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Precautionary suspension: do employees have the right to make representations?

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If an employer suspects an employee of committing an act of misconduct, it is possible that the employer will want to place that employee on what is usually referred to as a "precautionary suspension". The question that arises is whether the employer must give the employee a chance to make representations on why he or she should not to be suspended, prior to a decision being taken in this regard.

This is one of the issues that the South African Constitutional Court had the opportunity to grapple with in the recent matter of ***Allan Long v South African Breweries (Pty) Limited & Others***.

Background

Mr Long (the "**employee**") was employed by South African Breweries ("**SAB**") as a district manager. Among other things, the employee was responsible for ensuring that SAB complied with all legal requirements in his district, which included ensuring that SAB's fleet of delivery trucks was properly licenced and that all of the vehicles were roadworthy. During late 2012, it was discovered that a number of the vehicles and trailers were unlicensed and/or not roadworthy. The employee issued instructions to certain subordinates to remedy the situation, but did not proactively involve himself in ensuring that this was done.

In May 2013, a fatal accident involving one of the unroadworthy vehicles occurred. The employee was placed on suspension pending an investigation into the issues relating to the fleet. Approximately three months later, the employee was subjected to a disciplinary hearing and dismissed. He referred disputes relating to his suspension and his dismissal to the Commission for Conciliation, Mediation and Arbitration (the "**CCMA**"). This ENSight will only deal with the suspension dispute. The CCMA found that the employee had been unfairly suspended on the basis that the suspension was "unduly long" and because the employee was not provided with an opportunity to make representations before a decision to suspend was taken. SAB referred the matter to the Labour Court on review.

The Labour Court found that the CCMA had erred in finding that the employee's suspension was unfair and overturned the award. It held that there is no requirement for an employee to be provided with the opportunity to make representations before being placed on precautionary suspension.

The Constitutional Court decision

After the Labour Appeal Court refused leave to appeal, the employee took the matter on appeal to the Constitutional Court, alleging that the finding by the Labour Court that there was no need to provide an opportunity to make representations did not pass constitutional muster, and that this finding goes against the principles established in the case law.

The Constitutional Court held that the finding of the Labour Court regarding the issue of an opportunity to make representations could not be faulted.

Because the Constitutional Court simply aligned itself with the Labour Court's findings, it is necessary to consider the findings of the Labour Court.

The Labour Court set out the important differences between the two possible species of suspension – the first being a suspension as a disciplinary sanction, and the second being a suspension as a "holding operation" or a precautionary suspension. A suspension as a disciplinary sanction can only follow a fairly conducted disciplinary proceeding, and is usually as an alternative to dismissal. It is important to distinguish this from a precautionary suspension, the species of suspension dealt with in this matter. This distinction is consistent with the case law on the subject. The Labour Court quoted ***Mashego v Mpumalanga Provincial Legislature and Other***, wherein the Labour Court confirmed that:

"It is generally accepted than an employer has discretionary power to suspend an employee if the presence of such an employee at work is likely to undermine an investigation."

The Labour Court held that the reason for the distinction between the two species of suspension is that the standards of fairness differ between the two. The Labour Court also referred to the decision in ***Member of the Executive Council for Education, North West Provincial Government v Gradwell*** in which the Labour Appeal Court stated:

"When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated…"

The Labour Court went on to conclude that in the case of a precautionary suspension, there is no requirement for an employee to be given an opportunity to make representations before the employer decides to place that employee on suspension. The Labour Court held that the fairness or otherwise of a precautionary suspension is determined by three considerations:

1. the suspension must be directly linked to a pending investigation or process. The suspension must serve to protect the integrity of that investigation or process, or to mitigate the risks that the presence of that employee in the workplace may pose to the investigation or process. It is important that the suspension must not be for the purposes of punishing the employee;

2. the second consideration relates to prejudice to the employee. Where a suspension is on full pay (which it ought to be in the case of a precautionary suspension), the Labour Court stated that prejudice to the employee is "curtailed and will not readily be seen to be unfair." The Labour Court also stated that damage to the employee's reputation would not be a consideration, as this would render almost every precautionary suspension unfair; and
3. the precautionary suspension should not be "unduly long." What will be considered to be unduly long will depend on the facts present in a particular set of circumstances.

The Labour Court found that a precautionary suspension could therefore still constitute an unfair labour practice if the employer does not have a fair reason for it, if it causes undue prejudice to the employee, or if the suspension is unduly long without a valid reason. In relation to the facts of this case, the Labour Court held that Commissioner's reliance on the perceived right to make representations was misplaced, and the suspension was not unfair.

The Labour Court also held that it is not necessary for the employer, at the stage of implementing a precautionary suspension, to substantiate the allegations of misconduct – it is sufficient for the employer to hold a **reasonable belief** that the misconduct took place.

The Constitutional Court confirmed that a suspension pending an investigation and possible disciplinary action is a precautionary measure and does not constitute disciplinary action, and as such, the requirements in terms of the Labour Relations Act, 1995 relating to fair disciplinary action do not apply.

Practical Implications

By endorsing the Labour Court's decision and reasoning, the Constitutional Court has accepted that it will not be unfair to fail to provide an employee with an opportunity to make representations prior to being placed on precautionary suspension. However, employers should be cautious about deciding to place an employee on precautionary suspension without such an opportunity. The reason for this caution is that, in the SAB dispute, the courts considered whether the suspension constituted an unfair labour practice – a statutory right by definition. However, the right to be provided with an opportunity to make representations may arise from other sources, such as a contract of employment, a collective agreement, a disciplinary code and procedure, and/or an established workplace practice. A failure to provide a hearing in breach of a right derived from these sources could also give rise to an employer liability. If such a possible liability exists, employers would do well to seek legal advice prior to deciding whether to suspend an employee.

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