

The above considerations will apply in both a preventative as well as a punitive suspension.

11 Unpaid preventative suspension permitted in terms of statutory provisions

In the South African Police Service applicable regulations provide that a member may be suspended without pay pending a disciplinary enquiry. If such a member is found not guilty he or she is entitled to be paid the forfeited remuneration.

The South African Police Service Act (68 of 1995) provides furthermore that a member who is in detention pending a criminal trial or who is serving a term of imprisonment is deemed to be suspended without pay (s 43). Concerning this provision it is submitted that the provisions concerning a suspension need not apply.

The member is not in a position to tender his or her services, and the situation is one of temporary supervening impossibility of performance. In such an instance the South African Police Services need not remunerate the member. In addition, if the detention is of an unreasonably long duration, the South African Police Services, as employer, may terminate the services lawfully. It is submitted that such a dismissal will also be fair if it follows an investigation, and if possible, the member is given the opportunity to be heard. Such a dismissal will be categorized as a dismissal for incapacity.

Concerning an unpaid suspension pending a disciplinary enquiry, it is apparent that the suspension would have amounted to breach of contract, had it not been for the applicable regulations. It would also have amounted to an unfair labour practice as envisaged in section 186(2) of the Labour Relations Act.

An arbitrator will, however, not have the authority to determine that such a suspension is unfair, since it is provided for in delegated legislation.

Concerning the provision in section 43 of in the South African Police Service Act where a member is deemed to be suspended without pay whilst in detention, the common law contractual position is the following: The member cannot tender his or her services due to temporary supervening impossibility of performance, and the payment of remuneration is not required. It is unnecessary to create a deemed-suspension provision. It is submitted that this is not unconstitutional, however, because the deemed unpaid suspension has the same effect as temporary impossibility of performance which is the contractual position.

Concerning the unpaid suspension pending a disciplinary enquiry provided for in the regulations, it is submitted that it is unconstitutional in that it amounts to contravention of section 23(1) of the Constitution, and that the provision does not amount to a permissible limitation of a constitutional right as envisaged in section 36 of the Constitution.

12 Conclusion

From the above discussion it is apparent that the suspension of employees at work has significant contractual, labour-law and constitutional indications.

When an employer resorts to suspension as a precautionary measure or punitive disciplinary sanction regard must be had to contractual consequences as well as a possible unfair labour practice challenge based on section 186(2) of the Labour Relations Act, 1995.

The contractual position is that, unless agreed between the parties, an unpaid suspension will amount to breach of contract. If suspension is therefore imposed as a sanction the employee's agreement must be obtained. Suspension without pay as sanction should accordingly be imposed as alternative to dismissal. Should the employee refuse suspension, he or she will be dismissed. It follows that suspension should be used sparingly, and in serious instances of misconduct. If an employee refuses a suspension, the dismissal that follows must be substantively fair.

A paid suspension may also amount to breach of contract if employee has a contractual right to work. In such a instance the employee needs to agree to the suspension – even if imposed as a precautionary measure.

Both a precautionary and a punitive suspension must be substantively and procedurally fair.

The substantive fairness of a precautionary suspension refers to the reason for not wanting the employee on the premises pending a disciplinary enquiry. The employee will have to show that there is a fair reason to suspend, relating to the investigation or the nature of the suspected misconduct. An automatic suspension pending a disciplinary enquiry for any misconduct may be substantively unfair.

The substantive fairness of a punitive suspension refers to the nature of the misconduct. The misconduct must be of a serious nature and the suspension must be offered as alternative to a dismissal.

Procedural fairness requires a disciplinary enquiry in the case of a punitive suspension.

In the case of a precautionary suspension the employee needs to be given the opportunity to make representations which, it is submitted, needs not be oral. The requirement does not mean that a formal enquiry needs to be conducted.

Employers are advised to regulate both precautionary and punitive suspensions in disciplinary procedures and codes which may be contractually agreed upon. In doing so, the legal pitfalls concerning suspension set out above may be prevented.

Finally, although statutory enactments may provide for an unpaid precautionary suspension, it is submitted that such provisions will contravene section 23(1) of the Constitution and infringe the constitutional right to fair labour practices.

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