The Suspension of Employees

Jan du Toit*, South African Labour Guide, 2017

Employers are often faced with situations where a decision must be taken whether an employee that was allegedly involved in misconduct should be suspended or not. Item 4 of schedule 8 of the Labour Relations Act requires that an employer must conduct an investigation prior to taking disciplinary action against an employee and in order to do that the employer may suspend an employee pending a hearing. This seems to be pretty straight forward but section 186 (2)(b) of the Labour Relations Act is in direct contrast to this and states that the suspension of an employee could be unfair, making it an unfair labour practice.

The question is now to suspend or not? The decision to suspend will hugely depend on the circumstances regarding the alleged misconduct and an employee should not be suspended unless there are prima facie grounds for believing that the employee has committed serious misconduct and that there is some objectively justifiable reason for excluding the employee from the workplace.

In *Mogothle v Premier of the North West Province & another [2009]* 4 BLLR 331 (LC) the Labour 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.

In *Tungwana / Robben Island Museum (2009)* 18 CCMA 6.4.2, reported in Butterworths [2009] 11 BALR 1178 (CCMA), Mr Tungwana was suspended pending a disciplinary enquiry into allegations that he failed to disclose outside interests and other acts of negligence. Tungwana referred his suspension as an unfair labour practice to the CCMA which was incorporated in a pre-dismissal arbitration. The commissioner found that the charges against Mr. Tungwana were unfounded. Turning to the suspension of the employee the commissioner found that there were no prima facie (on the face of it) grounds to believe that the applicant had committed serious misconduct and the employer therefore had no reason to exclude Tungwana from the workplace. Six months of the employee's salary was awarded as compensation for his unfair suspension.

Employers should therefore carefully consider the following before taking a decision to suspend an employee.

Suspension reasons checklist

Question 1 - Is there "on the face of it" reason to believe that the employee was involved in the misconduct? Yes/ No

Question 2 - Is the alleged misconduct of a serious nature? Yes/No

Question 3 - Is there a possibility that the employee may interfere with witnesses? Yes/ No

Question 4 - Is there a possibility that the employee may tamper with evidence? Yes/ No

Question 5 - Is there a possibility that the accused employee may retaliate against the complainant, especially if the complainant is in a lower position that the accused employee? Yes/No

Question 6 - Is there a possibility that the employee may commit further similar acts of misconduct if he / s he is not suspended? Yes/No

Do not suspend the employee if the answer to either question 1 or 2 are "no".

Suspension may be considered if the answers to question 1 and 2 are "yes" and at least one other question is answered as "yes".

So how does one go about fairly suspending an employee?

In *SA Post Office Ltd v Jansen van Vuuren NO & others (2008)* 29 ILJ 2793 (LC) also reported at [2008] 8 BLLR 798 (LC), the employee, a senior systems programmer, was suspended on full pay when he failed to give a satisfactory explanation for an electricity outage in an area in which he had been authorised to perform certain tasks on the employer's servers. He later faced a disciplinary enquiry and was issued with a final written warning for the offence of making changes in the production environment without proper authorisation.

In proceedings before the CCMA, the commissioner found that the employee had been suspected of being the cause of the outage simply because of his presence in the server room and that the employer had placed the burden on him to prove that he was not responsible for the outage. He found further that the charges against the employee had been extremely vague and disclosed no misconduct. Furthermore, the plea of guilty by the employee did not reflect an unequivocal admission of guilt by him. The commissioner concluded that the warning issued by the employer constituted an unfair labour practice.

Regarding the suspension of the employee, the commissioner found this to constitute a separate unfair labour practice on the grounds that the employee was unaware of the nature of the offence he was alleged to have committed and was not given an opportunity to make representations concerning his suspension. The commissioner, having reasoned that suspension prejudices an employee psychologically, socially and in terms of future job prospects, awarded him six months' compensation.

Employers should take note that they should refrain from hastily resorting to suspending employees when there is no valid reason to do so. Suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfilment. Suspensions must therefore be based on substantive reasons and fair procedures must be followed before employees are suspended. Unless the circumstances dictate otherwise, employees must be offered the opportunity to be heard before being placed on suspension.

There are currently two different approaches to the actual suspension discussion. The first is to notify the employee in writing of the employer's intention (and reasons) to suspend the employee based on the outcome of the preliminary investigation. The employee is invited to submit reasons to the employer (normally within 24 or 48 hours) that may be taken into consideration before a final decision is taken regarding the suspension of the employee. This approach is in my mind perilous. Such a notification serves as a "heads-up" to the employee and allows ample opportunity for the employee to tamper with evidence, interfere with witnesses and to possibly commit further similar acts of misconduct as a farewell gesture.

The second and much simpler approach is to invite the employee into the boardroom, together with a representative from the HR department, and to inform the employee of your suspicions and reasons for considering suspending the employee. The employee is given the opportunity to respond and the employer will now have to consider the submissions made by the employee. This may be done in collaboration with the representative from HR and the employee is asked to remain in the boardroom until you have taken a decision. This way the employee is unable to cause further harm as described in the first scenario.

Suspension discussion checklist

Question 1 – Was the employee informed of the reasons for the suspension? Yes/ No

Question 2 – Was the employee allowed an opportunity to give reasons for not suspending him/ her? Yes/ No

Question 3 – Was the employee informed of the duration of the period of suspension and is it a fair period (normally not more than 30 days)? Yes/ No

Question 4 – Was it explained to the employee what would happen at the end of the suspension period or as soon as the investigation has been finalized? Yes/ No

Is suspension with or without pay? Suspension is always as a rule on full pay unless the employee agrees to suspension without pay. In *Sappi Forests (Pty) Ltd v CCMA & others (2008)* 17 LC 1.11.83, reported in [2009] 3 BLLR 254 (LC), Judge Pillay ruled that "the position at common law has always been that an employer who suspends an employee without pay commits a breach of the contract of employment. An employer may suspend an employee without pay if the employee so agrees, or legislation or a collective agreement authorises the suspension."

From this it is therefore clear that employees may only be suspended without pay if they agree. An example would be suspension without pay as an alternative to a dismissal. The argument is that the employee made continued employment intolerable and that as a last attempt to correct the behaviour of the employee, the employer offered suspension without pay as an alternative to terminating the employment relationship. In *County Fair v CCMA & Others [1998]* 6 BLLR 577 (LC) and *South African Breweries Ltd (Beer Division) v Woolfrey & Others [1999]* 5 BLLR 525 (LC) it was held that suspension without pay is a permissible disciplinary penalty where appropriate. It is however recommended that such a sanction is subject to the employee signing a sanction by agreement letter.

A fresh approach to section 186 (2)(b). In a *Nohe & another / Maswika Stones t/a Tombstones Land (2010)* 19 CCMA 6.4.1 commissioner Boyce took a fresh approach to the interpretation of a suspension in terms of section 186 (2)(b). The applicants claimed that they have been unfairly suspended after the employer discovered cash shortages. The suspension of the two employees was on full pay and pending a disciplinary hearing but they persisted that their suspensions constitute an unfair labour practice. Commissioner Boyce interpreted section 186 (2)(b) of the Labour Relations Act as follows:

"the "unfair suspension" embodied in section 186(2)(b) of the Act precedes the words "or any other disciplinary action short of dismissal in respect of an employee". The word "other" in the said section can only mean that the Legislature regards "unfair suspension" as but one type of "unfair disciplinary action short of dismissal". Had the Legislature intended that any suspension could (if unfair) amount to an unfair labour practice, it would surely have dealt with suspension on its own in a sub-paragraph of section 186(2). The Legislature, in other words, would not have linked the words "unfair suspension" to "unfair disciplinary action short of dismissal" by using the words "any other", if it did not regard the "unfair suspension" referred to in section 186(2)(b) of the Act as but one type of "unfair disciplinary action short of dismissal". What this means is that a suspension which is not "disciplinary action short of dismissal" cannot amount to an unfair labour practice in terms of section 186(2)(b) of the Act. The "disciplinary action" which is envisaged by section 186(2)(b) of the Act, is a form of punishment, or a penalty (such as a written warning, suspension from work for a period of time, demotion, etc.) which is imposed on an employee by an employer for some sort of misconduct.

In the present matter suspensions were not punitive suspensions, and they, consequently, did not amount to "disciplinary action". The applicants' suspensions were procedural steps pending their disciplinary hearings... The said suspensions were, therefore, not suspensions as contemplated by section 186(2)(b) of the Act since they cannot possibly fall into the category of "unfair disciplinary action short of dismissal"."

The question that must however be answered is whether the Labour Court will agree with Advocate Boyce?

*__Jan du Toit__ is available to assist employers with disciplinary enquiries and CCMA matters. He can be contacted on **jand@labourguide.co.za**.

Suspension is one of the modules that are discussed in our one day "Managing Problem Employees" seminar. Enquiries can be addressed to **Peraldo Senekal** – **psenekal@labourguide.co.za**.

From: **http://www.labourguide.co.za/most-recent/1269-suspesnsion?highlight=WyJzdXNwZW5zaW9uIl0=**

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