

## **CAN I SUSPEND AN EMPLOYEE?**



### **1. Introduction**

Dubious situations arise whereby an Employer either knows or suspects that an Employee is involved in committing an act of misconduct / gross misconduct. The Employer is usually familiar with the steps to take when investigating and preparing for a disciplinary hearing, to ensure it is procedurally and substantively fair. But there are situations where the act of misconduct is regarded as being extremely serious and could have far reaching consequences and negatively impact the company. But at what point is the alleged misconduct so extreme that suspension is warranted?

### **2. Governing Legislation**

The point of departure is the Labour Relations Act (LRA). However, the governing legislations is ambiguous on the topic. Item 4 of schedule 8 of the LRA 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 disciplinary hearing. Section 186 (2)(b) of the LRA in direct contrast to this states that the suspension of an employee could be unfair, making it an unfair labour practice.

### **2. When Can You Legally Suspend An Employee?**

An Employer will need to assess the specific circumstances related to the misconduct on an ad hoc basis. The broad answer is that if an Employer can prima facie show grounds that the act of misconduct allegedly committed by the employee is so serious and there are objective grounds that could justify the reasons for excluding the employee from the workplace, an employee can be suspended.

### **3. Is Suspension With or Without Pay?**

Generally and as a blanket rule – suspension is always with full pay. However, as with most aspects of law there are exceptions to this rule. In the following instances the general rule falls away:

- 3.1. If the employee agrees to suspension without pay then the general rule that suspension is always with full pay falls away; and
- 3.2 Based on legislation; or
- 3.3 A collective agreement authorises the suspension without pay.

It is therefore clear that employers may only suspend employees without pay if they agree thereto. 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 resort to correct the behaviour of the employee, the employer offered suspension without pay as an alternative to terminating the employment relationship. In such an instance it is advisable that the employee signs a "Sanction by Agreement Letter."

#### **4. How Does an Employer 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 commissioner indicated that the suspension constituted an unfair labour practice because the employee was not aware 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, indicated that suspension prejudices an employee psychologically, socially and in terms of future job prospects. The employee was awarded six months' compensation.

Employers need to be cognisant that they should refrain from hastily resorting to suspending employees when there is no valid reason to do so. Suspending an employee could have a detrimental impact on the affected employee and may prejudice his/her reputation, advancement, job security and fulfilment. Suspension must therefore be based on substantive reasons and a fair procedure must be followed. Unless the circumstances demand suspension, employees must be offered the opportunity to be heard before being placed on suspension.

The question remains how to afford the employee the opportunity to be heard while not jeopardising the investigation, the company and fellow employees?

Currently there are two approaches to hearing the employees side before deciding to proceed with the suspension.

- The first approach is not advised as it gives the employee too much notice. It serves as a "heads-up" to the employee and allows them the opportunity to tamper with evidence, interfere with witnesses and to possibly commit further and/or similar acts of misconduct.

The employer must notify the employee in writing of their intention (and reasons) to suspend the employee based on the outcome of the preliminary investigation. Then invite the employee to submit reasons why they should not be suspended (normally within 24 or 48 hours). The employer should then consider these reasons prior to finalising a decision regarding the suspension.

- The second approach is recommended. The employer should invite the employee into the boardroom, together with a representative from the HR department, shop steward or another employee who could act in the capacity as a representative and inform the employee of their suspicions and reasons for considering suspending them. The employee is given the opportunity to respond almost immediately and the employer will consider the submissions made by the employee. This may be done in collaboration with the representative from HR or selected representative and the employee would then be asked to remain in the boardroom until a decision has been reached. This approach ensures that the employee is unable to cause further harm and there is no time delay.

## 5. Suspension Checklist

|    | Question                                                                                                                                                                                                                                                              | Answer Yes / No |
|----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| 1. | "On the face of it" is there reason to believe that the employee was involved in the misconduct?                                                                                                                                                                      | Yes/ No         |
| 2. | Is the alleged misconduct of a serious nature?                                                                                                                                                                                                                        | Yes/No          |
| 3. | Is there a possibility that the employee may interfere with witnesses?                                                                                                                                                                                                | Yes/ No         |
| 4. | Is there a possibility that the employee may tamper with evidence?                                                                                                                                                                                                    | Yes/ No         |
| 5. | Is there a possibility that the accused employee may retaliate against the complainant, especially if the complainant is a subordinate of the accused employee?                                                                                                       | Yes/No          |
| 6. | Is there a possibility that the employee may commit further and / or similar acts of misconduct if she/he is not suspended?                                                                                                                                           | Yes/No          |
|    | <ul style="list-style-type: none"><li>Do not suspend the employee if the answer to either question 1 or 2 are "no".</li><li>Suspension may be considered if the answers to question 1 and 2 are "yes" and at least one other question is answered as "yes".</li></ul> |                 |

### 5.2 Suspension Discussion Checklist

|    |                                                                                                                                            |         |
|----|--------------------------------------------------------------------------------------------------------------------------------------------|---------|
| 1. | Was the employee informed of the reasons for the suspension?                                                                               | Yes/ No |
| 2. | Was the employee allowed an opportunity to give reasons for not suspending him / her?                                                      | Yes/ No |
| 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 |
| 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 finalised? | Yes/ No |

## 6. Conclusion

While there are obvious instances that justify suspension there are instances where the misconduct is shrouded in a grey area and less obvious that suspension would be justified.

It is essential that Employers strike a balance between protecting the integrity of the investigation and ensuring that the employee's rights are protected.

Case law is clear that if a suspension is deemed unnecessarily prolonged, the employee may have grounds to claim that the suspension was unfair. As indicated above whether a suspension is justified as well as the duration needs to be determined on an ad hoc basis.

Contact one of the Altitude Employment Solutions business partners for expert advice to ensure that the suspension is justifiable to avoid it been deemed an unfair labour practice.

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