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To suspend or not to suspend

Summary

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? This article investigates the nature of the suspension, the courts' application thereof and makes recommendations on procedural aspects.

“Behoort ek my werknemer te skors of nie?”

Vir baie werkgewers is skorsing van 'n werknemer letterlik 'n erge hoofpyn. Die vraag wat gewoonlik ontstaan is: Wat moet ek doen alvorens ek 'n werknemer skors? Hierdie artikel ondersoek die aard van skorsings en die howe se toepassing daarvan en maak sekere prosedurele aanbevelings.

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1. Introduction

Suspension is defined as “depriving a person of a job or position for a time”.¹ Grogan defines 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”.² If there is a dispute about the fairness of a suspension, the employer’s right to discipline the employee³ will be weighed up against the employee’s right to fair labour practices.⁴

The contract of employment creates a relationship of employment between an employer and an employee. This contract also imposes certain duties that must be observed by both parties in the employment relationship. If an employer fails to comply with his/her duties, the employee has various remedies to his/her disposal.⁵ The contrary is also true, the employer has certain remedies at his/her disposal if the employee fails to honour his/her duties/obligations. Aside from these duties and remedies, an employer, on the one hand, is in a position of authority towards the employee and the employer is therefore at liberty to discipline the employee; an employee, on the other hand, is entitled to fair labour practices. An example of the disciplinary measures an employer is entitled to is the suspension of an employee. Suspension of an employee should, however, not result in an unfair labour practice.

The suspension of an employee is literally a headache for some employers. The question which usually comes to mind is: What do I have to do before I can suspend an employee?

This article aims to address the lack of legislative guidelines pertaining to the procedural fairness of suspension of employees. In attainment to answer to this, the nature of suspension is discussed by way of making reference to the right to suspend an employee, the distinction between suspension as a preventative- and punitive measure and the possibility of suspension resulting in an unfair labour practice. Possible guidelines, ensuring the procedural fairness of a suspension, are proposed. (When applicable and where necessitated, distinctions between preventative — and punitive suspension are highlighted.) It is proposed that the lack of clear guidelines be addressed by the legislature in order to ensure that the employer, who experiences unnecessary difficulty with implementation of procedural fairness of suspension, in a meaningful way can make use of this vital tool in the workplace.

1 Hawkins 1996: 450.

2 Grogan 2007A:61-62.

3 *Labour Relations Act* 66/1995: Schedule 8..

4 *Constitution of the Republic of South Africa Act* 108/1996: sec 23.

5 Remedies include the termination of the contract of employment, claiming specific performance, claiming damages, refusal to work and certain other statutory remedies.

2. Suspension as a possible unfair labour practice

2.1 The right to suspend an employee — Common law versus the *Labour Relations Act*

In terms of the common law the employer has no right to suspend an employee. The right to suspension can only be obtained via a contract, a wage-regulating measure or by usage in trade.⁶

In terms of section 23 of the Constitution⁷ an employee has the right to fair labour practices and the *Labour Relations Act*⁸ should give effect to this right but the *Labour Relations Act* only deals with the unfair suspension under the definition of an unfair labour practice in section 186(2) stating:

‘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.

From the above it is not clear when an employee may be suspended, how an employee may be suspended or for how long an employee may be suspended. No clear guidelines from legislation to answer the above are provided and we have to turn to the court’s interpretation to get the necessary guidance on the application of a suspension.

2.2 Distinction between preventative — and punitive suspension

Suspension may take the form of a ‘holding/cautionary suspension’⁹ pending a disciplinary hearing or as suspension as a disciplinary action.¹⁰ To distinguish between the two, one can consider the intention of the employer: if the suspension was intended to assist the employer in any way and not to punish the employee, it will most probably be suspension as a holding operation.¹¹

6 ILJ 1985:421. Also see Grogan A 62.

7 Sec 23.

8 *Labour Relations Act*.

9 In some cases called a preventative suspension. See Grogan A 62 and also see *Leonard T Thubakgale and Eksakhweni Security Services* (2004) 13 CCMA 6.4.1.

10 *Du Toit et al* 2006:498 and *Ndlovu v Transnet Ltd ta Portnet* 1997 7 BLLR 887 (LC): This is a punitive measure as a form of discipline according to *Koka v Director-General: Provincial Administration North West Government* 1997 7 BLLR 874 (LC) 1028.

11 *National Union of Metalworkers of South Africa and Nu-Fiber Form Plastics SA (Pty) Ltd* 2005 26 ILJ 204 (BCA) Bargaining Council Arbitration (MEGA 4999).

2.2.1 The 'holding/cautionary suspension'

Suspension as a form of a holding operation usually occurs in practice where the employer suspends the employee until a formal enquiry or disciplinary hearing has been held. In circumstances like these, employers choose to suspend the employee before the employee has actually had an opportunity to state his case. Employers may have several reasons to justify this conduct, such as the fact that the continued presence of the employee may be harmful or threatening to legitimate business interests¹² or that the continued presence of the employee may be detrimental to the investigation into the allegations against the employee.¹³ This form of suspension requires continued provision of wage/salary.¹⁴ It is only permissible where it was intended to enable the employer to investigate the charges against the employee.¹⁵

The 'holding/cautionary suspension' always occurs prior to a disciplinary hearing and it is with the enjoyment of all benefits for the employee. There are a few exceptions to this general rule. Statutory conditions of service or even a contract of employment may expressly provide for suspension without pay.¹⁶ It is therefore important for the employer to finalize the investigation as soon as possible to either charge or reinstate the employee. The continued provision of benefits will be discussed here under.

In *National Union of Metalworkers of South Africa and Nu-Fiber Form Plastics SA (Pty) Ltd*¹⁷ Arbitrator Driscoll formulated it as follows:

... Preventative suspension is accepted, and is not deemed to be punitive, where the employer *bona fide* believes that such action is necessary in order to properly investigate the complaints against the employee. The essence of suspension pending a disciplinary hearing is that a finding has not been made against an employee and thus action is not intended to be a punitive measure, but an administrative one.¹⁸

12 Du Plessis & Fouche 2006:307.

13 Also refer to *Phutiyaqae v Tswaing Local Municipality* 2006 15 (LC) 6.4.1 in this regard. Mokgoatheng AJ made the following remarks at par 35-36: "The applicant is suspended with full pay and benefits, his suspension is a holding operation intended as an interim measure undertaken for accountable and transparent governance whilst the respondent is conducting investigations pending a disciplinary enquiry if such proceedings are justifiable. The prejudice the respondent will suffer, is far greater than the potential prejudice, if any, the applicant will suffer, all the applicant has to do is remain on suspension whilst the investigations are proceeding ..."

14 Du Plessis & Fouche 2006:307. It is submitted that the payment of wages/salary must continue until such time as when a final decision (after enquiry/disciplinary hearing has been held) is reached.

15 *Mabulo v Mpumalanga Provincial Government & others* 1999 8 BLLR 821 (LC) 826. Also refer to fn 33 & 34 hereunder.

16 Grogan 2007A:62. Grogan refers to policemen, some public servants and municipal employees.

17 *National Union of Metalworkers of South Africa and Nu-Fiber Form Plastics SA*.

18 *National Union of Metalworkers of South Africa and Nu-Fiber Form Plastics SA*: 207.

Landman AJ also describes the purpose of this kind of suspension as ‘... not to impose discipline, but for reasons of good administration ...’¹⁹

In the *Leonard T Thubakgale*-case²⁰ the applicant (a security guard) was suspended pending an outcome of a court case (in which the applicant was charged with illegal possession of a firearm and negligence). The regulations of the Security Officer’s Board allow a guard to remain in employment until he/she has been found guilty of a charge. The court case was withdrawn against the applicant, but the employer still failed to lift the suspension of the applicant. Although the aforementioned fact may be of the utmost importance in deciding upon the fairness of the suspension, it is submitted that: The main purpose of preventative suspension is to “remove” the employee from the workplace (for reasons of good administration) until the employee is afforded an opportunity to defend his case. This opportunity is usually in the form of a disciplinary hearing. The hearing is usually held within a reasonable time. If one should suspend an employee pending the outcome of a court case, it may take years for the court case to be finalised. Should the employee be found not guilty during the court case, the suspension of the employee may very well have been very unfair. It is therefore submitted that a criminal charge against an employee may constitute a reason for the removal of the employee for reasons of good administration, but such an employee must be afforded an internal disciplinary hearing regarding the suspension pending the outcome of the court case. Preventative suspension cannot be connected with the outcome of a criminal/civil court case. A disciplinary hearing must be held to decide upon the preventative suspension of the employee in such an event.

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.²¹ Arbitrator Williams agreed with the aforementioned statement in *CEIWU on behalf of Khumalo and SHM Engineering CC*.²²

19 *Koka v Director-General: Provincial Administration North West Government*: 1028 Landman AJ also quote from Denning MR in *Lewis v Heffer & others* 1978 3 ALL ER 354 (CA) as cited in *Muller and others v Chairman of the Ministers’ Councils: House of Representatives & others* 1991 12 ILJ 761 (C) at 771H-772A. In this quotation/citation, mention is made of circumstances which call for “good administration”. Where someone is under suspicion, co-workers may very well find it uneasy to work in the presence of such a person and may it necessitate the suspension of the particular employee in order to “get back to proper work”.

20 *Leonard T Thubakgale and Eksakhweni Security Services*.

21 *Koka v Director-General: Provincial Administration North West Government*: 1029.

22 *CEIWU on behalf of Khumalo and SHM Engineering CC* 2005 26 ILJ 1803 (BCA) Bargaining Council Arbitration (MEKN 1109) (C) 1811A-B “... although ‘holding’ suspensions, such as the applicant’s, do not usually fall within the ambit of s 186(2) (b), there are times that they have the same effect as a disciplinary measure...In this case, whilst the applicant’s suspension might well have started out as a holding measure, it went on for a lengthy period and accordingly had a disciplinary effect. I am therefore satisfied that it was in itself a disciplinary measure ...”

The holding suspension should thus only be utilized under the following conditions:

1. If the presence of the employee might have an effect on a disciplinary investigation;²³
2. If the reputation of the business is in question;²⁴
3. If it is in the best interest of the employee not to be present during the investigation.²⁵

The aim of this suspension is to create a suitable environment to investigate any alleged misconduct. If there is merit in case then the employer will have to draft a charge sheet and convene a disciplinary hearing. If there is no case, the employer will lift the suspension and the employee will proceed with his normal duties. The aim of the “holding suspension” is thus not to punish as in the case of the disciplinary suspension.

The manner in which you suspend is thus important because the possibility of a continued employment relationship must be taken into account as well.

2.2.2 Suspension as a disciplinary action

This type of suspension can only take place as a punitive measure after a disciplinary hearing has been held. The normal rules of substantive and procedural fairness during misconduct hearings should be applied. This suspension could be without any benefits. This type of penalty is especially useful to punish severe misconduct and retain the skills of the employee.

There is no detailed description in the legislation therefore we rely on court decisions to guide us in this process.

Suspension as a punitive measure has numerous advantages:²⁶

- An indication to the employee of the seriousness in which the employer regards the employee’s behaviour.
- In situations of tension between the employer and employee, it may serve as a neutral ground for parties to cool off.
- During suspension, the employer can make choice to either warn or dismiss employee.

23 If there are legitimate fears that the employee might intimidate witnesses of destroy evidence. Also see *Marcus v Minister of Correctional Services & others* 2005 2 BLLR 215 (SE). In this case the employee’s presence at the workplace would have had no effect on the investigation and the suspension was set aside by the High Court.

24 For example: The employee is accused of assaulting a client or fraud.

25 For example: The moral values of an employee (eg priest) are in question or allegations of financial mismanagement (eg. chartered accountant).

26 Rycroft 1985:422.

Suspension as a punitive measure must be substantially and procedurally fair.²⁷ This kind of suspension is generally utilised by an employer as a form of disciplinary measure short of dismissal. The employer is, however, not compelled to take this route when choosing upon an appropriate sanction. The Industrial Court, in *Miya v Smiths Manufacturing (Pty) Ltd*²⁸ held:

... an employee does not have a right to expect his employer, unless this is enshrined in some agreement or code, to extend to him an offer to accept suspension without pay as a disciplinary measure. In the absence of an agreement to this effect the extension of such an offer is a matter of grace which lies within the discretion of the employer and he will not generally be faulted should he fail to make such an offer.

2.3 Suspension as a possible unfair labour practice

In light of a suspension being one of two categories, the question whether both types can constitute an unfair labour practice, may be asked.²⁹ This question may be approached in two different ways.

Du Toit³⁰ is of the opinion that both categories of suspension may establish an unfair labour practice because of the wording of sect 186(2)(b)³¹ which is inclusive of both. Du Toit's opinion is supported by a remark made by Pillay J in *Perumal v Minister of Safety and Security and Others*:³²

A suspension is always disciplinary action, irrespective of whether it is implemented as a temporary measure to maintain the employee's status of as a sanction for misconduct. The words 'any other' fortifies this interpretation. The phrase 'disciplinary action' is also not restricted to mean 'disciplinary sanction' ...³³

This remark by Pillay J was made with reference to *Koka*.³⁴ Authors supporting this approach also make reference to the *Koka* case as authority. Le Roux, for instance, interpreted the Court's decision that suspension as a holding operation should be treated as suspension for disciplinary reasons and that it could amount to an unfair labour practice for that reason.³⁵

27 Reason for suspension must be serious enough as to justify a dismissal. See fn 30 & 31. Also, hearing must be held before employee is suspended.

28 *Miya v Smiths Manufacturing (Pty) Ltd* 1995 1 ICJ 1.12.39.

29 Suspension is an ordinary practice. It may be unfair on procedural grounds (conduct relating to suspension was unfair) or substantive grounds (reason for suspension is unjustified). In a dispute regarding an alleged unfair labour practice, the onus is on the employee to establish, on a balance of probabilities, the existence of such a practice.

30 Du Toit *et al* 2006:470.

31 "the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee."

32 *Perumal v Minister of Safety and Security and Others* 2001 22 ILJ 1870 (LC).

33 *Perumal v Minister of Safety and Security and Others*: 1874 par 14.

34 *Koka v Director-General: Provincial Administration North West Government*.

35 Le Roux 2002:1710.

The other approach, however, may be taken if the *Koka* case³⁶ is interpreted differently. In the *Koka* case Landman AJ extensively dealt with the difference between suspension as a punitive measure and suspension as a holding operation. The question whether a suspension may constitute an unfair labour practice was posed. In answering this question, Landman AJ made the following remarks:

What does suspension mean in the context of item 2(1)(c)³⁷ of the LRA? Does it encompass suspension for both reasons, or only suspension where it is used as a disciplinary measure? The reference in item 2(1)(c) to suspension 'or any other disciplinary action short of dismissal in respect of an employee', seems to indicate that the suspension contemplated in this item is itself one which is imposed as a disciplinary measure. Assuming this to be correct, can it be said that a suspension imposed primarily as a holding operation or as an interim measure, is tantamount to suspension for disciplinary reasons? In my opinion, this would depend upon the facts of each case...I think that the applicant's suspension is a type of holding operation. It is not intended as a temporary or permanent disciplinary measure, but it has very much the same effect. In my view, the suspension of the applicant should be treated as a suspension for disciplinary reasons and it follows that it could reasonable fall within the definition of an unfair labour practice, as set out in item 2(1)(c) of schedule 7 to the LRA.³⁸

In answering the abovementioned question as to whether both types of suspension can constitute an unfair labour practice, and with reference to the *Koka* case one can distinguish between theory and practice. Theoretically, pertaining to the existence of an unfair labour practice, the difference between the two categories of suspensions may be a noteworthy aspect because it seems as if it is only suspension as a punitive measure can constitute an unfair labour practice. Suspension as a holding measure is not regarded as being an unfair labour practice as it is purely administrative of nature. Only when the holding measure has the same effect as the punitive measure, will it be susceptible to be an unfair labour practice. However, from a practical side, pertaining to the existence of an unfair labour practice, this distinction is not of much value. The reason being the following: the "same effects" referred to may include circumstances such as the stoppage/reduction of benefits, the disruption of the employee's life, the anxiety of the employee, demotion of status, a hearing not being held when the suspension was made dependant on a hearing, an unreasonably lengthy holding suspension and so forth. These circumstances are more or less the same reasons why an employee usually challenges the fairness of suspension. In the absence of circumstances like these there is also no need to challenge the fairness of the suspension.

36 *Koka v Director-General: Provincial Administration, North West Government.*

37 *Labour Relations Act*: item 2(1)(c) of schedule 7(as amended by sec 64 of Act 55/1998 and then deleted by sec 55(a) of Act 12/2002) The wording of item 2(1)(c) are however, almost exactly, reflected in the current sec 186(2)(b) of the *Labour Relations Act*.

38 *Koka v Director-General: Provincial Administration, North West Government*: 1028-1029.

The abovementioned is supported by Grogan³⁹ where he also states that a suspension imposed as a disciplinary action is the type of suspension as referred to in sect 186(2)(b). He continues by stating that a holding operation may fall within this ambit if it is disciplinary in nature.

3. Proposed guidelines ensuring the procedural fairness of suspension

For purposes of this article the following will be discussed:

- Notice of the intention to suspend and issuing of warnings before suspending an employee;
- Reasons for suspension;
- Opportunity to respond;
- Speedy resolution of the dispute and duration of the suspension;
- Adherence to collective agreements, sectoral determinations and own policies and procedures pertaining to suspension, and
- Provision of benefits.

3.1 Notice of the intention to suspend and issuing of warnings before suspending an employee

Prior to suspension even being considered by the employer, the employee must be provided with a notice. It is submitted that the notice which must be provided to the employee, pertains to more than mere notice of the intended suspension. This notice must indicate the procedural steps (e.g. the suspension) which the employer intends to take. The employee must then also be informed of the details of the proposed suspension.⁴⁰ The two types of notices may be combined in one, depending on the circumstances of each case.

When providing detailed particulars regarding the intended suspension, an employer must not only provide the particular ground/reason for the suspension, but also sufficient particulars regarding the ground/reason. The particulars or details pertaining to the reason for the suspension must be of such a nature as to enable the employee to respond meaningfully to the allegation.⁴¹ These particulars pertaining to the suspension must also include the conditions of the suspension and a reasonable indication as to when the suspension will be lifted.⁴²

39 Grogan 2007B:270.

40 This will include the type of suspension — either as holding operation or as disciplinary sanction. Depending on the kind of suspension, the reasons for the suspension, if a disciplinary hearing is (or was already) going to be held, the duration of the suspension (or at least an indication thereof) and conditions of suspension. Also see the *Leonard T Thubakgale* case in this regard.

41 *Marcus v Minister of Correctional Services & Others*.

42 *Leonard T Thubakgale and Eksakhweni Security Services*.

(a) Suspension as a holding operation

Abovementioned general principles have reference. The ground or reason for suspending the employee must not only clearly indicate why the continued presence of the employee cannot be allowed by the employer but also the reason for this.⁴³

(b) Suspension as a disciplinary sanction

This type of suspension is allowed in circumstances where a dismissal is justified, but due to mitigating factors, the suspension of the employee was rather imposed.

Irrespective of the category of dismissal,⁴⁴ it is assumed that a hearing or enquiry of some or other kind has already taken place before suspension as a disciplinary sanction is utilised by the employer. During the hearing the employer would have decided upon suspension instead of dismissal and would have conveyed this decision to the employee. Informing the employee of the decision would have most probably also included informing the employee of the period of suspension, the reasons for suspension.

3.2 Reasons for suspension

Although the reason for suspending an employee rather resorts under the issue of substantive fairness, it is briefly discussed under procedural fairness because of the fact that the reason for suspension must be indicated in the notice of suspension. An employer is obliged to provide the employee with reasons for suspending the employee. Should an employer fail to give such reasons, it may result in the procedural unfairness of the suspension.⁴⁵ These reasons are also described as “positive grounds”.⁴⁶

(a) Suspension as a holding operation

It is usually regarded that the protection of business interests from possible harm by the continued presence of the employee is a reasonable ground for suspension as a holding operation. Similarly, an employer’s opinion that an employee’s presence may possibly prejudice an investigation will suffice as a good enough reason for suspension pending a disciplinary hearing/ investigation. Note however that an employer must be able to produce evidence supporting aforementioned opinion.⁴⁷ The mere fact that an investigation will

43 Refer to the reasons for suspension hereunder.

44 In the case of misconduct the employer most certainly would have warned the employee or summoned the employee to a disciplinary hearing. In the case of incapacity or poor work performance the employer would have informed the employee of dissatisfaction with performance.

45 *Leonard T Thubakgale and Esakhweni Security Services*.

46 Van Jaarsveld & Van Eck 2005:147.

47 *Marcus v Minister of Correctional Services & Others*. The fact that an investigation is already at an advanced stage will most probably be an indication of the invalidity of this reason.

be held is not enough reason for the suspension of the employee. It must be proven that the employee's presence may prejudice the investigation.⁴⁸

The minute that the reason for a preventative suspension is to punish the employee, the suspension will be regarded as substantially unfair.⁴⁹

Note that it was held on more than one occasion that the possible stigma attached to a suspension may leave or not, is not enough reason for an employee to contest a suspension.⁵⁰

From the abovementioned it seems as if the good judgement of the employer is still recognised. In *SA Police Union & another v Minister of Safety & Security and another*⁵¹ the honourable Judge of Appeal Farber noted the following:

Discipline, and the deployment of mechanisms designed to preserve and maintain it, and in appropriate circumstances to punish it suitably, are matters which fall within the sole prerogative of the employer. Absent an abuse of power, or some other cognizable basis in law which precludes the institution thereof, a court would not, save in the most exceptional circumstances, be inclined to interfere with a decision to institute disciplinary proceedings.⁵²

(b) Suspension as a disciplinary sanction

Du Toit, D. *et al* submits that suspension as a disciplinary sanction will only be permitted in circumstances similar to those where dismissal would have been justified.⁵³ These grounds are usually grounds of misconduct of a more serious nature. Suspension without pay (if not prohibited by statute or contract) is in fact recommended as an alternative sanction to dismissal. Employers must take note that the occurrence alone of such a ground of a serious nature does not automatically afford a good enough reason to suspend an employee. In the event of the occurrence of such a ground, all circumstances must still be taken into consideration in order to justify it as a good enough reason.⁵⁴

48 *Ibid.*

49 *Sajid v Mohamed NO & others* 2000 21 ILJ 1204 (LC).

50 *Kati v MEC, Department of Finance, Eastern Cape Province* 2007 28 ILJ 589 (E); *Ngwenya v Premier of Kwazulu-Natal* 2001 22 ILJ 1667 (LC); 2001 8 BLLR 924 (LC); *Zwakala v Port St John's Municipality & others* 2000 21 ILJ 1881 (LC) and *Hultzer v Standard Bank of SA (Pty) Ltd* 1999 20 ILJ 1806 (LC).

51 *SA Police Union & another v Minister of Safety & Security and another* 2005 26 ILJ 524 (LC).

52 *SA Police Union & another v Minister of Safety & Security*: 548.

53 Du Toit *et al* 2006: 499 Also refer to *SAB v Woolfrey*: 527-528.

54 In *Country Fair v Commission for Conciliation, Mediation and Arbitration and others* 1998 19 ILJ 815 (LC) an employee was involved in the assault of another employee. The employee was dismissed (in a review of the case he was re-employed without retrospectivity similar to suspension without pay). The court found that dismissal because of assault was too harsh a penalty as the assault occurred during a lover's quarrel. It therefore proves that assault as a ground did not automatically justify an action to be taken. Sometimes the ground itself, although an aggravating factor, may also serve as a mitigating factor.

In order to ensure that the reason for suspending an employee is a fair one, an employer must always take the Code of Good Practice: Dismissal⁵⁵ into consideration. As in the words of Judge Landman in *Country Fair v Commission for Conciliation, Mediation and Arbitration and others*:⁵⁶

The Code of Good Practice which is set out in schedule 8 to the LRA is, I presume, a code issued in terms of the Act. Therefore it is a Code of Good Practice which must be taken into account by any person considering whether or not the reason for dismissal⁵⁷ is a fair reason in terms of s 188(2) of the LRA. The effect of this is that the employer must take the code into account in the first instance.

3.3 Opportunity to respond

In general, suspension must not be a unilateral decision.⁵⁸ The position has changed through the years. Depending on the type of suspension,⁵⁹ there may be a need for a hearing to be held before suspending an employee. This need arises from the maxim *audi alteram et partem*.

It is advisable to have a hearing or to afford the employee an opportunity to respond if the employee is suspended as a punitive measure. When an employee is suspended pending a disciplinary hearing, it is, in most of the cases, not necessary for a hearing to be held. Since a hearing is not always a question of fact with preventative suspension, an employer may use the test as set out by Corbett CJ in *Administrator, Transvaal & Others v Traub & Others*,⁶⁰ in order to determine if the *audi alteram et partem* rule had to find application:

The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public official of body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before a decision is taken (or in some instances thereafter — see Chikane's case *supra* at 379G), unless the statute expressly or by implication indicates the contrary.⁶¹

55 *Labour Relations Act*: schedule 8.

56 *Country Fair v Commission for Conciliation, Mediation and Arbitration and others*: 824.

57 And since a ground for dismissal can also be a ground for suspension, this pertains to suspensions also.

58 *FAWU v SA Breweries Ltd* 1991 1 ICJ 8.12.4.

59 Preventative/Punitive.

60 *Administrator, Transvaal & Others v Traub & Others* 1989 (4) SA 731 (A) — Though this is a case from the Administrative Law it is submitted that the same principles should apply in the Labour Law as in the case of the legitimate expectation.

61 *Administrator, Transvaal & Others v Traub & Others*: 748 Care should be taken by an employer as not putting too much weight in the possible prejudice to an employee's reputation. In *Phutiyaagae v Tswaing Local Municipality* it was found that a suspension pending a disciplinary hearing cannot be more prejudicial towards the employee's reputation than the prejudice caused by, for example an arrest and appearance in a criminal court.

In the High Court case of *Rantho v MEC for Tourism, Environmental Affairs & Another*⁶² the court set aside the decision to suspend the employee based on the fact that the employer did not follow the internal Code of Conduct and did not provide the employee an opportunity to respond to allegations before the suspension. In terms of the disciplinary code the suspension might only have taken place if the employee committed a serious offence and the employee's presence at the workplace might jeopardise any investigation. The Court found that both requirements must be met before the employer can suspend.

The opportunity to respond does not necessarily refer to a hearing and does not mean that an employee is entitled to have a hearing before a suspension. The Labour Court found in *Venter v SA Tourism Board*⁶³ that Schedule 8 to the *Labour Relations Act*⁶⁴ does not confer a right to a hearing before a suspension, it is not a constitutional right and it is not unfair for an employer to suspend an employee without a prior hearing.

(a) Suspension as a holding operation

Different opinions regarding the question of a hearing before a suspension complicates the matter. However, the majority of judgements seem to favour the approach that a hearing is not required.⁶⁵ In *FAWU v SA Breweries Ltd*⁶⁶ the Court found a tendency of overstating the need for the application for the *audi alteram et partem* rule. It found that a hearing is not necessary in cases where provision of benefits continues. In the *Mabilo* case⁶⁷ and other judgments⁶⁸ it was held that a hearing is not required. Similarly, in the *Phutiyagae* case⁶⁹ Mokgoathleng AJ stated the following:

In my view the applicant's right to be heard before suspension cannot by any stretch of logic be construed as a glaringly grave injustice, or a serious miscarriage of justice justifying the conclusion that the failure by this Court to intervene will result in the applicant suffering irreparable harm. The applicant will in due course obviously have an opportunity to put his version, when this matter is referred to conciliation and/or arbitration proceedings, where he will be afforded a full opportunity to defend himself and clear his name on the ultimate question whether the charge is or is not made out.

62 Orange Free State Division of the High Court under case number 641/2005.

63 *Venter v SA Tourism Board* 1999 4 LLD 582 (LC) par 22-23.

64 *Labour Relations Act*: schedule 8.

65 Du Plessis & Fouche 2006:307.

66 *FAWU v SA Breweries*.

67 *Mabilo v Mpumalanga Provincial Government & others*: 827.

68 *Koka v Director-General: Provincial Administration North West Government*: 1029; *Venter v South African Tourism Board*: par 23 where the following was held: "The Code of Good Practice contained in Schedule 8 of the Labour Relations Act 66 of 1995 ("the Act") does not provide for a hearing prior to suspension. Neither does the Constitution. A right to fair administrative action does not mean that a hearing before suspension is required".

69 *Phutiyagae v Tswaing Local Municipality*: par 42-43.

It is submitted, according to the other opinion, that some circumstances may, however, necessitate a hearing.⁷⁰ In *Muller & Others v Chairman of the Ministers' Council: House of Representatives & Others*⁷¹ the applicants were not granted a hearing before their suspensions. It was held that an employee may have the right to be heard unless such a right has been waived by the employee or if this duty to afford a hearing, has been fulfilled in some or other way, the reason being that the suspension may have an adversarial effect on the career prospects and reputation of the employee.⁷² Howie J also quoted from *Administrator, Transvaal & others v Traub & others*⁷³ by answering the question as to when the *audi alteram et partem* rule must be applied:

When the statute empowers a public body or official to give a decision prejudicially affecting an individual in his liberty, property, existing rights or legitimate expectations,⁷⁴ he has the right to be heard before that decision is taken unless the statute expressly or impliedly indicates the contrary.⁷⁵

One must therefore first determine if a decision which may have a prejudicial effect exists and, if so, if the legislature has excluded a hearing.⁷⁶

In the CCMA case of *PSA obo Matamane and the Department of Education, Arts, Culture and Sports*,⁷⁷ the employee was suspended without emoluments⁷⁸ for alleged misconduct relating to the issuing of a fraudulent cheque. The employee appealed internally against the suspension without success and then referred the matter to the CCMA. The CCMA ruled that the employer is entitled to suspend an employee without emoluments, but the employer must grant the employee a fair opportunity to present his or her case, as to why he or she should not be suspended without emoluments. The employer must follow the Rules of Natural Justice and failed to do so. The commissioner stated:⁷⁹

70 *Ngwenya v Premier of KwaZulu-Natal*: 931. An agreement was reached with the effect of uplifting a suspension and the agreement was not honoured thereafter. After the failure to honour the agreement, the employee was suspended for a second time. The court found that a hearing before the second suspension was necessary in the light of said agreement. Also refer to *Mhlauli v Minister of Department of Home Affairs*: 1151-1152 where it was reiterated that a public servant may not be suspended in the absence of a hearing. This opinion is also supported by Grogan 2007A 63.

71 *Muller & Others v Chairman of the Ministers' Council: House of Representatives & Others* 1991 12 ILJ 761 (C).

72 *Muller & Others v Chairman of the Ministers' Council: House of Representatives*: 767.

73 *Administrator, Transvaal & others v Traub & others*.

74 Included in this is the penal effect which suspension may have. Howie J, in the *Muller* case, made reference to a loss of remuneration and social and personal implications.

75 *Administrator, Transvaal & others v Traub & others*: 748.

76 *Muller & Others v Chairman of the Ministers' Council: House of Representatives & Others*: 769.

77 *PSA obo Matamane and the Department of Education, Arts, Culture and Sports* 2000 9 CCMA 6.4.1.

78 The employer justified this action in terms of Sec 22(7) of the *Public Services Act* 1994 read in conjunction with the Public Service Regulation K2.2.

79 Page 5 par 11.

Although it is trite that an employer has the right to suspend an employee pending a disciplinary hearing, such suspension is not supposed to be punitive in nature.

It is submitted therefore, that a preventative suspension may have three types of effects namely a purely administrative effect, a corrective effect and a punitive effect. Occasionally (e.g. when suspension is used as a corrective disciplinary measure) there is a need for an opportunity to be heard before suspending an employee without remuneration. Employers should take caution when distinguishing between suspension as a corrective disciplinary measure and suspension as a punitive measure. Circumstances where suspension with a punitive effect could be justified, but suspension as a corrective measure was chosen by the employer because of mitigating factors, may very well justify the absence of such an opportunity. Lengthy periods of suspension without pay may constitute a suspension with a punitive measure rather than a suspension as a corrective measure, and, if that is indeed the case, an opportunity must be afforded. If the suspension is only for reasons of good administration, an opportunity need not be afforded.

(b) Suspension as a disciplinary sanction

When an employee is suspended and the suspension takes the form of a punitive measure, especially when wages are withheld,⁸⁰ an opportunity to be heard must be afforded to the employee prior to such a suspension. The employee must have the opportunity to be heard and must be found guilty of the charges laid against him prior to the suspension of the employee. The reason for this statement is, according to Du Toit,⁸¹ to be found in the guidelines of the Code of Good Practice: Dismissal. These guidelines provides that an enquiry must be held before an employee is dismissed and since suspension as a disciplinary sanction is imposed as an alternative to dismissal, these guidelines will be applicable in the case of a suspension as a disciplinary sanction.

Circumstances, such as the fact that an employee waived his right to be heard or the fact that the duty to afford a hearing was fulfilled by an employer, may have an influence on actually holding a hearing.⁸²

Although an opportunity for the employee to respond to allegations is imperative, there may be circumstances which may exclude a hearing. When in doubt as to hold a hearing or not, there are two criteria which may be taken into consideration: If there was a decision causing prejudice (for example the decision to suspend an employee without pay), a hearing must be held. If a hearing is excluded by legislation, a hearing need not be held.⁸³

In terms of item 3(3) of the Code of Good Practice: Dismissal⁸⁴ “formal procedures do not have to be invoked every time a rule is broken or a standard

80 *FAWU v SA Breweries Ltd.*

81 *Du Toit et al* 2006:471.

82 *Jacobus John Muller v Chairman of the Ministers* 1994 1 ICJ 6.4.1.

83 *Jacobus John Muller v Chairman of the Ministers*: 6.4.1.

84 *Labour Relations Act*: Schedule 8.

is not met". In circumstances where minor violation was committed by an employee it is more appropriate to address it by way of informal conversation, advice and corrective disciplinary measures. In *NUMSA obo Tshikana v Delta Motor Corporation*⁸⁵ the aforementioned was confirmed where it was held that an employer was not required to convene a formal hearing before imposing a sanction short of dismissal where the penalty of dismissal was never contemplated. Commissioner Fouche stated:

It is a common and well-accepted practice that employers discipline their employees without a hearing when they issue warnings or other disciplinary sanctions short of dismissal. An employer cannot be expected to hold a formal disciplinary hearing every time an employee breaches a rule. If this was a requirement, employers' human resource or industrial relation offices' would be involved in hearings around the clock. The common practice is that hearings are conducted when dismissal is a possible sanction.⁸⁶

In conclusion it is therefore submitted that an employee must be afforded an opportunity to be heard, either by way of a hearing or other informal conversation, unless such a right has been excluded by legislation or has been waived by the employee.

3.4 Speedy resolution of the dispute and duration of the suspension

(a) Suspension as a holding operation

An employee not being afforded a hearing or an employee not being afforded a hearing within reasonable time or an employee not being afforded a hearing at all, seems to be of great concern. This kind of problem is not an unusual occurrence in case law; there are already traces of this procedural unfairness in local newspapers. Gibson⁸⁷ reports of a case where a public servant was suspended without being charged with any offence. There was also no indication as to when a disciplinary hearing would be held. According to the disciplinary rules of the Association for Government Officials, an official must be afforded a hearing within 60 days of being suspended.

It is not only required that a hearing be held but also that this hearing be held within a reasonable time. In order to facilitate a hearing within a reasonable time, the investigation which precedes the hearing must be done without unreasonable delay. The normal course of events in the workplace was described in *Mabilo v Mpumalanga Provincial Government & Others*:⁸⁸ the employee was charged with an alleged wrongdoing. Thereafter an investigation was held into the allegations against the employee. After conclusion of the investigation, it was decided if the employee may return to work or if the employee would be formally charged at a disciplinary hearing. The employee must be informed as to which one of the two options will be followed. The reasons for justifying a right to a speedy

85 *NUMSA obo Tshikana v Delta Motor Corporation*.

86 *NUMSA obo Tshikana v Delta Motor Corporation*: 1306.

87 *Volksblad* 2005:16.

88 *Mabilo v Mpumalanga Provincial Government & Others*.

investigation were set out in *Mabilo v Mpumalanga Provincial Government & Others*.⁸⁹

1. To prevent the unnecessary disruption in the life of the employee.
2. To minimise the anxiety and concern of the employee.
3. To limit the possibility that the employee will not be allowed a fair hearing.
4. To resolve the dispute expeditiously.

Suspension as a holding measure cannot continue indefinitely. The enquiry and hearing must be finalised timeously.⁹⁰ If it is found that the period of suspension is too long, it may constitute an unfair labour practice,⁹¹ more so in circumstances where the period of suspension has been limited by a disciplinary code.⁹² It seems as if a lengthier period of suspension, than that which is normally acceptable, may be accepted if the employer is able to provide sufficient reasons for the length of the suspension. However, be aware of facts which may indicate that a lengthy period was indeed not necessary, such as witnesses' statements being dated the same day.⁹³

When an employee is suspended pending a disciplinary hearing and the charges are withdrawn, the suspension cannot continue on the basis that another hearing must be held in order to determine the status of the relationship between the employer and employee, while it is in fact the same issues to be decided at the second hearing than in the first hearing. In this case a "second" suspension would be unfair as it is precisely the same issues to be put before another chairperson.⁹⁴

Suspensions may not be longer than the maximum period agreed upon.⁹⁵

(b) Suspension as a disciplinary sanction

When suspension is imposed as a disciplinary penalty, the hearing or informal enquiry preceding the suspension, must be held and finalised as soon as possible. If a maximum period for finalisation is indicated in a code or contract, this period must be adhered to. The duration of the suspension must be fair in the circumstances.

89 *Mabilo v Mpumalanga Provincial Government & Others*.

90 *Ngwenya v Premier of KwaZulu-Natal*: 932 where the following was stated: "If there is anything tangible against the applicant, the inquiry should proceed without any delay."

91 *Ibid*. That is because of the punitive effect such a lengthy period of suspension may have.

92 *Ned v Department of Social Services & Population Development* 2001 22 ILJ 1039 (BCA).

93 *CEIWU on behalf of Khumalo and SHM Engineering CC (C)*: 1811. It was found that statements dated the same day were indicative of speedy conclusion on investigation.

94 *Sajid v Mahomed*: 1224-1225.

95 *Du Toit et al* 2006:471. Agreements to this effect are usually found in sources like collective agreements or individual agreements between the parties.

3.5 Adherence to collective agreements, sectoral determinations and own policies and procedures pertaining to suspension

There is no need to distinguish between preventative and punitive suspensions when discussing this guideline.

Cognisance must be taken of the internal suspension policies of the workplace. These policies regularly contain provisions for example the consideration of alternatives before resorting to suspension.

If a certain policy or disciplinary code finds application in a workplace the questions which arise are the following: "To what extent is the employer bound by that policy/code? May there be any deviation from it?" It seems as if this question can only be answered by referring to surrounding circumstances in each case. This answer does not, however, satisfactorily address the original question. Therefore, it further seems that, although circumstances may differ from case to case, a deviation from the policy/code will either be allowed or not allowed depending on the most favourable⁹⁶ outcome for the employee. In *Ned v Department of Social Services & Population Development*⁹⁷ the disciplinary code made provision for precautionary suspension (holding suspension pending a disciplinary hearing) with a hearing to be held within a month from the date of suspension. In this case the hearing did not take place within the prescribed month. It appears that arbitrator Hutchinson had great appreciation for the fact that the disciplinary code was a result of collective bargaining (negotiations between the employer and the representative union took place before agreement was reached on the code)⁹⁸ and it was this appreciation that led him to declare the action of the employer as an unfair labour practice. As already mentioned in footnote 22 hereunder, the arbitrator took note of the fact that the provision of holding a hearing within one month may be an onerous one. It appears that even considering the possible unfairness of the time constraint towards the employer, the unfairness towards the employee of not holding the employer to the agreement (disciplinary code) seemed to carry more weight. The contrary is also true. Should a provision in a code lead to any unfairness towards the employee, the employer will be allowed to deviate from the provision in the code.⁹⁹

96 The measure for "most favourable circumstances" would be the fairness which such a deviation would entail towards the employee.

97 *Ned v Department of Social Services & Population Development*.

98 *Ibid.* 1044-1045 "... the disciplinary code was negotiated with a representative trade union. One of the primary objects of the Act is to promote collective bargaining, employee participation and dispute resolution". Also on p 1045 "... The failure to honour an obligation expressly undertaken, is per se unfair conduct. Considerations of fairness and equity play a pivotal role in superimposing a normative assessment on the respondent's conduct. The respondent's conduct is not above reproach inasmuch as it was under an obligation to act within constraints of the parameters jointly agreed upon. If the undertaking of holding a disciplinary hearing within a month is onerous, it is for the respondent to renegotiate it. Unilateral action undermines the efficacy of collective bargaining and materially frustrates the accomplishment of the objects of the Act. An analogy can be drawn with contracting parties where fairness dictates that each party should be held to its bargain".

99 The same measure of fairness towards the employee is utilized again. Arbitrator Hutchinson referred to *Kammies v Golden Arrow Bus Services (Pty) Ltd* 1994 15 ILJ 1113 (IC); 1994 7 BLLR 80 (IC) to underline this fact.

In *SA Police Union & another v Minister of Safety & Security and another*,¹⁰⁰ the validity of suspensions of members of the Public Servants Association of SA were considered. The suspensions were found to be invalid and of no effect since the SA Police Service Discipline Regulations required that disciplinary proceedings had to be instituted against an employee before such an employee could be suspended. The disciplinary proceedings were not instituted prior to the suspensions.¹⁰¹

In *Minister of Labour v General Public Service Sectoral Bargaining Council & Others*¹⁰² clause 7.2(c) of Resolution 1 of 2003 of the Public Service Coordinating Bargaining Council was taken under consideration. In terms of this clause an employee must be brought into a hearing within 60 days of suspension. If there was any need for a postponement for further investigations, the parties must go to the hearing and request for a postponement. In this case the employee had been suspended and was not afforded a hearing within the prescribed 60 days. The matter was referred for arbitration where it was found that an unfair labour practice had been committed because the provisions of the Resolution were not followed. This award was confirmed by the Labour Court.¹⁰³

It was however contended, in *Country Fair v Commission for Conciliation, Mediation and Arbitration and others*¹⁰⁴ that an employer's own disciplinary code should serve only as a guideline.¹⁰⁵ This approach was confirmed in *Venter v South African Tourism Board*¹⁰⁶ where Revelas J made the following remark: "The respondent's disciplinary code is a guideline. It is not cast in stone. There are circumstances where the parties may deviate from the code."¹⁰⁷

In *Muller and others v Chairman of the Ministers' Council: House of Representatives and others*¹⁰⁸ one of the initial grounds for bringing the application was the fact that suspensions of employees were effected by persons other than the appropriate Ministers who had that authority. Although the parties reached agreement on this ground, an important issue was raised. Employers should ensure that only the person, who is authorised to impose certain penalties on an employee, is the person who orders the suspension of the employee.¹⁰⁹

100 *SA Police Union & another v Minister of Safety & Security and another*.

101 *Ibid.* 540.

102 *Minister of Labour v General Public Service Sectoral Bargaining Council & Others* 2006 27 ILJ 2650 (LC).

103 *Minister of Labour v General Public Service Sectoral Bargaining Council & Others*: 2655.

104 *Minister of Labour v General Public Service Sectoral Bargaining Council & Others*.

105 *Ibid.* 829 "Even if there was a code, there is every reason to think that it should be treated primarily as a guide and not as a fixed matrix of inflexible rules and regulations."

106 *Venter v South African Tourism Board*.

107 *Venter v South African Tourism Board*: par 24.

108 *Muller and others v Chairman of the Ministers' Council: House of Representatives and others*: 763-764.

109 In *Cassim v SA Police Service and others* 2004 25 ILJ 1424 (LC) the court had to decide if the powers of suspending employees, in terms of the SA Police Service Regulations, could have been delegated. Although it was found that the powers of suspension could have been delegated (but not the power to suspend emoluments), it clearly underlines the fact that employers should take note that it is imperative that the person suspending an employee, is indeed cloaked with the authority to do so.

3.6 Provision of benefits

(a) Suspension as a holding operation

In *Chaba/Iselwa Investment CC*¹¹⁰ the employer refused to continue providing benefits to the employee while the employee was suspended for a period of two months pending an investigation into alleged misconduct. The employer contended that payment of salary was not necessary on the principle of “no work no pay”. Commissioner Hlongwane held that this principle of “no work no pay” only applied in cases where “... the absence from work is at the initiative of an employee”. If, therefore, the employee was not working due to the initiative of the employer, for example when the employer suspends the employee for administrative purposes, the employer cannot rely on the principle of ‘no work no pay’ to refuse the continued provision of benefits.

In *Mhlauli v Minister of Department of Home Affairs & Others NNO*¹¹¹ the Court quoted from the *Muller’s* case and confirmed that the continuance of benefits is imperative where no hearing is held.¹¹²

Reference to continuance of benefits is also made in the case of *SAEWA obo Members v Aberdare Cables*¹¹³ where Manzana J confirmed the principle:

It is trite law that an employer has got a right and responsibility to maintain discipline in the workplace. The employer has a right to institute disciplinary action when the rules have been breached. This means an employer has a right to suspend an employee during the period of investigation and the suspension has to be with full pay as the employee cannot be disadvantaged by the investigation. It would be unfair to suspend the employee without pay before the disciplinary hearing i.e. before guilt has been proved. A suspension without pay can only be used as a penalty after the employee is found guilty at a disciplinary enquiry.¹¹⁴

There are, however, exceptions: In *SAEWA obo Members v Aberdare Cables* the employee was suspended pending a disciplinary hearing. The date of the hearing was set. It was postponed for four days in order to allow the parties to consult. A second postponement was requested by the employee’s union. The employer refused to provide benefits for the period after the second postponement. The court found in favour of the employer and made the following remark:

In the case of *Msipho and Plasma Cut (2005) 26 ILJ 2276 (BCA)* it was held that when a scheduled disciplinary hearing is postponed at the instance of an employee, an employer may not be liable for remuneration between the

110 *Chaba/Iselwa Investment CC* 2004 12 BALR 1534 (CCMA).

111 *Mhlauli v Minister of Department of Home Affairs & Others NNO* 1992 13 ILJ 1146 (SE) 1151-1152.

112 It is usually with suspension as a preventative measure where no hearing is held. It therefore follows that benefits may be suspended when a hearing was held (suspension as a punitive measure). If a hearing was not held, benefits must still be provided (suspension as a preventative measure).

113 *SAEWA obo Members v Aberdare Cables* 2007 JOL 18999 (MEIBC).

114 *SAEWA obo Members v Aberdare Cables*: 5.

date of postponement and the following date of hearing. It was further held that, 'it would be unfair to hold an employer responsible for an employee's actions. Further if this were to be the case, employees would find reason to delay the disciplinary proceedings as it would always be at the employer's cost.' Based on the aforementioned decided case, I find the applicant is not entitled to receive a salary after 28 July as the postponement was not at the instance of the respondent.¹¹⁵

(b) Suspension as a disciplinary sanction

Withholding an employee's 'pay' is regarded as a form of punishment.¹¹⁶ It therefore follows that suspension without pay may be regarded as the category of suspension used as a punitive measure. It further follows that suspension as a holding measure must involve continued provision of benefits, as this kind of suspension is only affected for purposes of good administration and not for purposes of punishing the employee.

In the event of the suspension of an employee, an employer is usually required to continue providing benefits¹¹⁷ to the employee.¹¹⁸ The only exception to this may occur in the event of a suspension used as a disciplinary measure, where an employer sometimes has a discretion to continue with the provision of benefits or not. This discretion may be obtained by way of a contract of employment or a collective agreement. If no such discretion is obtained, the employer is obliged to continue providing the employee with his/her benefits.¹¹⁹

Although the continued provision of benefits may therefore fall within the discretion of the employer when suspension is used as a disciplinary sanction (with suspension as a holding operation, provision of benefits is imperative¹²⁰), and then only "... where the contract of employment or collective agreement provided for such action to be taken ...",¹²¹ in the bargaining council arbitration of *CEIWU obo Khumalo and SHM Engineering CC*,¹²² arbitrator Williams found that undue delay and the effect of refusal of payment of benefits¹²³ may very well be indicative of procedural unfairness because of the unduly punitive effect it has.

The employer's limited right of refusal to continue with provision of benefits while the employee is suspended, is not affected by section 19 of the *Basic Conditions of Employment Act*.¹²⁴

115 *Msipho and Plasma Cut* (2005) 26 ILJ 2276 (BCA): 6.

116 *COSFWU and Others v Aircondi Refrigeration (Pty) Ltd* 1995 1 ICJ 10.7.1.

117 Benefits include salary/wage, contributions to medical aid and pension fund etc.

118 *Koka v Director-General: Provincial Administration North West Government*: 1027.

119 *J Tsebe v Pelma Motor & Diesel Engineering* 1992 1 ICJ 5.3.18.

120 Suspension (as a holding operation) without remuneration has been held to be an unfair labour practice in *Tsaperas and Another v Clayville Cold Storage (Pty) Ltd* 2002 BALR 1225 (CCMA) as well as in *Chaba v Iselwa Investment*.

121 *National Union of Metalworkers of South Africa and Nu-Fiber Form Plastics*: 207. Also see Grogan 2007a:62.

122 *CEIWU obo Khumalo and SHM Engineering CC*.

123 *CEIWU obo Khumalo and SHM Engineering CC*: 1811.

124 *Du Toit et al* 2006:499. The reason for this is the fact that "no tender of services ... by the worker takes place or is required" — *South African Breweries Ltd (Beer Division) v Woolfrey and Others* 1999 5 BLLR 525 (LC): 527-528.

Item 3 of the Code of Good Practice: Dismissal¹²⁵ deals with disciplinary measures short of dismissal. Item 3(2) of the said Code introduced the concept of corrective or progressive discipline. One example of such corrective disciplinary measures may be in the form of suspension without pay. Refer to *NUMSA obo Tshikana v Delta Motor Corporation*¹²⁶ in this regard. The employee was suspended without pay for one day because he refused to follow an instruction from his supervisor. The CCMA found the suspension to be a form of corrective disciplinary measure¹²⁷ as opposed to preventative suspension or suspension with a punitive effect. The reason for the founding was based upon the fact that it was an established fact that the employer made use of progressive discipline. The purpose of the suspension of the employee was not to penalise the employee and also not for reasons of good administration, but rather to enforce the standard of conduct required of employees.

4. Conclusion

It is submitted that our courts have developed clear guidelines for the application of suspensions in the workplace, but it is not readily accessible for most of the employers.

To address this problem the legislator should consider introducing suspension guidelines as part of Schedule 8 of the Act. This could form part of Item 3 dealing with disciplinary measures short of a dismissal. By issuing guidelines the legislator will not discourage or prevent parties to conclude their own procedural agreements in this regard.

From the above case law it is important to distinguish between the two types of suspension. It is submitted that there sometimes (e.g. when suspension is used as a corrective disciplinary measure) is not a need for a disciplinary hearing before suspending an employee without remuneration. Employers should however take caution to distinguish between suspension as a corrective disciplinary measure and suspension as a punitive measure. Circumstances where suspension with a punitive effect could be justified, but suspension as a corrective measure was chosen by the employer because of mitigating factors, may very well justify the absence of a disciplinary hearing. Lengthy periods of suspension without pay may constitute a suspension with a punitive measure rather than a suspension as a corrective measure, and, if that is indeed the case, a disciplinary hearing must be held.

The proposed Item 3 should also include procedural aspects like the notice of the intention to suspend and issuing of warnings before suspending an employee, reasons for suspending an employee, an opportunity for the employee to respond to the suspension and proposed timeframes for suspensions. It is however submitted that that parties (and the legislator) should be cautioned against the use of a suspension without benefits before a disciplinary hearing.

125 *Labour Relations Act: Schedule 8.*

126 *NUMSA obo Tshikana v Delta Motor Corporation: 1306.*

127 *NUMSA obo Tshikana v Delta Motor Corporation.*

Employers must take care in acting consistently when suspending employees. Not only similar cases must be treated alike, but when more than one employee is implicated in the same action justifying suspension, every such employee must be subject to possible suspension.

Suspension is a vital tool in the maintenance of workplace discipline and parties should be encouraged to use this to give effect to fair procedures in the cases of dismissals and to give effect to progressive discipline.

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