

An Overview of Precautionary Suspension Phenomenon in a Workplace

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ABSTRACT Precautionary suspension in the workplace is not out of place. It is part of the necessary actions of a disciplinary process taken against employees for gross misconducts. However, the concern and the problem inherent in precautionary suspension for misconduct is that when imposed, the employer might do so with disdainful disregard for due process and procedure. While it should be preventive in nature, it might be applied as a punitive sanction. In this regard, it will constitute flagrant violation of the laws and regarded as unfair labour practice with consequences against the employer. This paper seeks to analyse that while precautionary suspension is recognised under the law, it should be imposed based on reasonable grounds especially if there have been serious allegations of gross misconducts against an employee. It looks at the various decisions of the courts and the dynamics of failure to justify precautionary suspensions against employees in the government departments and the consequences thereof, some of which are settlements between the employer and employee to pay severance packages or lump sums of money to the suspended employee provided that the case will not be pursued and the suspended employees will not return back to their previous jobs. This is loosely referred to as 'The Golden Hand Shake.' It also explains the importance of timeous and expeditious hearings of cases relating to precautionary suspensions in order not to continue to pay a suspended employee.

INTRODUCTION

The issues surrounding precautionary suspensions of employees in the workplace based on the perceptions or judgments of the employers for one reason or another are now being frequently challenged and becoming contestable in the workplace, labour tribunals and the courts. Against this backdrop, Biggs and Van der Walt (2011) point out that "*the suspension of employees happens frequently in the work environment in different contexts. It has several contractual and other legal consequences.*"

Precautionary suspension (herein after referred to as suspension) is defined in clause 7.2.7(2) of the Public Service Disciplinary Code and Procedure, Resolution 1 of 2003, which is the Senior Management Service Handbook 2003 (SMS Handbook), as a measure through which the employer may suspend the employee on full pay if the employee is alleged to have committed a serious offence and the employer believes

that the presence of such an employee at the workplace might jeopardise any investigation into the alleged misconduct or endanger the wellbeing or safety of any person or state property. Clause 7.2.7(2) of the SMS Handbook deals only with disciplinary issues of senior managers in the government departments or public service.

Suspension is defined as "*depriving a person of a job or position in a workplace for a time pending an outcome of a process*" (Hawkins 1996). Grogan (2007) describes it as follows "*... the term used in the employment context to describe situations in which an employer declines to accept an employee's services, but does not terminate the contract.*" The issues of fairness and fair labour practices are usually given prominence in suspension situations especially when there is a dispute about the fairness of a suspension (Verkuil 2005). This is because the employer, in most cases will be performing all the pertinent roles in a disciplinary procedure and hearing against an accused employee and sometimes force it on the employee (Cottone 2001). Against this backdrop, there should be a level playing field and the employer should not be seen as a bully hence "*the employer's right to discipline the employee will be weighed up against the employee's right to fair labour practices*" (Conradie and Deacon 2009).

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Section 186(2) (b) of the Labour Relations Act 66 of 1995 defines what an unfair labour practice is with specific reference to a precautionary suspension, it reads thus: (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.*”

Precautionary suspension is a process that is of course acceptable to be imposed on an employee by the employer if there is a good cause necessary for good administration (Conradie and Deacon 23009). In such situations, the employer will continue to pay the employee the full pay, as was held in the case of Mabilo v Mpumalanga Provincial Government and others [1999] 8 BLLR 821 (LC) where the applicant was suspended from duty on full pay pending a disciplinary inquiry into various charges against him. He challenged his suspension in the Labour Court, but the court dismissed his application on the basis that it was necessary for the employer to suspend him to be able to investigate charges against him and also for the promotion of orderly administration.

Mhlauli (2011), commenting on the suspensions in the Eastern Cape Department of Health, South Africa stated that some employees suspended from the department spent years without facing any disciplinary action after having been suspended. As a result of this, millions of Rands were wasted on the salaries of people who were at home doing nothing.

Against the backdrop of unnecessary application of precautionary suspension, particularly in the government institutions and establishments, Smit and Mpedi (2012), state that “*there are a great number of cases involving unwarranted or protracted suspensions being brought against local municipalities, which certainly won't please taxpayers, and in most cases the labour court has ruled in favour of the employees involved.*”

Objective of the Study

The paper looks at the broader issues of suspensions imposed on employees by the employers without considering the basic principles which are applicable and the implications of these on the right to fair labour practice. The paper

points out that employers need to be careful and have to apply their minds before taking the route of precautionary suspensions in order not to violate the right of the employees. Pursuant to this, the paper asserts that non-compliance with the necessary law before imposing precautionary suspension will attract consequences especially if such action is not warranted (Beaumont 2012).

METHODOLOGY

The paper relied hugely on literature that involved extensive reviewed of articles, books, legislation and case law.

OBSERVATIONS AND DISCUSSION

The Employer's Power to Discipline

According to Banderet (1986), “*the institutional theory states that the employer's disciplinary power derive from the fact that he is the head of an enterprise and of a hierarchical organised community of interests, for which he assumes responsibility. As such, he has the power to make regulations, direct operations and exercise powers by hiring and firing at will.*” It is pertinent to point out that the legal limitation of the employer's disciplinary powers has always existed (Banderet 1986). This is evident in the rise of democracy and general acceptance of the principles of equity and freedom; the employer's disciplinary powers have ceased to be equated with a natural feature of strictly hierarchical society. In constitutional democracy like South Africa, workers now have protection under the laws against abuses in the exercise of employer's powers (Tushnet 2003).

The employer has overall power and control over an employee when imposing suspension (LeRoy 2006), which can either be used for good or bad motive (Houh 2005). If suspension is imposed on an employee as a result of misconduct, in this regard, it will be preventive in nature because it will be used to assist the employer during the course of investigation pending hearings but not to punish or intimidate the employee (Peeters 2003). In this instance, suspension is a form of a ‘holding/cautionary suspension pending a disciplinary hearing or as suspension as a disciplinary action (Du Toit 2006). A clear explanation of the meaning of preven-

tive suspension is well articulated by Biggs and Van der Walt (2011: 701) thus “*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.*” The essence of suspension in this instance is to allow for comprehensive unhindered investigations into the alleged misconduct to be conducted smoothly and timeously to logical conclusions.

However, “*if it is determined that the suspension initially was effected as a holding operation, but in fact has the same effect as a form of sanction, then it should be treated as the type of suspension which is nothing else than a punitive measure*” (Conradie and Deacon 2009: 41). According to Biggs and Van der Walt (2011: 702) “*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.*” This will constitute an unfair labour practice. Moreover, it is important to point out that “*a suspension pending a disciplinary enquiry is not meant to be punitive as the allegation of misconduct has not been proved*” (Biggs and Van der Walt 2011: 701).

Insights into the Issues and Problems Relating to Precautionary Suspension

Generally, an employee may be suspended at the workplace for misconduct or on any other ground specified in the law if the employer reasonably believes that by being at the workplace during the course of investigation, the employee is likely to jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person or state property (Roth 2003).

However, it is not always necessary to impose suspension on an employee where misconduct is suspected or has been committed on the part of the employee (Okpaluba 1999), as was held in the case of *Mogothle v Premier of the North West Province* and another [2009] 4 BLLR 331 (LC), whose suspension was governed by SMS Regulations as he was in the manage-

ment level, and the court noted in this case 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 threats. The suspension of the applicant was set aside by the Labour Court (LC) as it held that there was no indication on the papers that the applicant’s presence in the workplace would jeopardise the investigation. Israelstam (2011) supported this position and stressed this fact by stating that an employee’s suspension may be necessary only in order to ensure that his/her presence at the workplace will not interfere with the investigation.

In the case of *Mogothle*, the court remarked that the employee must not be excluded from the workplace unless if there is some objectively justifiable reason for doing so. This position fits perfectly with an observation of Conradie and Deacon (2009) where they point out that “*suspension is depriving a person of a job or position for some time, and further states that for that to happen the employer must be having an opinion that an employee’s presence may possibly prejudice an investigation and that opinion must be supported by evidence.*”

The basic hypothesis and central theoretical argument of this paper is that the lack of experience and knowledge in labour matters on the part of some officials who are supposed to deal with labour issues compound the problem. The case of *Ngwenya v Premier of KwaZulu-Natal* [2001] 8 BLLR 924 (LC) tacitly affirmed this view as the applicant was suspended on full pay for a period of more than six months without any hearing wasting taxpayers money due to lack of capacity to prosecute on the part of the employer. Thereafter, there were a lot of uncertainties about the best action to take resulting in delay by the employer to reach a decision. As a result of this, the applicant referred the matter to the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as the CCMA), whereby the parties reached a settlement that the applicant will lift the precautionary suspension and allow the applicant to resume his duties. The applicant was again suspended the following day on the same allegations. The applicant then referred the matter to the Labour Court on an urgent basis, and the precautionary suspension was set aside on the

basis that the applicant could not be suspended indefinitely pending the disciplinary action that is not forthcoming.

The understanding is that if the correct procedures were followed before and after the suspension, the suspension would have been sustained. Coetzee (2007) states that the CCMA, Dispute Resolution Centres of Bargaining Councils and the Labour Court have become familiar institutions where battles between disgruntled employees and their employers have, since 1995, been settled and these institutions find their roots, therefore, in the Labour Relations Act, which in turn gives statutory effect to the Bill of Rights in the Constitution. This was affirmed in the recent case of *Glynnis Breytenbach and National Director of Public Prosecutions*, which was heard on the 25/06/2012, the judgment was delivered on the 18/07/2014 in suit number J1397/12, in the Labour Court, in which the application by the applicant for her precautionary suspension to be lifted was dismissed on the basis that the matter was not urgent to an extent that it needed a declaratory order from the Labour Court, and that there were suitable forums which deal with unfair labour practices, to which she could have referred the matter to.

The argument is that if those who have been assigned to deal with labour issues are well trained and capable of dealing with issues of suspensions, their decisions will be sustained and not set aside because they would have done the right thing by applying the law, follow the procedures and applied their minds. McGregor and Budeli (2010) emphasised on the issue of the incompetency by managers who are to deal with labour matters by asserting that “*long periods of leave or suspension on full pay pending investigations or disciplinary actions are encountered often in the case law.*” A number of cases criticize this practice. In *Heyneke v Umlhlatuze Municipality* (2010) 31 ILJ 2608 (LC) the court cautioned:

“Protracted leave or suspension on full pay pending investigations or disciplinary actions is a prevalent practice, especially in publicly funded entities. This practice is a sign of weak, indecisive management that cannot diagnose problems and find solutions efficiently. These inefficiencies impact on both taxpayers and shareholders alike, and not on the private pockets of the management of public organizations, consequently, the incentive to finalize investi-

gations and disciplinary procedures is weak. This practice has to stop.”

To improve and build capacity, it has been stressed that Senior Managers in the South African Public Service must offer guidance and mentoring to the young employees to support them in order to know how to deal with issues of suspensions and other labour disputes so as to avoid unnecessary expenses on litigations and hearings. According to Sing and Govender (2008), “*in modern times mentoring focuses on providing psychosocial support and career direction. This explanation can be expanded to mean an experienced, wiser and probably older employee handing over to a junior employee, attitudes and attributes that create successful people in a given discipline.*” *If an employee successfully challenged and won a case against suspension, the employee may receive promised monetary compensation, commonly referred to as “golden handshakes”* (Soanes 2001), so that the employee can leave the particular job without pursuing the case further in the courts of law or labour tribunals.

A golden handshake is “essentially a severance agreement between an employee and employer usually offered a director, senior executive or consultant who is let go before his or her contract has expired” (Financial Dictionary 2014). Golden handshake is a term that is loosely used in an employment relationship where the employer and the employee will reach a settlement that an amount of money be paid (McCraley 2000) to the employee on the grounds that the employee will have to leave that employment and not pursue any disputes against the employer in the court or before any tribunal (McCraley 2000). It is pertinent to point out that it is very rare to report most of these cases of settlements in the law reports because the settlements must have been voluntarily agreed to by all the parties hence documents involved are not published for members of the public for public consumption (Bedlin and Nejelski 1984).

However, a “*golden handshakes can be controversial, of course. On one hand, golden handshakes often include promises not to sue or work for competitors, which can help companies part with certain employees peacefully and for a fixed cost. Alternatively, they sometimes come across as distasteful when the amount of the severance package is considered excessive*

or if the employee receives the pay even after gross misconduct" (Financial Dictionary 2014).

Typical examples of such settlements made on the Golden Handshakes are provided thus, on the 18/8/2010, there were media reports that the Premier of the Limpopo Province, Cassel Mathale, placed the then Director-General of the Provincial Government of Limpopo, Dr Nelly Manzini, on precautionary suspension pending the finalisation of her disciplinary enquiry by the office of the premier. She then took the matter to the Johannesburg Labour Court, in suit number J1901/10, but the matter was not heard because, reportedly, she was offered a golden handshake if she offered to resign. On the 6/10/2010, the office of the Premier of the Limpopo Province issued a media report which stated that all charges against Dr. Manzini have been withdrawn and the parties have reached an agreement for the amicable parting of ways. She subsequently resigned as the Director General of the Limpopo Province, and did not pursue her case in court.

In 2009, Advocate Vusi Pikoli, who was then the National Director of Public Prosecutions (NDPP), brought an urgent application to the North Gauteng High Court (NGHC), to prevent the National Prosecuting Authority (NPA) from advertising his post while he was still on precautionary suspension. The matter was subsequently, settled out of court and media reports stated that he was given R7.5 million severance settlement after he challenged his suspension against the then President of the Republic of South Africa, Thabo Mbeki. The then Crime Intelligence Head, Joey Mabasa also reportedly received R3, 5 million as a golden handshake to vacate his post (NSAW 2012).

If the right decisions were made before suspensions were effected in the above hypothetical cases, or if the need was there for those suspensions to be effected, then the expectation is that the cases would have proceeded to finality without necessarily offering the employees golden handshakes. In cases where the employers have cases of misconducts against the employees, they should have been put through disciplinary hearings for the wrong they have been alleged to have committed as this will deter prospective employees for committing misconducts.

Insights from Contemporary Literature

Commenting on the hassle of putting an employee under suspension pending a process

Conradie and Deacon (2009) writes that "*for many employers, the suspension of an employee literally amounts to a headache. The question which usually comes to mind is: What do I have to do before I can suspend an employee?*" Some of the answers to the question raised by Conradie and Deacon (2009) are well articulated in the constitution and the LRA and the issue of suspension on the ground of unfair reason will amount to an unfair labour practice by virtue of section 186(2)(b) of the LRA.

Biggs van der Walt (2011), commenting on the case of Mabilo stated that "*an employer must not be allowed to abuse the suspension process.*" In their book van Jaarsveld and Eck (2005), indicate that an employer must have positive grounds when deciding to suspend an employee because wrongful suspension could make the employer liable to a claim for damages or could constitute an unfair labour practice. To buttress this position, the case of Engineering Council of SA and another v City of Tshwane Metropolitan Municipality and another 2008] 6 BLLR 571 was relied upon by van Jaarsveld and Eck (2005) and it is submitted that this position is valid and accords with the provisions of the laws governing suspensions and related issues. In the Engineering's case, the second applicant who was an electric engineer held the position of Managing Engineer: Power System Control for the first respondent, the City of Tshwane Metropolitan Municipality. As a highly qualified engineer with an honours and master's degrees in electrical engineering, the second applicant refused to agree to the appointment of several people who, in his opinion lacked the necessary experience to perform the work involved, as working on the high voltage system requires specific skills necessary to avoid putting the employee or the public at risk. The second applicant then raised his disquiet with his superiors, and because of that he was suspended and a disciplinary hearing was instituted against him. The court ordered the first and second respondents not to impose any disciplinary sanction on the second applicant as the suspension was held to be an unfair labour practice.

An employee is entitled to a speedy and effective resolution of the dispute (Weil 2004). Suspension diminishes an employee's self-worth and could demoralise the employee forever especially if the suspension was done with preju-

dice (DelPo and Guerin 2013). Therefore, an employer needs to take into consideration the need for self-esteem on the part of the employee before taking any step to suspend the employee (Podesta 2001). In the case of Ngwenya, the applicant had been suspended for about six months without a hearing, and when he approached the Commission for Conciliation, Mediation and Arbitration (CCMA), the respondent, being his employer decided to reach a settlement with the applicant allowing him to resume his employment. Upon resuming employment, the applicant was suspended again, which then made him to approach the court for relief. The suspension was set aside as being unconstitutional and unlawful by the court. It was also held in this case that employees cannot be kept on full pay indefinitely because disciplinary action is being considered by the employer. This is because, the employer will be paying for services not rendered, and taxpayers' money will be wasted. Continued suspension will also tarnish the reputation of the employee.

An employee will normally be negatively affected by a suspension and this may have serious personal and social consequences on the employee as the right to work is linked to the right to dignity (Everett et al. 2004). This issue was well canvassed by the court in the case of Mogothle, and the court said in paragraph 31 of the case that *"in so far as the substantive dimension of fair dealing in relation to suspension is concerned, Halton Cheadle has observed that suspension is the employment equivalent of arrest, with the consequence that an employee suffers palpable prejudice to reputation, advancement and fulfilment. On this basis, he suggests that employees should be suspended pending disciplinary enquiry only in exceptional circumstances."*

The issue of whether an employee who has been placed on precautionary suspension should continue to receive salary during the course of suspension has continually been generating heated debate amongst scholars and the courts. Grogan (2007: 71-72) asserts that *"suspension is a term used in the employment context to describe situations in which an employer declines to accept an employee's services because the employer believes that the presence of the employee would jeopardise any investigation into the alleged misconduct or endanger the well-being or safety services but does*

not terminate the contract." Pursuant to this, Grogan (2007) vehemently argues that an employee is entitled to remuneration during the period of suspension; an exception to the employee not being paid a salary during the period of precautionary suspension is when the contract of employment of the employee states that, or, if a collective agreement provides for non-payment of a salary during precautionary suspension. Keall (2012) also holds the same view.

Upon being placed on precautionary suspension, the employee is still entitled to be paid a full salary even if the employee is not rendering any service to the employer (Conradie and Deacon 2009), until such time that the employer decides to hold a disciplinary enquiry against the employee where a verdict will be pronounced (Vernon 2003), or until the employer decides to recall the employee to come back to work if the employer decides not to hold a disciplinary enquiry (Grogan 2007).

In the case of *Mabitsela v SAPS* (2004, 8 BALR 969), a policeman was suspended without pay pending a charge of murder. The arbitrator observed that although the police regulations allow for suspensions of police officers to be without pay, the plaintiff claimed at the bargaining council that his suspension was unfair because he had been on unpaid suspension for five months. The arbitrator found that the suspension itself was fair but that it had been unfair to implement the suspension without pay. In the words of Israelstam (2011), *"this case shows that, even where regulations allow employers to suspend employees without pay this may still be unfair under the circumstances."*

Failure to pay salary to a suspended employee may, to certain extent, affect even the well-being or health of the suspended employee and have devastating consequential impacts on the family and those who look up to the employee as a bread winner (Smith 2002). This was what the court adjudicated on in the case of *Booyesen v Minister of Safety and Security and Others* [2011] 1 BLLR 83 (LAC), where the employee could not proceed with the disciplinary enquiry because of the fact that he was allegedly sick. The issue of his inability to attend and take part in the disciplinary enquiry went to an extent of being referred to the Labour Appeal Court (LAC), where the matter was referred back to the Labour Court (LC) for it to decide on whether the applicant was in a position to take part in the

disciplinary enquiry against him because of his alleged unstable state of mind or not. The matter started in 2007 and the LAC only gave judgment to refer it back to the LC to deal with the matter on the 01/10/2010.

Commenting on the above judgement, Venter (2011) stated that “*the fact that the LAC ordered the LC to deal with the matter, could in future make the LAC to be inundated with urgent applications by employees facing discipline by their employers and time will tell under what circumstances the Labour Court will be prepared to intervene.*”

However, Mhlauli (2011) was of the view that by paying a suspended employee who has been placed on a precautionary suspension is a mere waste of tax payers money. Mhlauli (2001) accentuated that salary will be paid to someone who is not doing anything or contributing to the improvement of the institution. Smit and Mpedi (2012) concern is on the issue of protracted suspension and payment of salary to the suspended employee during the course of the suspension without offering any services.

From the above submissions, it is clear that different authors have vehemently submitted that it is not desirable for employers to suspend employees when it is not necessary to do so, but if need be, it should be timeously and the disciplinary hearings finalised as soon as possible. Against the backdrop of this, speedy and timeously hearings will save the employer the payment of salaries because the suspension is not unnecessarily protracted and at the same time, the employee will promptly know his or her faith because suspension can sometimes negatively affect the self-esteem.

CONCLUSION

In a workplace, precautionary suspension should be imposed on an erring employee only if it is really necessary to do so. For example, with regard to gross misconduct, in order for the promotion of orderly administration, precautionary suspension may be imposed on an employee if there is reasonable apprehension that the employee will interfere with the investigations or pose some other threats. Once a precautionary suspension has been imposed on an employee, the disciplinary hearings should be finalised as early as possible within the ambit of the time governing the procedures upon which

the employee has been charged. The allegations against an employee must be investigated fully and be justifiable to warrant a suspension before being imposed otherwise the employee will have reasonable grounds to challenge the suspension. The position of the law is that failure to pay a suspended employee salary during the course of suspension will be an unfair labour practice unless if the contract of employment allows for non-payment of salary upon and during the course of suspension.

RECOMMENDATIONS

Precautionary suspension is duly recognised under the law and labour law and as such an employee who has been accused misconducts will definitely be suspended pending investigation and hearings. However, what the courts and the labour tribunals are saying is that, there must be substantive reasons that would warrant the suspension. Employers are therefore enjoined to look before they leap otherwise, by imposing unfair and unjust suspensions may result to claims for damages against them.

By imposing a precautionary suspension, this indicates that the case or enquiry is expected to be completed in the shortest time possible as time is of essence. Consequently, the investigations must be done speedily, so that the disciplinary processes can also be concluded judicially and expeditiously. To this end, before the commencement of hearings, capable hands are expected to handle the matter in order to assess whether the grounds for suspension are in line with the provisions of the law and whether if the matter is adjudicated, the employer will succeed.

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