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Labour and Social Security Law Unit of the
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Nelson Mandela Metropolitan University
for tomorrow

In this Issue:

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1. From the General Secretary's Desk

The ELRC is pleased to provide stakeholders with its March 2013 Labour Bulletin. It contains notes on recent case law of relevance to the education sector as well as some critical commentary on decided cases.

We hope to both inform and stimulate readers. Some of the issues covered are contentious. It goes without saying that the views are those of the authors alone. We would encourage an exchange of views on the jurisprudence generated by the courts and by the ELRC because these rulings shape the way the sector operates.

We trust you will find value in these pages.

Ms NO Foca
ELRC, General Secretary

Aspects of unfair suspension at work

1 Introduction

The suspension of employees happens frequently in the work environment in different contexts. It has several contractual and other legal consequences. In the present note the meaning of suspension is considered and the legal consequences of suspension are explained and evaluated. In the discussions both the common-law and statutory provisions of suspension are considered. The interaction between the principles of the two systems is also highlighted. The constitutional validity of certain legal provisions of statutory regulation of suspension is also commented upon.

2 The common-law position

Suspension is a situation in the employment arena where the employer does not accept an employee's services for a period of time, but neither does the employer terminate the services of the employee (Grogan *Dismissal Discrimination & Unfair Labour Practices* (2005) 61). Despite the employer's reasoning for suspending an employee, the employer is not generally relieved of its contractual duty to pay the employee (Grogan *Dismissal Discrimination* (2005) 62).

At common law, the employer may only suspend an employee without pay if a contract has been concluded to that effect, either when the employment contract was first concluded, or if a collective agreement or regulation provides for such penalty, or if the employee faces dismissal and agrees to suspension without pay as a penalty. Where the employee agrees to suspension without pay as a penalty, the employer must prove that the employee has agreed to the variation of the original contract freely and without duress (Grogan *Dismissal Discrimination* (2005) 62).

Under the common law, employees are obliged to work as long as the contract remains in existence, but the employer is not generally bound to provide the employee with work. Whether they are provided work or not, workers are entitled to be paid as long as they tender service. If the employer is prepared to pay the employee for the period of suspension, the employee has no remedy unless he or she can show that the denial of the opportunity to work affects the right to remuneration detrimentally or, more rarely, the right to professional development.

Suspension without pay is a breach of contract, but, in the absence of an agreement to the contrary, payment of remuneration during the suspension of an employee accordingly satisfies the employer's contractual obligations, unless there is a right to work in a given instance. Brassey ("The Contractual Right to Work") suggests, correctly is submitted, that whether an employee has a right as well as an obligation to work depends on the terms of the agreement. Whether such a right exists must be determined by a proper construction of the contract. In *Marbe v Georg Edwards Daly's Theatre* ([1928] 1 KB 269) the court held at 288 that it depends "particularly on the express words of the contract, but may also depend on the character of the employment and possibly the amount and nature of the remuneration" (see Brassey 1982 *ILJ* 253).

A typical instance where an employer and an employee will agree to the right to work is where and employee is paid by results. That is where the employee is paid on commission or by the piece, for example. A further instance may be where the preservation of the status of the employee is important to such an employee. The fact that the employee holds a position of certain status is relevant to determine whether such an employee has contractually agreed to the right to work but it is not decisive in itself (Brassey 1982 *ILJ* 255).

Where an employee concludes a contract with an employer not only to receive remuneration but also to acquire or maintain certain expertise the parties would normally have impliedly agreed to the right to work. Apprentices and candidate attorneys fall within this category. In *Muzondo v University of Zimbabwe* (1981 4 SA 755 Z) the court concluded that a university lecturer had the right to work, because, although he was paid during a suspension he could not make use of university funds or facilities to conduct research in his field of study during the suspension.

In instances where an employee seeks to enhance or maintain his or her reputation by concluding a contract of employment there would generally also be an agreement to the right to work. An example of a right to work based on the maintenance of reputation is to be found in the English case of *Fechter v Montgomery (*(1863) 55 ER 274), where an actor concluded to perform exclusively for an acting company but was not given any role to act in for a period of five months although he was paid in full. The relevant court held that the actor was justified in cancelling the contract of employment with the acting company on the basis that the latter had been in material breach of contract by not providing him with work.

If a right to work is accordingly present even a suspension *with* pay will amount to breach of contract in the absence of the agreement with the employee. Such agreement may be obtained immediately prior to the suspension on an *ad hoc* basis or may be agreed upon when the contract is concluded and can become part of the terms and conditions of employment of the employee. Where there exists no contractual right to work, the employer may freely suspend an employee lawfully, in terms of common law; provided the agreed upon remuneration is paid to such an employee.

In terms of the law of contract a suspension without pay will amount to material breach of contract in all instances, unless the employee agrees to such a suspension. The contractual position as set out above remains applicable, even in the face of the development of statutory labour law, particularly the unfair labour practice concept contained in section 186(2) of the Labour Relations Act (66 of 1995, hereinafter "the LRA").

In this regard the judgment of *Fedlife Assurance Ltd v Wolfaardt* (2001 12 BLLR 1301(A)) is instructive. The Supreme Court of Appeal concluded that the LRA "does not expressly abrogate an employee's common-law entitlement to enforce contractual rights"

(1306C). In this case the employee sought to enforce the terms of a fixed-terms contract of employment when he was selected to be retrenched based on the criteria of "last-in-first-out" during the period of the contract. The selection criteria were fair, but the contract did not make provision for dismissal on notice. Similarly, where an employer imposes unpaid suspension as a sanction for misconduct, it follows that the employee has to agree to the suspension without pay. The employee will only do so when offered as alternative to dismissal as a sanction, or when it is agreed to at the conclusion of the contract. If, for instance, the disciplinary code of the employer is incorporated into the contract, and it makes provision for an unpaid suspension as sanction, such general agreement will probably be present, and, if the employer imposes such a suspension it will not amount to breach of contract.

3 Legislation

Although not universally accepted, it can generally be said that the common-law contract of employment confers no inherent right to fairness (*South African Maritime Safety Authority v McKenzie* 2010 5 BLLR 488 (SCA); and Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@Work* (2008) 165). Section 23 of the Constitution provides that everyone has the right to fair labour practices. Ngcobo J in *NEHAWU v University of Cape Town* ((2003) 24 *ILJ* 95 (CC)) assessed the fairness component of the right to fair labour practices, which he defined in terms of a balancing or accommodation of often competing interests (Van Niekerk *et al Law@Work* 39):

> "In my view the focus of s23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed" (*NEHAWU v University of Cape Town supra* par 40).

The LRA and other legislation such as the Basic Conditions of Employment Act (75 of 1997) (hereinafter "BCEA") and the Employment Equity Act (55 of 1998) (hereinafter "EEA"), were enacted to give effect to this constitutional right (Van Niekerk *et al Law@Work* 165; and see too *South African Maritime Safety Authority v McKenzie supra*).

Section 186(2)(b) of the LRA specifically deals with unfair suspension as an unfair labour practice and reads as follows:

> "(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."

This section requires that there is a labour practice that arises between an employer and an employee and that the conduct (whether act or omission) is unfair. The specific unfair labour practice (that is, suspension in this instance) occurs during the currency of employment (Van Niekerk *et al Law@Work* 167-168).

There is no definition in the LRA of "labour practice", but it is necessary at least that the practice (the suspension) must arise within the employment relationship (Van Niekerk *et at Law@Work* 168). By including unfair conduct relating to suspension as part of section 186(2), the legislature clearly recognizes that in some circumstances suspension may be fair. That would be for instance when a punitive suspension without pay as alternative to dismissal is a fair sanction for particular misconduct, or when a preventative suspension with pay has no punitive effect.

4 Payment vs Non-payment

Section 34 of the BCEA prohibits deductions from employees' remuneration unless by agreement or following due process of law. Suspension without consent would amount to breach of contract (Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw *Labour Relations Law: A Comprehensive Guide* 5ed (2006) 497 fn 151). Thus, unilateral deductions from employees' wages are prohibited (Grogan *Dismissal Discrimination* 62).

Certain statutory employees (for example policemen, some public servants and municipal employees) may be suspended without pay pending an enquiry because their statutory conditions of service expressly provide for suspension without pay (Grogan *Dismissal Discrimination* 62).

Suspension without pay pending a disciplinary enquiry has been held to be unfair by the CCMA in *Tsaperas v Clayville Cold Storage (Pty) Ltd* ([2002] BALR 1225 (CCMA). The Labour Court in *Harley v Bacarac Trading 39 (Pty) Ltd* ([2009] 6 BLLR 534 (LC) 539) held that suspension without pay and the fairness thereof are self-evidently linked to the payment of remuneration,

especially where, as is the case here, an employee is suspended without pay. Where suspension is effected as a measure pending a disciplinary hearing, as is the case here, suspension without pay is a material breach of contract (see above).

The CCMA found in *Joubert v Ground Crew (Pty) Ltd t/a First Catering SA* ([2009] 12 BALR 1284 (CCMA)) that, while the suspension itself was lawful, the employer had also stopped the applicant's petrol allowance, to which he was contractually entitled. This was unlawful and unfair.

5 Preventative suspension

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.

A preventative suspension has been held to be

> "a practice universally followed by employers, [to suspend] employees until serious charges against them are properly investigated and, if they are found to have substance, permitting the employee to answer them" (*Ortlieb v Khulani Springbok Patrols* [1994] 4 BALR 423 (CCMA) 425).

Suspension could be effected pending a disciplinary enquiry. The suspension is effected in order to conduct an investigation and to enable the smooth and timeous completion of such proceedings (Van Niekerk *et al Law@Work* 183). The Labour Court in *Phutiyagae v Tswaing Local Municipality* ([2006] JOL 17477 (LC)) stated that, as the applicant had been suspended on full pay and the suspension was necessary to conduct the investigation into the alleged misconduct, the application to have the suspension set aside, had to be dismissed.

A suspension pending a disciplinary enquiry is not meant to be punitive as the allegation of misconduct has not been proved (Van Niekerk *et al Law@Work* 183).

Du Toit *et al* indicate that an employee may be suspended as a "holding operation", pending a disciplinary hearing (Du Toit *et al Labour Relations* 498).

When is preventative suspension unfair? This occurs where preventative suspension is used for purposes for other than those for which preventative suspension is intended, for example to punish the employee (Grogan *Dismissal Discrimination* 63). In *Sajid v Mohamed NO* ((2000) 21 *ILJ* 1204 (LC)) the Labour Court ruled the suspension of the employee unfair because the employer had withdrawn all charges against the employee and there was no evidence that the employer intended to convene an enquiry into the allegations against the employee (Grogan *Dismissal Discrimination* 63). For preventative suspension to be fair, the employer must be able to prove that the employee has committed some form of misconduct and that, objectively speaking, there is a sound reason to keep the employee away from the workplace (Grogan *Dismissal Discrimination* 63).

In *Harley v Bacarac Trading 39 (Pty) Ltd* ([2009] 6 BLLR 534 (LC) 539) the Labour Court held that in the absence of any apparent apprehension that the applicant's continued presence in the workplace prejudiced a legitimate business interest, and in view of the demonstrated psychological and financial prejudice to the applicant, the applicant's suspension was unfair.

A preventative suspension may also be unfair in instances where there is a right to be heard prior to the suspension. It has been held for a long time that administrative law requires that an employee working for a public authority and who is suspended pending a disciplinary enquiry, must be given the opportunity to be heard (see *Bucarac Trading 39 (Pty) Ltd supra*). It may be argued that such a suspension would also be unfair.

6 Punitive suspension

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. Initially, the view was taken that only punitive suspensions fell within the ambit of unfair labour practices, but this view was rejected by the Labour Court (*Ndlovu v Transnet LTD t/a Portnet* [1997] 7 BLLR 887 (LC) 894J-895A; and *Sappi Forests (Pty) Ltd v CCMA* [2009] 3 BLLR 254 (LC)) and held that there could be an unfair labour practice even where the suspension precedes disciplinary action (that is, a preventative suspension). The CCMA and bargaining councils support this view and assume jurisdiction over both punitive and preventative suspensions.

Suspension could be a disciplinary sanction, that is, the outcome of the disciplinary enquiry could result in suspension as the punishment or

penalty for the employee (Van Niekerk *et al Law@Work* 183).

The Labour Court has held that suspension without pay is allowed as a disciplinary penalty in appropriate circumstances (Du Toit *et al Labour Relations* 499). Mlambo J in *South African Breweries Ltd (Beer Division) v Woolfrey* ([1999] 5 BLLR 525 (LC) par 11-12) that the prohibition of deductions from an employee's remuneration in terms of the BCEA does not prevent an employer from imposing the penalty of suspension without pay and that the employer's duty to pay remuneration under such circumstances is suspended by the fact that "no tender of services ... by the worker takes place or is required" (Du Toit *et al Labour Relations* 499).

If suspension is imposed as a disciplinary sanction or penalty, the ordinary requirements of substantive and procedural fairness should apply (Du Toit *et al Labour Relations* 499).

7 Preventative suspension and substantive fairness

Considerations of substantive fairness relate to the reason for the suspension. The employer must have a justifiable reason believing that the employee is involved in serious misconduct and that suspension is necessary, such as: where the seriousness of the misconduct may create a state of affairs (such as rumours and suspicion) necessitating a suspension of the employee so as to ensure work carries on smoothly; or where the employer has a reason to believe that the employee may interfere with the investigation or witnesses; or it may be where the employer fears recurrence of the misconduct; or where the seniority and authority of the employee has bearing on the matter.

In *Koka v Director-General: Provincial Administration, North West Government* ((1997) 18 ILJ 1018 (LC)), the court distinguished between a suspension as a holding operation (preventative) and a suspension as a form of discipline. The court pointed out that the context of the working in section 186(2)(b) seems to indicate that the suspension contemplated in the item is one which is imposed as a disciplinary measure. However, in the court's view a suspension imposed primarily as a holding operation could be tantamount to suspension for disciplinary reasons. It is submitted that such a suspension will not generally be meant to be punitive.

The purpose of such a suspension is normally to conduct an investigation and to ensure that the employee does not interrupt the investigation or influence witnesses.

Another purpose may be that the charge to be preferred against the employee is of such a nature, that the employer takes precaution of this type of situation is when the charge involves fraud and the employee is entrusted with the safekeeping of money.

In *Mabilo v Mpumalanga Provincial Government* ((1999) 20 ILJ 1818 (LC)) the head of the Department of Public Works of a Provincial Department was suspended on full pay pending a disciplinary enquiry. He sought to interdict the suspension although he had been afforded the opportunity to set out reasons why he should not be suspended. Instead of making use of the invitation the employee sought detailed particulars of a charge sheet which was not available then.

He also sought 21 days within which to furnish reasons. It was the court's view that the employee would be entitled to these particulars once charges had been brought, but not at the stage when a decision is to be taken concerning the suspension.

The court opined that an employer must not be allowed to abuse the suspension process, and that an employee is entitled to a speedy and effective resolution of the dispute. The investing action must be concluded within a reasonable period and unnecessary disruption to the employee's life must be prevented.

It is submitted that a lengthy delay in bringing charges which leads to an unreasonably long suspension may cause the preventative suspension to become substantively unfair.

A factor to be taken into account when evaluating the fairness of a suspension is whether the employer has followed the provisions of the applicable disciplinary code or regulation. This is of particular importance in the case of statutory employers. In *Marcus v Minister of Correctional Services* ([2005] 2 BLLR 215 (SECLD)) the High Court set aside a preventative suspension on review because the employer had not proved that the employee was guilty of "serious misconduct", for which suspension was reserved by the applicable regulation. Furthermore, it was evident that the employee's presence at the workplace would not affect the investigation into the alleged offence (Grogan *Dismissal Discrimination* 63).

8 Suspension and procedural fairness

8 1 Preventative suspension

Although a formal enquiry is not required prior to suspension pending a disciplinary enquiry, the *audi alterem partem* principle should be observed (Du Toit *et al Labour Relations* 499). Summary suspension with pay is fair if the employer has a reasonable concern that a legitimate business interest would be harmed by the employee's continued presence in the workplace. If there is no good reason for the suspension, or if the employee is not given an opportunity to be heard, the suspension will be unfair (Du Toit *et al Labour Relations* 499). Little or no guidance has been given by the courts regarding the scope of an enquiry afforded to an employee prior to preventative suspension. Logic indicates that employees must be given an opportunity to state their case as to whether they should be suspended or on the terms of the suspension (Grogan *Dismissal Discrimination* 63).

Molahlehi J in *Dince v Department of Education North West Province* ([2010] 6 BLLR 631 (LC) par [38]) held that

> "there is no doubt in my mind that there is no reasonable possibility that any other court in South Africa may come to the conclusion that the *audi* rule does not apply in suspension cases."

Another interesting factor to consider is the need for self-esteem and a sense of self-worth by the employee.

> "The freedom to engage in productive work – even where that is not required in order to survive is indeed an important component of human dignity ... for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and sense of self-worth – the fulfilment of what is to be human – is most often bound up with being accepted as socially useful" (*Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA) par [27]).

What impact would a preventative suspension have on these needs of the employee? Although an enquiry is not required before suspension pending a disciplinary enquiry, where suspension damages an employee's reputation, the employee is entitled to be heard before being suspended (Van Niekerk *et al Law@Work* 184). The High Court in *Muller v Chairman of the Minister's Council: House of Representatives* ((1991) 12 *ILJ* 761 (C)) accepted that the *audi alterem partem* principle is applicable to cases of suspension because it has adverse effects on the career prospects and reputation of the employee (Grogan *Dismissal Discrimination* 63).

Molahlehi J, in *SAPO Ltd v Jansen van Vuuren NO* ([2008] 8 BLLR 798 (LC) par [40]) opined as follows:

> "There is, however, a need to send a message to employers that they should refrain from hastily resorting to suspending employees when there are no valid reasons to do so. Suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfilment. It is therefore necessary that suspensions are based on substantive reasons and fair procedures are followed prior to suspending an employee. In other words, unless circumstances dictate otherwise, the employer should offer an employee an opportunity to be heard before placing him or her on suspension."

The Labour Court in *Mogothle v Premier of the North West Province* ([2009] 4 BLLR 331 (LC)) held that:

> "In summary: each case of preventative suspension must be considered on its own merits. At a minimum though, the application of the contractual principle of fair dealing between employer and employee, imposing as it does a continuing [duty] of fairness on employers when they make decisions affecting their employees, requires first that the employer has a justifiable reason to believe, *prima facie* at least, that the employee has engaged in serious misconduct; secondly, that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy; and thirdly, that the employee is given the opportunity to state a case before the employer makes any final decisions to suspend the employee."

The employee should also be notified (preferably in writing) of the suspension, the reasons for the suspension and the conditions of the suspension. The employee should also be informed of matters such as payment, whether the employee is relieved of any or all of their duties and whether the employee is prohibited from entering the workplace as well as when the suspension will be lifted.

For a suspension pending a disciplinary enquiry (preventative suspension) to be considered procedurally fair, it is accordingly necessary that the employee should be: informed of the reason for the suspension and of the length and duration of the suspension; and paid for the period in full (Van Niekerk *et al Law@Work* 183). As a general rule, the employer must continue remunerating the employee during the course of the preventative suspension. It has been held that where an employee requests a

postponement of a disciplinary enquiry, an employer does not have to pay an employee who has been suspended pending the disciplinary enquiry from the date of such postponement (Van Niekerk *et al Law@Work* 183). Employees who are suspended pending a disciplinary enquiry are normally entitled to their full pay for the duration of the suspension, however, it would not be fair to the employer to apply this principle in situations where the employee has requested the extension of the suspension (Van Niekerk *et al Law@Work* 183).

8 2 Punitive suspension

Since suspension as a penalty is usually imposed as an alternative to dismissal, it would be advisable to follow the guideline of the Code of Good Practice: Dismissal which provides that the employer should conduct an enquiry, except in exceptional circumstances, before resorting to dismissal [item 4(1), (4)], when deciding to suspend an employee (Du Toit *et al Labour Relations* 499). Because punitive suspension is a disciplinary sanction, it must be imposed for a fair reason and in accordance with a fair procedure. The requirements for a fair enquiry in cases of punitive suspension are the same as the requirements for any other form of disciplinary action (Grogan *Dismissal Discrimination* 64). Procedural fairness seems necessary in those cases where an employer is allowed to suspend an employee without pay. It must be remembered that the contractual requirement that an employee should agree to a suspension without pay remains.

9 Suspension period

In his concept paper, Cheadle suggests that suspension pending disciplinary enquiries should be aimed at curing two forms of abuse which are prevalent especially in the public sector: arbitrary suspensions and inordinate periods of suspension (Cheadle "Regulated Flexibility: Revisiting the LRA and the BCEA" 2006 *ILJ* 663). Cheadle argues that appropriate protection against the former would be provided by judicial scrutiny supplemented by a Code of Good Practice and the latter should be dealt with by (Du Toit *et al Labour Relations* 498)

> "(a) the creation of a statutory obligation to conduct and conclude disciplinary hearings within a reasonable time and a power to strike down tardy disciplinary hearings; and (b) institutional reform in the public service, namely an expedited process and [an] independent institution to conduct disciplinary hearings" (Cheadle 2006 *ILJ* par 74).

Suspension pending a disciplinary enquiry (preventative suspension) should not be unreasonably prolonged, otherwise the effect of the suspension would be disciplinary in nature and not "a holding operation" (Du Toit *et al Labour Relations* 498).

Criteria for judging the fairness of suspension was laid down by the Labour Court in *Mabilo v Mpumalanga Provincial Government*:

> "[T]he employee is entitled to a speedy and effective resolution of the dispute. Employers must not be allowed to abuse the process. The investigation must be concluded within a reasonable time taking all the relevant factors into consideration and the employee must be informed without undue delay about the process that the employer is initiating. This may take the form of allowing the employee to return to his or her work or alternatively furnish this individual with a charge sheet summoning the individual to a properly constituted disciplinary hearing. The disciplinary hearing must be initiated within a reasonable time of the individual being suspended" ([1999] 8 BLLR 821 par 17).

The Labour Court in *Minister of Labour v General Public Service Sectoral Bargaining Council* ([2007] 5 BLLR 467 (LC)) held that a suspension for an unreasonably long period is an unfair labour practice. In a review application, the Labour Court considered the suspension of an employee for a period far in excess of that permitted by the relevant disciplinary code. The Labour Court held that the suspension was unfair. The employee was the Assistant Director: Information Technology and was suspended in 2002 and he faced charges of alleged nepotism, sexual harassment and "self enrichment". Two years later the suspension was lifted and he returned to work. Two months later, the employee was again suspended pending the investigation of allegations of fraud and corruption. The arbitrator ruled that the suspension was unfair and ordered the applicant to uplift the suspension with immediate effect. The applicant failed to do so and instead convened a disciplinary enquiry, called that enquiry off, and then launched an application for review of the arbitration award. The court could find no reason why the suspension should not constitute an unfair labour practice. The court considered the disciplinary code which stated that if an employee is suspended pending disciplinary action, an enquiry should be convened within 60 days and the presiding officer must then decide whether a postponement should be granted (Van Niekerk *et al Law@Work* 184).

In *Ngwenya v Premier of Kwa-Zulu Natal* ([2001] 8 BLLR 924 (LC)) the court held that an employee may not be kept indefinitely on suspension, even with full pay, pending disciplinary action.

Bhoola J, in *Mapulane v Madibeng Local Municipality* ([2010] 6 BLLR 672 (LC) the court

noted that a clause in the applicant's contract provided that, if the employee was placed on "precautionary suspension", a disciplinary hearing had to be convened within 60 days, failing which the suspension would lapse unless the chairperson of the hearing extended the suspension. The court rejected the applicant's submission that this provision meant that the suspension could not be extended beyond a period of 60 days.

In *Israel v Department of Correctional Services* ([2009] 6 BALR 540 (GPSSBC)) the commissioner found that, while the respondent was entitled to suspend the applicant, it had a corresponding duty to ensure that the disciplinary proceedings should be finalized within the period prescribed by the code or, if it could not do so, within a reasonable time. It had not done so. The whole process had taken more than two years. Given the fact that the applicant was accused of a single count of misconduct, this was far too long.

The commissioner in *PSA obo Blose v Department of Education, KwaZulu-Natal* ([2009] 6 BALR 584 (GPSSBC)) noted that the applicable disciplinary code (PSCBC Resolution 1 of 2003) provides for the possible suspension of employees on full pay if they are alleged to have committed "serious misconduct", and the employer believes that their presence at work might jeopardize investigations or endanger persons or property. However, the code also provides that disciplinary action should be taken within "a month or 60 days", depending on the complexity of the investigation. No hearing had been held; thus the suspensions were unfair.

10 Remedy

In *SA Post Office Ltd v Jansen van Vuuren* ((2008) 29 ILJ 2793 (LC)), the employee, a senior systems programmer, was suspended on full pay pending a disciplinary enquiry. The alleged misconduct related to a power outage. The employee was suspended for being the cause of the outage simply because of his presence in the server room. The commission concluded that the final written warning amounted to an unfair labour practice. Concerning the suspension the commissioner concluded that an independent unfair labour practice had been committed. Compensation equal to six months' remuneration was awarded.

The court's view was that in dealing with compensation ordered (in s 194(a) of the LRA) the determination of the appropriate relief requires a balancing of the interests of both the employee and the employer.

The following objectives are to be considered: the wrong should be addressed, future violations should be deterred, an order that can be complied with should be made and everyone affected by the award should be accorded fairness.

The court pointed out that in granting compensation equal to six months' remuneration the commission had not taken into account that the suspension period was not long and that it had been with pay. The reason for awarding this amount of compensation were *inter alia* that the employee had been unaware of the nature of the offence he had allegedly committed. He was also not afforded the opportunity to make representations prior to the suspension.

In essence, the suspension was both substantively and procedurally unfair. It was the commissioner's view that the suspension had prejudiced the employee socially as well as psychologically and in regard to future job prospects.

The court held that the commissioner's conclusion concerning the unfairness of the suspension was correct, but that the amount of the compensation was too high. No financial loss was suffered by the employee.

It was clear that compensation in the form of *solatium* is generally granted as a remedy. It is submitted that just and equitable relief may also include an order to uplift a suspension still in operation.

The above considerations will apply in both a preventative as well as a punitive suspension.

11 Unpaid preventative suspension permitted in terms of statutory provisions

In the South African Police Service applicable regulations provide that a member may be suspended without pay pending a disciplinary enquiry. If such a member is found not guilty he or she is entitled to be paid the forfeited remuneration.

The South African Police Service Act (68 of 1995) provides furthermore that a member who is in detention pending a criminal trial or who is serving a term of imprisonment is deemed to be suspended without pay (s 43). Concerning this provision it is submitted that the provisions concerning a suspension need not apply.

The member is not in a position to tender his or her services, and the situation is one of temporary supervening impossibility of

performance. In such an instance the South African Police Services need not remunerate the member. In addition, if the detention is of an unreasonably long duration, the South African Police Services, as employer, may terminate the services lawfully. It is submitted that such a dismissal will also be fair if it follows an investigation, and if possible, the member is given the opportunity to be heard. Such a dismissal will be categorized as a dismissal for incapacity.

Concerning an unpaid suspension pending a disciplinary enquiry, it is apparent that the suspension would have amounted to breach of contract, had it not been for the applicable regulations. It would also have amounted to an unfair labour practice as envisaged in section 186(2) of the Labour Relations Act.

An arbitrator will, however, not have the authority to determine that such a suspension is unfair, since it is provided for in delegated legislation.

Concerning the provision in section 43 of in the South African Police Service Act where a member is deemed to be suspended without pay whilst in detention, the common law contractual position is the following: The member cannot tender his or her services due to temporary supervening impossibility of performance, and the payment of remuneration is not required. It is unnecessary to create a deemed-suspension provision. It is submitted that this is not unconstitutional, however, because the deemed unpaid suspension has the same effect as temporary impossibility of performance which is the contractual position.

Concerning the unpaid suspension pending a disciplinary enquiry provided for in the regulations, it is submitted that it is unconstitutional in that it amounts to contravention of section 23(1) of the Constitution, and that the provision does not amount to a permissible limitation of a constitutional right as envisaged in section 36 of the Constitution.

12 Conclusion

From the above discussion it is apparent that the suspension of employees at work has significant contractual, labour-law and constitutional indications.

When an employer resorts to suspension as a precautionary measure or punitive disciplinary sanction regard must be had to contractual consequences as well as a possible unfair labour practice challenge based on section 186(2) of the Labour Relations Act, 1995.

The contractual position is that, unless agreed between the parties, an unpaid suspension will amount to breach of contract. If suspension is therefore imposed as a sanction the employee's agreement must be obtained. Suspension without pay as sanction should accordingly be imposed as alternative to dismissal. Should the employee refuse suspension, he or she will be dismissed. It follows that suspension should be used sparingly, and in serious instances of misconduct. If an employee refuses a suspension, the dismissal that follows must be substantively fair.

A paid suspension may also amount to breach of contract if employee has a contractual right to work. In such a instance the employee needs to agree to the suspension – even if imposed as a precautionary measure.

Both a precautionary and a punitive suspension must be substantively and procedurally fair.

The substantive fairness of a precautionary suspension refers to the reason for not wanting the employee on the premises pending a disciplinary enquiry. The employee will have to show that there is a fair reason to suspend, relating to the investigation or the nature of the suspected misconduct. An automatic suspension pending a disciplinary enquiry for any misconduct may be substantively unfair.

The substantive fairness of a punitive suspension refers to the nature of the misconduct. The misconduct must be of a serious nature and the suspension must be offered as alternative to a dismissal.

Procedural fairness requires a disciplinary enquiry in the case of a punitive suspension.

In the case of a precautionary suspension the employee needs to be given the opportunity to make representations which, it is submitted, needs not be oral. The requirement does not mean that a formal enquiry needs to be conducted.

Employers are advised to regulate both precautionary and punitive suspensions in disciplinary procedures and codes which may be contractually agreed upon. In doing so, the legal pitfalls concerning suspension set out above may be prevented.

Finally, although statutory enactments may provide for an unpaid precautionary suspension, it is submitted that such provisions will

contravene section 23(1) of the Constitution and infringe the constitutional right to fair labour practices.

Lynn Biggs and Adriaan van der Walt
Nelson Mandela Metropolitan University,
Port Elizabeth

How to approach urgent relief in precautionary suspension cases

Employees often bypass the statutory provisions of the LRA providing for unfair suspension disputes to be dealt with by Bargaining Councils, by alleging that the relief they seek is urgent and that urgent proceedings are not possible in Bargaining Councils. In *MEC for Education, North West Provincial Government v Gradwell [2012] 8 BLLR 747 (LAC)* the Labour Appeal Court gave more clarity on how employees should approach such disputes. The Court held that the employee should in the first place not institute proceedings to obtain final relief in the Labour Court but should refer an unfair labour practice relating to suspension to the applicable Bargaining Council. The Court was of the view that the Labour Court in any event does not have jurisdiction to grant final relief as a court of first instance in suspension disputes because suspension in the employment context does not constitute administrative action.

The Court was further of the view that where the employee believes that the relief he requires is urgent, he should, in addition to the referral of the dispute to the Bargaining Council, also make an urgent application in the Labour Court seeking an urgent interim order pending the outcome of the unfair labour practice proceedings before the Labour Court. In this way the Labour Court will not make a final determination as a court of first instance about the fairness of the suspension, but will merely issue an urgent interim order preserving the status quo pending the finalisation of the unfair labour practice dispute by the Bargaining Council. Of further importance is that the Court held that while the requirements of procedural fairness applies to both precautionary suspension and suspension imposed as a disciplinary sanction, the proposition that all suspensions must be procedurally fair requires qualification.

The requirements of procedural fairness are flexible, and ultimately depend on the balancing of a range of factors. In cases of precautionary suspension, a hearing may be attenuated and the requirements of procedural fairness relaxed because the employee is not deprived of pay, the period of suspension will normally be of limited duration, because the balance of convenience normally favours the employer. A right to make written representations will, therefore, normally suffice.

Adv Pierre Van Tonder
ELRC National Senior Arbitrator

The onus in affirmative action disputes

The Employment Equity Act (EEA) provides that every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups. People from designated groups are defined in the EEA as black people, women and people with disabilities. However, the EEA does not expressly tell us who bears the onus to prove that a person falls within a designated group, when this aspect is in dispute. In the recent case of *Gebhardt v ELRC and Others* (LC) 2013] 1 BLLR 28 (LC) the Labour Court gave clarity about the onus in such disputes.

The applicant, a 'white' female educator was diagnosed with a disease, which caused her hearing to deteriorate to such an extent that she was required to wear hearing aids in both ears.
The applicant indicated her disability in a survey form. She also advised the chief executive officer and vice-rector of the college where she was employed of her hearing impairment. The applicant thereafter applied for a promotion. In her application for the post, she indicated her hearing disability. Three candidates, of whom the applicant was one, were interviewed for the position. The applicant received the highest scores during interviews and the panel recommended the applicant as its first nominee for the post. The employer decided to appoint another candidate "V", a 'coloured' female educator, the candidate with the second highest score.

Before the ELRC, the employer's defence was that although the applicant was the best candidate, coloured female educators as opposed to white female educators were under-represented in terms of the employer's equity targets. This resulted in "V" being appointed over the applicant. The ELRC panellist who arbitrated the dispute held that because the employer's decision to appoint the second best candidate was in line with the employer's equity target, there was therefore no unfair conduct. With regard to the applicant's disability, the panellist held that an employee bears the onus of establishing whether he/she falls within a specific designated group that entitles him/her to be considered when an employer seeks to achieve its equity targets. The panellist found that the applicant had failed to prove her disability to her employer and, as such, there was no obligation on the department to consider the applicant's alleged disability when filling the post in question. The applicant's claim was dismissed.

On review, the labour court held that the ELRC panellist misunderstood which party bore the legal onus to prove an employee falls within a designated group. With reference to sections 13 and 19 of the EEA, the Court held that it is the duty of an employer to gather information about all employees in his workforce in order to determine whether he or she falls within a particular designated group. The onus was therefore on the employer to gather information about the disability of any employee who alleges that she is a member of a particular designated group. In the circumstances the award was set aside and remitted back to the ELRC to be heard afresh before another arbitrator. The parties settled the dispute during the second arbitration hearing.

Adv Pierre Van Tonder
ELRC National Senior Arbitrator

Joinder of Parties having substantial interest in school-based promotion disputes

1 Introduction

In disputes of unfair labour practice lodged either at the CCMA or a bargaining council, the traditional parties would be the disputee (or Applicant) and the Employer (or Respondent). There would be instances, however, which justify the joining of a so-called "3rd Party" to the proceedings (conciliation/arbitration) if such a party demonstrates having a direct and substantial interest in the outcome of the dispute. The joining of the "3rd Party" is referred to as a Joinder.

The concept of Joinder historically derives from common law practice, which entitles any "3rd party" with a substantial interest in the outcome of any dispute / litigation proceedings, to be afforded an opportunity to be heard. (The *audi alterim partem* rule).

This article focuses on the application of the joinder principle to the extent it involves labour disputes with particular emphasis on disputes lodged and dealt with at the Education Labour Relations Council.

The need for joinder of a "3rd party" is prevalent in unfair labour practice disputes within the Public Service *per se.* However, it is the Education sector which record the highest number of promotion related disputes as a consequence of the large number of promotion posts advertised on an annual basis.

In light of recent developments in our courts, it is peremptory for promotion disputes to be lodged ***only*** after the employer has made a decision to effect an appointment or having made an appointment, as the case may be.

The practical effect of this translates into a situation in which there would always be a joinder party (appointed educator) to a promotion dispute, save in instances where the appointed incumbent waives his/her right to join proceedings.

In some cases, a disputee may seek only compensation as relief, which might obviate the need for a joinder as this form of relief cannot be

said to affect the rights and interest of the appointed incumbent.

There are, however, differing opinions on whether or not a need still arises for the joinder of the appointed incumbent. This is borne of the fact that commissioners posses wide ranging discretionary powers when granting a form of relief, which in their opinion, serves in the best interest of justice. This could mean issuing an order setting aside an appointment instead of granting compensation.

2. The legal provision for the joinder of a Party

Whist common law practice remain a justifiable basis in law to effect a joinder, there are, over and above this, specific provisions made in *Rules for the conduct of proceedings before the CCMA* – applicable to disputes dealt with at the CCMA, and *the Constitutions of Bargaining Councils* – applicable to disputes dealt with by Bargaining Councils).

For ease of understanding, Section 26 – Rules for the conduct of proceedings before the CCMA is re-produced here. This section states:

"(1) The commission or a commissioner may join any number of persons as parties in proceedings if their right to relief depends substantially on the same question of law and fact.
(2) A commissioner may make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter in the proceedings.
(3) A commissioner may make an order in terms of sub rule (2) –
(a) of its own accord;
(b) on application by a party; or
(c) if a person entitled to join the proceedings applies at any time during the proceedings to intervene as a party. "

The joinder provisions contained in the ELRC Constitution (section 56 of the ELRC Constitution) necessarily conveys the spirit and meaning of section 26 of the rules of the CCMA and it is therefore not necessary to repeat it.

3. Types of joinders

The joinder of parties could take two different forms:

i. In terms of rule 26(1) of the CCMA, "any number of persons as parties could be joined if their right to relief depends on "*substantially the same question of law and fact".*

It is not necessary to elaborate on this form of joinder as the focus of this article is on joinder of a "3rd party", who demonstrates a substantial interest in a dispute.

For the sake of completeness, it suffices to say that this form of joinder refers to an instant when the ELRC is in receipt of more than one dispute which rely on the same set of facts. For example, more than one educator disputing a particular promotion post and all cite the exact same reason as the basis of their dispute. In order to avoid a duplication of hearings and the risk of the production of conflicting awards on the same post, there is a need to consolidate/join these disputes so that they are all dealt with in a single arbitration hearing.

Such joinders are essentially identified and effected by the ELRC, who would be best placed to glean from the dispute referral forms, the commonality of the reasons advanced in each dispute referral. To this extent, parties are joined as co-disputees or co-applicants to proceedings and there could be more than two parties involved. In ***terms of rule 26(2)*** a person could be joined if s/he has a *"substantial interest"* in a dispute.

This article is premised on this type of joinder in which a need arises to join a "3rd Party" (or appointed educator) to the extent such an educator's rights could be materially affected by the outcome of the dispute.

For example, if the arbitrator rules in favour of the disputee and sets aside an appointment. To this extent, the joinder party acquires co-respondents or 2nd Respondent status in proceedings. (The Employer being the 1st Respondent).

4. How is an interested party joined to a dispute?

In terms of rule 26(3) a commissioner may make an order:

(a) Of its own accord; (referring to the instant when the disputing parties had not identified or alerted the joinder party or the ELRC.

In this instance, it would be the ELRC, prior to scheduling a hearing, or the presiding commissioner (during conciliation or arbitration)

as the case may be, who, of their own accord, invite the appointed educator to apply for joinder to proceedings.

(b) On application by a party, this could occur in one of three instances:

i. When a disputee has taken it upon himself/herself to identify the appointed educator and provides this information to the ELRC who, in turn, would serve notice on the appointed educator to apply for a joinder.

ii. When the employer/respondent on being served with a dispute referral form, identifies and informs the appointed educator (and just maybe the ELRC at the same time, which should be encouraged) of his/her right to be joined to proceedings to apply for joinder at the hearing.

iii. When the appointed educator becomes aware of a dispute been lodged in the post they occupy, takes it upon himself/herself to apply for joinder, either via the ELRC (which should be encouraged) or directly at the hearing itself.

5. What are the consequences for the failure to join any person having substantial interest in a dispute?

A significant delay in proceedings:
It is in all likelihood that the presiding commissioner would identify this omission either during conciliation or arbitration and be forced to postpone proceedings until such time due and proper notice has been served on the appointed educator to apply for joinder. As a result, this would cause unnecessary delays in the finalisation of the dispute and obviously fruitless expenses incurred by the ELRC.

The arbitration award being rendered defective, successfully reviewed and set aside:
In the unlikely event a commissioner proceeds to finalise the matter in the absence of the joinder party, to the extent of offering relief which affects the rights appointed educator, then such an award must, if challenged, be set aside. This again would have severe financial and time-consuming implications.

There are leading judgments in which awards had been successfully reviewed and set aside for failing to effect joinder of an interested party.

In Public Servants Association v Department of Justice and Others (CA5/2002) [2004] ZALAC 1 (7 January 2004) the court held:

"With regard to the issue of non- joinder it is trite that a third party should be joined in proceedings if he/she is shown to have a direct and substantial interest in a matter and has not consented or undertaken to be bound by any judgement that may be given in the matter. It is not necessary to refer to many authorities in this regard; it is sufficient to refer to the case of Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637(A)."

It was further held in paragraph *[32]* of the judgment*:*

" This created a state of affairs in which it could be said that the employer was faced with contradictory claims as to who should have been appointed. The unsuccessful candidates, Messrs Duminy and Nortier, then took their grievance or complaint to arbitration. That arbitration was, to say the least, about who should have been appointed to the two posts and who should not have been appointed. To my mind this demonstrates quite clearly that the successful candidates had a direct and substantial interest in the arbitration proceedings. It seems to me, therefore, that the commissioner could not and should not have sat in judgement on Messrs Duminy's and Nortier's claim in the absence of the other two affected partiesAs the two successful candidates had a direct and substantial interest in the arbitration proceedings, they should have been joined. The commissioner's failure to have them joined in the arbitration proceedings led to the issuing of an award adversely affecting their rights and interests without their having been joined and without their having been afforded an opportunity to be heard."

6. Conclusion

It is likely that in some cases the disputing Parties would be diametrically opposed in respect of the facts and merits of the issue in dispute.

However, there is no doubt that both parties would always seek the resolution of the dispute with a common purpose, being a speedy and expeditious resolution of the dispute.

For this reason it is expected of parties alike, to make every endeavour in assisting the ELRC's dispute resolution mechanism in its bid to speedily and efficiently help resolve disputes.

Having understood the value of being joined to proceedings or of the potential consequences of

waiving his/her right to be joined, it is unlikely that too many, if any at all, appointed educators would opt to waive their right to participation. That being the case, it is imperative for the disputing parties to make every effort, either on their own accord or by working together, to ensure that the appointed educator is duly made aware of the dispute and of his/her right to be joined to proceedings.

Mr Dolin Singh
ELRC Provincial Manager: KwaZulu-Natal

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3. Questions & Answers

Dear General Secretary

Question:

Does the ELRC have the right to post details of a case on its website? Is this not an infringement of the rights of the applicant?

Background

In 2010, while in the employ of the Education Department, a dispute over conditions of service was referred to the ELRC. The arbitration did not go my way and I left the employ of the Education Department and went into the independent education sector. I was made aware that the details of my case, including the commissioner's findings are in the public domain and easily accessible on the Internet.

I feel particularly aggrieved by this for the following reasons:

- My dispute was a confidential matter between myself and my then employer.
- Neither the employer, nor my union representative, nor the Commissioner who presided in this case indicated to me that details of this matter would be made public.
- My permission for this matter to be made public was neither sought from me nor given by me.
- My right to privacy in terms of Section 14 (d) of the Bill of Rights of the Constitution is infringed.

Consequently, I respectfully ask that the ELRC with immediate effect remove all information about this case from the Internet.

Anonymous

Dear Anonymous

The Constitution of the Republic of South Africa, 1996 is the supreme law of the country and binds all legislative, executive and judicial organs of State at all levels of government. In terms of Section 165 of the Constitution, the judicial authority in South Africa is vested in the courts, which are independent and subject only to the Constitution and the law. No person or organ of State may interfere with the functioning of the courts, and an order or decision of a court binds all organs of State and persons to whom it applies.

Chapter Two of the Constitution, and more particularly Section 23, seeks to regulate the rights of individuals, trade unions, and or employers organizations in the labour relations sphere. The Labour Relations Act, No 66 of 1995 was accordingly promulgated to give effect and regulate the fundamental rights conferred by Section 23 of the Constitution whereas, more specifically, the Act seeks to promote effective resolution of labour disputes. The CCMA and/or a Bargaining Council (including the ELRC) is accordingly clothed with the necessary jurisdiction to determine disputes quickly, fairly and with minimum legal formalities.

Arbitrators are required to declare conduct by an Employer that is inconsistent with the Constitution and/or any applicable law to be invalid. Decisions of an arbitrator are final and binding on the parties, however, also subject to review in the Labour Court. Decisions should be transparent and consistent with the values of the Constitution and the spirit and purpose of the Bill of Rights.

The ELRC is obliged to file every award issued by an arbitrator at the Labour Court within 14 days from date of finalization of the arbitration proceedings. Disputes that are heard by the courts (and the ELRC) are a matter of public record. Any member of the public, and/or the press can access the files, pleadings and any documents. Disputes that are arbitrated, in accordance with the Arbitration Act, however, bear the advantage of being completely private and confidential. The arbitration papers and order are not public documents and parties can ensure their privacy by insisting on a confidentiality clause in their arbitration agreement.

Statutory arbitrations, such as that which is conducted under the auspices of the ELRC, are however not private arbitrations but are regulated by the Labour Relations Act No 66 of 1995 and/or any collective agreement.

Ms NO Foca, ELRC General Secretary

Dear Readers

Please note that the *Questions and Answers* section is a new column that we would like to develop. We would like to hear your views and will respond to questions in the next issue of the Labour Bulletin. Please send any questions relating to labour law to the ELRC Media Officer, Ms Bernice Loxton.

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