

When is a Suspension an Unfair Labour Practice? A Review of Court Decisions (2013) 34 ILJ 1694

2013 ILJ p1694

Dawn Norton *

Introduction

Not all suspensions are unfair labour practices. An employer's conduct must be 'unfair' to fall within the definition of an unfair labour practice (ULP). Section 186(2)(b) reads: "'Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving ... the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.' The section contemplates two possible types of suspensions, firstly, a 'holding operation' (or sometimes called a 'precautionary suspension') pending an investigation and possible disciplinary enquiry, and, secondly, a sanction for misconduct.

In one of the earliest suspension cases following the implementation of the Labour Relations Act (LRA), ¹ Landman AJ (as he was then) in *Koka v Director-General: Provincial Administration, North West Government*² explained that the first type of suspension was for purposes of 'good administration' to determine whether there is a need to suspend an employee facing allegations of misconduct. He quoted Denning MR in *Lewis v Heffer & others*:³

'Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay, pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it... . The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work the man is suspended.'⁴

The second type of suspension constitutes a sanction — and may be effected with or without pay (depending on the provisions in a contract of employment, or disciplinary code, or collective agreement). Landman AJ commented that both types of suspensions could fall within the ULP regime ⁵ contemplated in the LRA. ⁶

* Director: Employment Law at Mkhabela Huntley Adekeye Inc. BA(Hons), LLB, LLM.

2013 ILJ p1695

Based on a review of reported cases over the last decade or so, ⁷ most suspensions concern the 'holding operation' type and involve public sector employees. For background purposes it is worth noting that the Public Service Commission (PSC), ⁸ concerned with the high number of employees on suspension, the extended length of time of employees on suspension, and the costs incurred by the state, conducted research into the matter. The PSC and the Department of Public Service and Administration delivered a presentation to the Portfolio Committee on Public Service and Administration in May 2012 and reported that in 2010/2011, 1,559 employees in national departments were placed on precautionary suspension. The majority of those employees came from the SA Police Service (869) and the Department of Correctional Services (471). Payment of wages to the 1,559 employees on suspension came close to R51.2 million. ⁹

The PSC listed the typical reasons for placing employees on suspension. Those reasons were financial misconduct, insubordination, failure to bank state monies, gross negligence resulting in loss of state monies, theft, drunken driving, misuse of state property, fraud, corruption, keeping dangerous weapons, sexual harassment, unauthorized expenditure, and violation of tender processes. ¹⁰

Employees aggrieved at their suspension may contest the fairness of the employer's action under the ULP provisions in the LRA. This involves an urgent application for interim relief to the Labour Court (LC) in terms of s 158(1)(a) or a review of a state employer's decision in terms of s 158(1)(h), or a referral of an ULP to the Commission for Conciliation, Mediation & Arbitration (CCMA) (or relevant bargaining

2013 ILJ p1696

council) in terms of s 191(1) of the LRA. Employees have been able to succeed in the LC, alleging unfair conduct by employers, on an urgent basis and have had their suspensions lifted for the following reasons:

- 1 Employers have violated the audi alteram partem rule because the employee has not been afforded an opportunity to make representations prior to the decision by the employer to suspend.
- 2 Employers have not complied with relevant statutory provisions or internal policies governing suspensions.
- 3 The period of suspension has exceeded the time-limits set out in the employer's disciplinary code.
- 4 The employer's decision to suspend was invalid.
 - 1 Act 66 of 1995.
 - 2 (1997) 18 ILJ 1018 (LC).
 - 3 [1978] 3 All ER 354 (CA).
 - 4 *Koka n 2* above 1028.
 - 5 *ibid* 1029.
 - 6 Landman AJ referred to item 2(1)(c) in schedule 7 ('Transitional Arrangements') to the LRA, which in 2002 became part of the body of the LRA as s 186(2)(b) — pursuant to s 41(c) of Act 12 of 2002.
 - 7 List of reported cases reviewed (in alphabetical order): *Abdullah v Kouga Municipality & another* (2012) 33 ILJ 1850 (LC); *Baloyi v Department of Communications & others* (2010) 31 ILJ 1142 (LC); *Dince & others v Department of Education, North West Province & others* [2010] 6 BLLR 631 (LC); *Dladla v Council of Mombela Municipality & another (2)* (2008) 29 ILJ 1902 (LC); *Koka n 2* above; *Lebu v Maquassi Hills Local Municipality (2)* (2012) 33 ILJ 653 (LC); *Lekabe v Minister: Department of Justice & Constitutional Development* (2009) 30 ILJ 2444 (LC); *Mapulane v Madibeng Local Municipality & another* (2010) 31 ILJ 1917 (LC); *Marcus v Minister of Correctional Services & others* (2005) 26 ILJ 745 (SE); *Masetlha v President of Republic of SA & another* 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC); *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC); *Mogothle v Premier of Northwest Province & another* (2009) 30 ILJ 605 (LC); *Mpati v Premier of Free State Provincial Government* [2011] 12 BLLR 1202 (LC); *Muller & others v Chairman of the Ministers' Council: House of Representatives & others* 1992 (2) SA 508 (C); (1991) 12 ILJ 761 (C); *Nyathi & others v Special Investigating Unit* (2011) 32 ILJ 2991 (LC); *Police & Prisons Civil Rights Union obo Masemola & others v Minister of Correctional Services* (2010) 31 ILJ 412 (LC) (POPCRU obo Masemola); *Police & Prisons Civil Rights Union obo Sephanda & another v Provincial Commissioner, SA Police Service, Gauteng Province & another* (2012) 33 ILJ 2110 (LC) (POPCRU obo Sephanda); *SA Municipal Workers Union obo Mathabela v Dr J S Moroka Local Municipality* (2011) 32 ILJ 2000 (LC); *SA Police Union & another v National Commissioner of SA Police Service & another* (2005) 26 ILJ 2403 (LC); *SA Post Office Ltd v Jansen van Vuuren NO & others* (2008) 29 ILJ 2793 (LC); *Taung Local Municipality v Mofokeng* (2011) 32 ILJ 2259 (LC).
 - 8 The Public Service Commission was established pursuant to s 196 of the Constitution. Its purpose is to encourage and develop an effective public service.
 - 9 www.pmg.org.za/report/20120502.
 - 10 *ibid*.

Unfair Conduct: Violation of the Audi Alteram Partem Rule

It is trite that the principle of fairness and the balancing of competing interests underlie the audi rule. It would be unfair if a decision maker could simply take a decision which adversely affects another, without hearing the other party's side.¹¹ Firstly, the decision may be entirely unnecessary (the other party may provide a perfectly acceptable explanation for the alleged transgression), or the decision may be irrational and unjustifiable and indicate an abuse of power. The LC is very alive to the weapon of suspension wielded by some employers for ulterior motives to exclude unpopular employees from the workplace, and will come to an employee's defence in such circumstances.¹²

The LC has held in numerous decisions that an employee must be given an opportunity to make representations prior to the employer making a decision to suspend him or her.¹³ In *Dince & others v Department of Education, North West Province & others*,¹⁴ Judge Molahlehi, quoting Zondo AJP (as he was then) in *Modise & others v Steve's Spar Blackheath*,¹⁵ explained that:

'The *audi* rule is part of the rules of natural justice which are deeply entrenched in our law. In essence the audi rule calls for the hearing of the other party's side of

the story before a decision can be taken which may prejudicially affect such party's rights or interests....' ¹⁶

Judge Molahlehi dismissed the department's application for leave to appeal against an earlier decision that the suspensions of members of the department's senior management team were unlawful and unfair. He concluded:

'[45] The respondents [the department] failed to comply with the rules of natural justice in that the applicants were suspended without being given a hearing before a decision that would deny them the right to their work and undermine their dignity was taken.

'[46] I am, accordingly, not persuaded that there are prospects that another court in considering the matter may come to a different conclusion to the one reached by myself.' ¹⁷

In *Dladla v Council of Mbombela Local Municipality & another (2)*, ¹⁸ the LC (per Moshwana AJ) held that representations could be made *after* the decision to suspend had been made provided the employer was open to persuasion. In this case the contract of employment stated: 'The municipal manager shall...be notified in writing of his suspension and shall be entitled to respond to the allegations within seven working days.' ¹⁹ Moshwana AJ disagreed with the proposition that because the municipal manager had not been afforded an opportunity to make representations before the decision to suspend, the suspension was unlawful. Moshwana AJ said: 'In our law, *audi alteram partem* can still be observed after the prejudicial decision.' ²⁰ He buttressed his view by stating that the suspension was with pay, and as the employee could not demonstrate a right to work, he therefore suffered little prejudice. His application to interdict the suspension was refused. ²¹

It is arguable that representations made after the decision has been taken compromise the *audi* rule. The representations would need to be of a compelling nature to persuade a decision maker to change his or her mind and reverse the original decision. Thus, the right to be heard before the decision has been taken is the more meaningful option to enable the decision maker to weigh up the representations made by both parties, and then arrive at a fair decision.

It stands to reason that an employee cannot make representations regarding an impending suspension if he or she does not know the reasons for the suspension. In *Baloyi v Department of Communications & others*, ²² the allegations were expressed baldly as follows: 'You are called upon to show cause why you should not be suspended pending a special investigation into the allegations of irregular appointments of

staff, favouritism, corrupt and fraudulent activities.' ²³ When the employee asked for further particulars the request was ignored. Molahlehi J said:

'Turning to the facts of the present case, it cannot be said that the applicant was afforded a proper opportunity to make representations about the pending decision to suspend her. ... The allegations made against the applicant are very wide, vague and fail to state when the incidents they are based on occurred. ... [A]s a general principle the applicant was entitled as of right to be given information which should have indicated the basis of the suspension. It is that information, properly presented to the applicant, that would have assisted her in formulating and making a meaningful representation in response to those allegations. Without being placed in possession of the details of the alleged misconduct or irregularities the applicant was denied the right to be heard before her suspension.' ²⁴

Recently in *MEC for Education, North West Provincial Government v Gradwell* ²⁵ the Labour Appeal Court (LAC) emphasized that courts must consider the seriousness of the misconduct alleged. ²⁶ Furthermore, the LAC clarified that the *audi* rule underpinning a right to a pre-suspension hearing 'may legitimately be attenuated'. Murphy AJA gave three reasons why this pertained in the case before him: the suspension was on full pay, the period of suspension was or should be for limited duration (in this case 60 days), and the purpose of the suspension — protecting the integrity of the investigation — would be undermined if there was to be an in-depth preliminary investigation. He concluded: 'Provided the safeguards of no loss of remuneration and a limited period of operation are in place, the balance of convenience in most cases will favour the employer. Therefore an

opportunity to make written representations showing cause why a precautionary suspension should not be implemented will ordinarily be acceptable and adequate compliance with the requirements of procedural fairness.' ²⁷

In summary then, the audi principle is critical to a fair suspension process. The employer must inform the employee of the nature of the allegations in sufficient detail to enable the employee to make representations with respect to those allegations. The representations should preferably be made before, rather than after, the decision is taken. Representations in writing will suffice.

2013 ILJ p1699

11 In *Muller* (n 7 above 777) the court found that the state had unfairly suspended four striking workers as they were not afforded an opportunity to make representations before this decision was taken. Howie J had this to say, '...the denial of such a right would operate with startling unfairness in some instances. What about the personal and social implications for the senior officer of 20 years' standing, with an impressive record of reliable service, who is a person of prominence and generally high esteem in his community? What about the financial implications for an officer with a young family to support...? If the respondents' answer is that suspension would not be ordered in such instances ... [i]t follows that the audi rule ought to have been observed...'

12 See for example *Mogothle* n 7 above para 38 in which Judge van Niekerk says, '... [there is a] trend apparent in this court in which employers tend to regard suspension as a legitimate measure of first resort to the most groundless suspicion of misconduct, or worse still, to view suspension as a convenient mechanism to marginalize an employee who has fallen from favour'.

13 See for example *Koka* n 2 above; *POPCRU obo Masemola* n 7 above; and *Lebu (2)* n 7 above.
14 n 7 above.

15 2001 (2) SA 406 (LAC); (2000) 21 ILJ 519 (LAC); [2000] 5 BLLR 496 (LAC).

16 *Dince* n 7 above para 34.

17 *ibid* paras 45-46.

18 n 7 above.

19 *ibid* n 1 (in the case cited).

20 *ibid* para 39.

21 *ibid* para 41.

22 n 7 above.

23 *ibid* para 6.

24 *ibid* para 30.

25 n 7 above.

26 *ibid* paras 28-29.

27 *ibid* para 44. It is worth noting that AJA Murphy mentioned obiter that he was not aware of decided cases which held that the common-law contract of employment had developed to the point that a hearing before a decision to suspend was a naturalia of the contract. Arguably, Van Niekerk J's decision in *Mogothle v Premier of the Northwest Province & another* (n 7 above) was such authority in 2009. However, that position was implicitly quashed a year later in *SA Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA); (2010) 31 ILJ 529 (SCA) when the Supreme Court of Appeal (SCA) held that the constitutional right to fair labour practices was not to be incorporated by way of tacit terms into a contract of employment. That right, so held the SCA, was given expression through the provisions and institutions of the LRA.

Non-compliance with Statutory Provisions or Internal Policies

Employers are obliged to comply with any applicable regulations, collective agreement or workplace policies. In *Lebu v Maquassi Hills Local Municipality (2)*²⁸ the LC set aside a suspension because the municipality had not complied with its own regulations, in particular regulation 6 of the Local Government: Disciplinary Regulations for Senior Managers 2010. ²⁹ The municipality had failed to justify the employee's suspension and to afford him seven days in which to make his representations on the reasons for the proposed suspension. The LC declared the municipal manager's suspension unlawful and he was reinstated with immediate effect.

In *Lebu (2)* Judge van Niekerk usefully summarized the procedural steps to ensure a fair suspension:

- 1 The employer must have prima facie evidence of serious misconduct.
- 2 The employer must reasonably believe that the continued presence of the employee would jeopardize an investigation, or that the employee might commit further acts of misconduct, or may interfere with potential witnesses.

- 3 The employer must inform the employee of the above suspicions in sufficient detail to enable the employee to respond. ³⁰
- 4 The employee must be permitted time to prepare a response to the suspicions.
- 5 The employee should be given an opportunity to make representations to the employer.
- 6 The employer must seriously consider the representations and make a decision on whether or not to suspend. ³¹

There were procedural irregularities in the case of *POPCRU obo Sephanda & another v Provincial Commissioner, SA Police Service, Gauteng Province & another*³² and the LC reviewed and set aside the suspension (without pay) of two policemen suspected of bribery and defeating the ends of justice. ³³ Judge Lagrange found that the provincial commissioner had contravened the SA Police Service Discipline Regulations 2006. ³⁴ The suspensions were instituted after the investigation into the alleged misconduct had been completed, and during the disciplinary enquiry — there was no precautionary purpose to the suspensions. To the extent that the real purpose was to prevent the employees from intimidating witnesses, the details of this were never set out for the employees' response prior to the decision to suspend.

2013 ILJ p1700

In *Marcus v Minister of Correctional Services & others*³⁵ Judge Jansen confirmed an interim order setting aside the suspension of an area commissioner and reinstating him into his former position. The judge found that the Department of Correctional Services had not complied with its own suspension policy. Not only had the department contravened the audi rule, as the department had not provided reasons for the suspension enabling the employee to respond, but it had not shown that the employee's presence at the workplace would jeopardize any investigation into the alleged misconduct. Furthermore, the department had not considered alternatives (such as a transfer) to the suspension. All three issues (the audi principle, the risk of the presence of the employee at the workplace, and the transfer as an alternative to suspension) were expressly set out in the department's policy, and as the department had breached those relevant provisions the judge found that the employer (represented by the Director: Departmental Investigation Unit) had not applied its mind to the matter and the rule nisi was confirmed.

28 n 7 above.

29 *Gazette* 34213 of 21 April 2011.

30 In terms of regulation 6(2), the employee should be given seven days' notice of the intention to suspend.

31 *Lebu (2)* n 7 above para 16.

32 n 7 above.

33 The policemen were accused of deleting video evidence implicating one of their colleagues.

34 *Gazette* 28985 of 3 July 2006.

35 n 7 above.

The Period of Suspension Exceeded the Stipulated Time-limits

In general employers are bound by any applicable suspension time periods, and if the suspension exceeds the time-limits prescribed, it may be set aside. ³⁶ In *Lekabe v Minister: Department of Justice & Constitutional Development*³⁷ a state attorney was suspended for misconduct. The allegations included inducements from service providers, sexual harassment and corruption. The department alleged that the Law Society of the Northern Province had found the state attorney guilty of serious professional misconduct.

Clause 2.7(2)(a) of chapter 7 of the Senior Management Services Handbook provides for a suspension period of 60 days during which time the employer must hold a disciplinary hearing. In *Lekabe* the 60 days passed without the department having taken any steps to discipline the employee. He approached the LC for an order lifting his suspension and an order declaring that the employer was no longer entitled to pursue disciplinary action against him. He succeeded with the first but not the second order. Molahlehi J reasoned that the time-limit is to prevent the abuse of power. He explained: 'The intention was to curb the power of employers in the public service from using protracted suspension as a means of marginalizing those employees who may have fallen out of favour.'³⁸ With

respect to the second issue he maintained that the

2013 ILJ p1701

employer does not waive its right to pursue disciplinary action after the 60-day period has expired. ³⁹

In *Nyathi & others v Special Investigating Unit*⁴⁰ Judge Basson found that an employer who had suspended an employee (for breach of her fiduciary duties, disclosure of privileged information and irregular claims for allowances) for longer than the period stipulated in the applicable disciplinary code had acted unfairly and reinstated the employee. The clause in the code read: 'If formal disciplinary proceedings are not instituted against a suspended member within 90 days from the date of his/her suspension, the suspension shall lapse and the member shall be reinstated to his/her post and the benefits with retrospective effect.'⁴¹

The judge dismissed the argument that the time period was 'merely a guide'. She found that the clause was framed in peremptory terms, and that its purpose was to 'restrain an employer from abusing protracted suspension as a method of marginalizing and prejudicing an employee'.⁴²

³⁶ This is the general principle. The courts have though at times found that substantial compliance suffices, or that the employer is not in breach of a time period if the employer has started (but not concluded) a disciplinary enquiry during the stipulated period of suspension. See, for example, *Mapulane* n 7 above.

³⁷ n 7 above.

³⁸ *ibid* para 20.

³⁹ *ibid* para 19.

⁴⁰ n 7 above.

⁴¹ *ibid* para 17.

⁴² *ibid* para 25.

The Decision to Suspend was Invalid

In *Taung Local Municipality v Mofokeng*⁴³ the LC found that the municipality had irregularly suspended the municipal manager after allegations of irregular spending and procurement transgressions had been brought to its attention by the SA Municipal Workers Union. The LC found that as the decision to suspend was taken at a council meeting which was not quorate, the decision was invalid. Molahlehi J held —

'...the fact that the defect is limited to procedure is immaterial in the assessment of its validity and force in law because it offends one of the basic principles of our law, namely the rule of law. The rule of law is foundational to any relationship between the parties in a constitutional democracy. The parties to any relationship are required to act lawfully in their interaction with each other. ... The manner in which the resolution in this matter was taken does not only undermine the rule of law but also fundamentally undermines the constitutional right to fair labour practices of the respondent. Thus the fact that the defect is limited to a procedural defect does not detract from the fundamental requirement of compliance with the rule of law'.⁴⁴

⁴³ n 7 above.

⁴⁴ *ibid* paras 32-33.

Analysis and Discussion

A suspension is regarded as unfair, and therefore as constituting an unfair labour practice, if an employer:

2013 ILJ p1702

- 1 fails to provide reasons, sufficiently detailed to enable the employee to respond to the allegations, justifying the intention to suspend;⁴⁵
- 2 fails to explain why it is necessary to exclude the employee from the workplace;⁴⁶
- 3 suspends an employee for misconduct which is not serious misconduct;⁴⁷

- 4 does not allow an employee to make representations (even written ones) as to why he or she should not be suspended; ⁴⁸
- 5 fails to comply with the procedures set out in applicable regulations, a collective agreement or internal workplace policies; ⁴⁹
- 6 ignores the time-limits in agreements or policies setting maximum periods for lawful suspensions; ⁵⁰ and/or
- 7 takes a decision to suspend and does not have the requisite authority to do so (eg a board is not quorate). ⁵¹

The hurdle to cross for a fair suspension is both substantive and procedural. On the substantive leg, the employer must have a prima facie belief that an employee has committed misconduct, the alleged misconduct must be material, and there must be valid reasons to justify the removal of the employee from the workplace. On the procedural leg, the employee must be notified of these substantive elements and afforded an opportunity to make representations to the employer before the employer makes a final decision on whether or not to suspend the employee (the audi principle). If the employer decides to suspend, then the procedures and time periods set out in regulations, a collective agreement or internal workplace policy must be respected.

Thus far the courts have found the conduct of employers wanting, largely because of a failure to apply with the procedural leg of a fair suspension. The most frequent transgression in this respect is non-compliance with the audi rule and a disregard for relevant regulations and workplace policies. The courts are particularly alive to the risk of abuse by employers who resort too quickly to suspension when faced with allegations of misconduct involving senior employees (especially those who have fallen out of favour with the powers that be).

Comparatively less attention has been given by the courts to the issue of the nature of the misconduct (the substantive leg), even when the alleged misconduct is of a serious nature and undermines the public

2013 ILJ p1703

interest. ⁵² The courts have correctly criticized employers for making blanket allegations of misconduct — 'fraud, corruption, procurement irregularities' etc — and for failing to provide details of those allegations. However, the courts have given far less weight to the nature of the misconduct and the potential prejudice to the employer when some of those details have been provided. Having already satisfied themselves that a suspension has not passed the procedural fairness test, they arguably look little further, and lift the suspension and reinstate the employee. Indeed the weight of justification by the courts (to set aside a suspension and reinstate the employee) falls heavily on the procedural side, with relatively less attention paid to the substantive reasons for the suspension. Murphy in the *Gradwell* decision seems to correct that imbalance and emphasis, by drawing attention back to the alleged misconduct and the prejudice which the employer may thereby have suffered, and by arguing that the audi rule may therefore reasonably be attenuated. ⁵³

45 See, for example, *Baloyi* n 7 above paras 28, 30; *Lebu (2)* n 7 above para 14 and *Marcus* n 7 above 748.

46 See, for example, *Marcus* n 7 above 748; *Lebu (2)* n 7 above paras 13-14; *Mogothle* n 7 above para 44.

47 See, for example, the comments in *Mogothle* n 7 above para 39; *Baloyi* n 7 above para 28.

48 See, for example, *Dince* n 7 above paras 26-27; *Baloyi* n 7 above para 30; *Marcus* n 7 above 748; *Mogothle* n 7 above para 43; *Muller* n 7 above 777; *POPCRU obo Masemola* n 7 above para 36.

49 See, for example, *Lebu (2)* n 7 above paras 16-17.

50 See, for example, *Nyathi* n 7 above paras 24-25; *Lekabe* n 7 above para 21.

51 See, for example, *Taung Local Municipality* n 7 above para 34.

52 For example, *POPCRU obo Sephanda* n 7 above; *Lekabe* n 7 above; *Nyathi* n 7 above.

53 He does not say how it may be attenuated — notionally that may for example be a shorter time period within which to make representations; and/or written, rather than oral representations.

Relief Upon a Finding of an Unfair Suspension

Only the CCMA or relevant bargaining council has jurisdiction to entertain suspension

disputes ⁵⁴ — the LC does not. ⁵⁵ The relief available upon a finding of unfairness is set out in s 193(4) of the LRA and permits an arbitrator to determine a dispute 'on terms that the arbitrator deems reasonable' which may include an order for reinstatement, re-employment or compensation. The word 'include' suggests that the arbitrator may fashion a remedy suited to correct the unfairness. If the employee has referred a suspension dispute to the CCMA or bargaining council and is subsequently dismissed then the dispute becomes arguably academic and the relief usually takes the form of compensation (to a maximum of 12 months' remuneration). ⁵⁶

The LC has the power to order interim urgent relief, ⁵⁷ in terms of s 158(1)(a) and may review and set aside a decision in terms of s 158(1)(h). In practice employees initially approaching the LC for relief motivate in the main for two orders — firstly, for a lifting of the suspension and, secondly, for reinstatement into their previous position. That relief may be confirmed on the return day, unless the employer succeeds in its opposition, then the interim relief is discharged. If the interim relief is

2013 ILJ p1704

confirmed then the relief (as it pertains to reinstatement) is in effect the same type of relief available in the CCMA or bargaining council. Whilst the LC has no jurisdiction to determine a suspension dispute, in practice though, through the urgent application process, the LC arguably does.

Of course, if a suspension is lifted, and the employee returns to work, an employer may still continue to conduct investigations into an employee's alleged misconduct and if prima facie evidence emerges to trigger a disciplinary process.

Recently, an employer (Kouga Municipality) ⁵⁸ when faced with an order from the LC for reinstatement of a chief financial officer (who had been suspended) simply terminated his fixed-term contract and offered to pay him the remuneration he would have earned had he worked his full term. The employer explained that it had lost faith and trust in him and sought to avoid further disciplinary processes.

The employee returned to court arguing that the employer was in contempt of the order (for reinstatement) and sought a new order setting aside the termination. The court found that the termination was unlawful, but refused to order reinstatement, but ordered payment of the balance of the fixed-term contract (which the employer had in any event offered to pay the employee upon termination of the employment contract). Judge Lagrange reasoned that the employee did not have a 'right to work' and that reinstatement was a discretionary remedy and, citing the Constitutional Court decision in *Masetlha v President of the Republic of SA & another*, ⁵⁹ said, '...where such a breakdown exists, the discretionary remedy of specific performance in the form of reinstatement is unlikely to be granted and the employee's remedy will be confined to payment of the balance of his contractual remuneration'. ⁶⁰

He found that the lifting of the suspension could be enforced only if there was a continuing employment relationship. Once there was a termination of employment, even though it was unlawful, the court order was inoperative. ⁶¹

2013 ILJ p1705

54 s 191(1) read with 191(5)(a)(iv) of the LRA.

55 s 157(5).

56 s 194(4).

57 Applicants must show that they have a prima facie right, an apprehension of harm if the relief is not granted, the balance of convenience must favour the applicant, and there must be no other satisfactory remedy. Applicants who have argued urgency on the basis of damage to their reputation have been unsuccessful in the Labour Court. See *Mosiane v Tlokwe City Council* (2009) 30 ILJ 2766 (LC); *Zwakala v Port St John's Municipality & others* (2000) 21 ILJ 1881 (LC).

58 See *Abdullah* n 7 above.

59 n 7 above.

60 *Abdullah* n 7 above para 12.

61 His explanation is worth noting in full (para 14): 'It might well be the case ... that the strategy of dismissal was a cynical response to the order lifting his suspension. However, even though both the suspension and the termination have the effect of keeping the applicant away from the workplace, it is wrong in law to conclude that the respondent's act of dismissal might have been in contempt of the interim order. Stripped of the regulatory procedures governing suspension of senior municipal

officials like the applicant, suspension on pay is a measure an employer is entitled to impose if it does not want to make use of the employee's services, unless the employee is engaged in the type of occupation which might entail a right to perform work. In any event, suspension can only take place in the context of an ongoing employment relationship. Conversely, lifting of a suspension can only be enforced in a continuing employment relationship. If the relationship is terminated for whatever reason no suspension can continue, nor can a lifting of a suspension subsist. Suspension and the remedies for unlawful suspension are logically contingent on the continuity of the employment relationship.'

Conclusion

A suspension constitutes an unfair labour practice when an employer fails to adhere to the principles of procedural and substantive fairness. This occurs procedurally in circumstances in which an employer violates the audi principle by disallowing representation from an affected employee before (or arguably after) a decision is made to suspend the employee. To give effect to the audi principle the employer must provide sufficient details of the alleged misconduct and must explain why it is necessary to remove the employee from the workplace. The employer must genuinely consider the employee's representations prior to making a decision on whether or not to suspend the employee. The employer must also comply with time-limits and any other provisions set out in regulations or policy which may apply to the particular employment relationship. If the employer fails to adhere to these principles and practices, the suspension may be unfair.

On the substantive leg, the nature of the alleged misconduct must be sufficiently serious to warrant the removal of the employee from the workplace. Furthermore, the risk which the employee's continued presence may pose to the investigative process should be convincingly motivated by the employer. If the misconduct is not objectively serious and/or there is no prima facie good reason to exclude the employee, then the suspension may constitute an unfair labour practice.

If an employee is aggrieved at a suspension then he or she has recourse to the CCMA or a bargaining council in terms of the unfair labour practice provisions in chapter VIII of the LRA. Remedies include reinstatement, re-employment or compensation. The employee may also approach the LC for interim urgent relief and the most common relief in this regard is similarly reinstatement.

© 2005 Juta and Company, Ltd.