# LABOUR LAW

*Disciplinary Hearings and Suspensions*

ONLINE SHORTS

2020

## ONLINE SHORT SERIES

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## INTRODUCTION

Employers may lawfully dismiss an employee where he/she has the failed to comply with or have contravened a rule / standard regulating conduct in or of relevance to the work place and employer's business.

Contravening a reasonable, necessary, known or expected to be known rule / standard regulating conduct, that has been consistently applied by the employer, amounts to misconduct and permits for the fair dismissal of an employee.

However, before an employee is dismissed for misconduct he / she must be afforded a fair disciplinary hearing (enquiry) during which he / she is afforded the opportunity to address the allegations that have been brought against him / her and to state his / her side of the story. The disciplinary procedure, the rights and obligations of the employer and employee as well as suspensions will be considered.

## CODE OF CONDUCT

The Code of Good Practice: Dismissal and the Employer's Right to Discipline, provides that all employers should adopt disciplinary rules that establish the standard of conduct required of their employees.[1] The standards of conduct must be clear and available to all employees in a manner that is easily understood. However, it should be noted that where rules or standards are so well established and known, an employer is not required to specifically communicate the rule/standard to the employees (for example that assaulting a co-employee or stealing company income or profits is prohibited).

The primary purpose of the employer's disciplinary code and procedure is to regulate and define the standards and quality that employees are expected to comply with within the company or organisation.

The employers code of conduct should adopt a progressive and/or corrective approach, with focus on correcting unacceptable behaviour and as a means to ensure employees are aware of and understand the standards and behaviour required of them. [2]

Consequently, an employer's code of conduct and disciplinary procedures should provide for a system of graduated disciplinary actions and measures as a means to correct unacceptable employee conduct or behaviour through warnings, counselling sessions, with dismissal serving only as a remedy of last resort.

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[1] All employers should adopt disciplinary rules that establish the standard of conduct required of their employees - Schedule 8 - The Code of Good Practice - Dismissal Part 3(1).

[2] Schedule 8 - The Code of Good Practice – Dismissal - https://www.labourguide.co.za/download-top/261-code-of-good-practice-dismissalpdf/file ; CCMA – " Disciplinary Procedures" - https://www.ccma.org.za/Services/Individual-Employee-Employer/Disciplinary-procedures

The Code of Good Practice: Dismissal and the Employer's Right to Discipline highlights that a formal inquiry and procedure need not be invoked for each and every rule that is broken or standard that is not met, as informal advice and correction through counselling and training is deemed the best and most effective means of dealing with and reprimanding minor violations of an employer's code of conduct.

However, repeated misconduct and disregard of the employer's code of conduct and/or work standards will warrant the issuing of warnings, which will generally follow a grading system based on the extent of the employees misconduct. That is to say that where an employee should breach a rule on which he/she has been advised on numerous times, a first warning may be issued, while a more serious form of misconduct, such as with theft and/or negligently endangering the life of a colleague may warrant a final written warning.

Final warning's and disciplinary action short of dismissal should be reserved for serious or repeated misconduct, while dismissal as a penalty may only be imposed where despite previous warnings and disciplinary actions the employee's misconduct persists or where the employee's misconduct is very serious. [3]

## COUNSELLING AND DISCIPLINARY ACTION

It is generally not appropriate to dismiss an employee for a first offence unless the misconduct is of such a serious nature or of such significance that continuing with the employment relationship is impossible.

Examples of instances where the misconduct has been deemed sufficient to diminish any hope of a continuing employment relationship include:[4]

- Gross dishonesty;
- Wilful damage to the property of the employer;
- Wilfully endangering of the safety of others;
- Physical assault on the employer, a fellow employee, client or customer, and
- Gross insubordination

In light of the fact that dismissal cannot be imposed as penalty for a first offence unless its severity warrants same, counselling is deemed an effective manner of dealing with minor misconduct and violations of the employer's code of conduct. Thus, counselling is appropriate where an employee should not be performing as expected, performing below the accepted standard of the employer or where it is evident that the employee is not aware of the said rule that they have violated. Consequently, counselling to remedy violations of rules of conduct will be the most appropriate where the violation and misconduct is trivial and can be forgiven.

[3] Schedule 8 - The Code of Good Practice - Dismissalhttps://www.labourguide.co.za/download-top/261-code-of-good-practice-dismissalpdf/file

[4] Schedule 8 - The Code of Good Practice – Dismissal - https://www.labourguide.co.za/download-top/261-code-of-good-practice-dismissalpdf/file

Disciplinary action can be resorted to where repeated counselling and guidance has failed to correct the employees conduct or where the degree of misconduct and/or violation of the employers code of conduct is significant. [5]

Prior to any disciplinary action being taken, the employer and employee should meet to inform the employee of the rule or standard that has been violated and to afford them the opportunity to address the alleged violation they have been accused of. The employer should also consider the seriousness of the misconduct; the circumstances of the misconduct; the nature of the employee's work; the employee's history and personal circumstances; and lastly whether previous dismissals have been effected for the same reason.

## TYPES DISCIPLINARY ACTION[6]

The seriousness of the violation should be determined in order to decide which form of disciplinary action would be most appropriate.

Where the employees breach of the employer's rule or code of conduct is minor, informal disciplinary action should be imposed, which entails counselling and verbal warnings. It should be noted that the law does not prescribe a minimum number of verbal warnings that are to be imposed before a final warning or dismissal may be imposed, same would be determined by the Employer's disciplinary code or applicable collective agreement. The type of disciplinary action that is imposed will be determined by the severity of the misconduct and the employer's disciplinary code.

Where the employee's breach of the employer's rule or code of conduct is more serious or amounts to repeated offences for which informal disciplinary action has not been effective, formal disciplinary action such as a written warnings, final written warnings, suspension, demotion or dismissal may be imposed.

Written warnings will lapse any time between 3 – 6 months, depending on the employer's disciplinary code. This means that should an employee not contravene the same rule or code of conduct within 3 to 6 months of receiving the said warning, the warning itself falls away and the employee starts with a clean slate. Final written warnings however last longer and will generally be valid for a period of 12 months, meaning should an employee contravene the same rule or code of conduct for which the final warning was imposed, it may lead to more severe forms of disciplinary action such as suspension or dismissal.

It should be noted that a warning for one type of offence will not apply to another type of offence, thus where an employee has received a written warning for successive late coming, the warning cannot lead to a second warning or to dismissal for failing to come to work, as the latter is deemed to be a different and separate form of offence.

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[5] CCMA – " Disciplinary Procedure" - https://www.ccma.org.za/Services/Individual-Employee-Employer/Disciplinary-procedures

[6] CCMA – " Disciplinary Procedure" - https://www.ccma.org.za/Services/Individual-Employee-Employer/Disciplinary-procedures

Employees are required to sign all written warnings and are to be provided with the opportunity to state any objection(s) they may have in respect of the alleged misconduct and warning should they have any. Failure by the employee to sign the written warning does not affect the validity of the warning itself. In such an instance a witness will be requested to sign the warning as confirmation that the employee received the warning and refused to accept same.

It should also be noted that employees are entitled to appeal final written warnings and may compel the employer to hold an enquiry where the employee should opine that the outcome can only be determined upon hearing oral evidence and/or testimony.

The more serious the employee's misconduct the more justified the employer is in imposing more serve disciplinary action such as suspension, demotion or dismissal, with dismissal being reserved as a means of last resort.

Disciplinary action must be preceded by a fair disciplinary hearing unless the hearing / enquiry is impossible such as where the employee has absconded or where it is undesirable, for example where property or life is threatened and/or endangered.

As provided, depending on the seriousness or repeated violations of an employer's code of conduct, the following forms of disciplinary action may be imposed, as per order of severity :

- Verbal Warning for a first offence / minor offence.
- Written warning for a repeated offence.
- Final Written warning for repeated offence. Generally imposed where employee has breached a rule or code of conduct for the third time or where the offence is sufficiently serious to justify a disciplinary action short of dismissal.
- Suspension without pay. Generally imposed where the offence is sufficiently serious to justify a disciplinary action short of dismissal and where the employee's presence at the work place will interfere with or harm further investigations into the alleged misconduct.
- Demotion, may only be imposed as disciplinary action as an alternative to dismissal where the offence is sufficiently serious to justify same
- Dismissal

## THE DISCIPLINARY PROCEDURE AND ITS COMPONENTS

### THE BASICS

Where misconduct has been alleged, the employer should investigate the alleged misconduct to determine whether there are sufficient grounds/reasons for dismissal. This does not necessarily have to be a formal enquiry, however the employer must inform the employee of allegations that have been made, in a form and language that the employee can understand.

Notice of enquiry should clearly provide:

- Date, time and venue of hearing

- Sufficient details of the alleged misconduct
- The employee's right to be assisted by a trade union representative or fellow employee.

In regard to the last requirement, it should be noted that generally attorneys and advocates are not permitted to assist an employee during a disciplinary hearing. The reason for same is to ensure that time and costs are not unnecessarily spent and that the matter is finalised as soon as possible. Additionally should the matter proceed to the CCMA the parties to the labour dispute will not be permitted to be represented by attorneys or advocates. It is only where the matter should proceed to arbitration that legal representation may be acquired.

The employee must be afford an opportunity to address the allegations and state his/her side of the story, being provided with a minimum of at least 2 working days to prepare their response and to be assisted by a trade union representative or fellow employee should they so wish. Upon completion of the enquiry the employer should advise the employee of the decision that has been made, preferably providing written notice of same.

Where dismissal is found to be justified and imposed, the employee must be provided with the reason for his/her dismissal as well be informed of their right to refer the matter to the CCMA, a counsel with jurisdiction or any other dispute resolution procedures that may be provided for in a collective agreement.

Furthermore, where the employee accused of misconduct is a trade union representative, an office bearer or official of a trade union, no disciplinary action may be imposed without first informing and consulting with the relevant trade union, who should be consulted prior to a notice of enquiry being served upon the employee.

It is only in exceptional circumstances where one cannot reasonably expect the employer to comply with same that pre-dismissal procedures may be disregarded.

CHARGES AGAINST EMPLOYEE

The misconduct of which an employee is accused of must be clearly communicated, in precise and simple terms, in a form and language that the employee understands. The employer should advise the employee of the allegations brought against him/her prior to the hearing so that the employee may have sufficient time to prepare and answer the allegations. Where allegations are vague and/or confusing, disciplinary action imposed may be found to be unlawful. [7]

Where additional information regarding the alleged misconduct is available and will assist in providing the employee with a better understanding of the allegations made against him or

[7] Le Roux and GWK Ltd (2004) 25 ILJ 1366 (BCA) - Nicolene Erasmus " Fair procedure" https://www.labourguide.co.za/discipline-dismissal/659-the-minimum-requirements-for-a-fair-disciplinary-hearing

her, such information should be included however it is not necessary for the allegations to be drawn up in the same detail as that required in criminal proceedings. [8]

An employee may not be charged with two or more forms of misconduct where the conduct in question only constitutes one offence, consequently charges may not be split or duplicated.

In determining whether a single act constitutes one or two instances of misconduct, one should consider the facts surrounding the employees alleged act of misconduct, the alleged offences committed by the employee and whether they amount to the same or different offence and lastly what the consequences of the employees actions are.

Thus where an employee should not come to work on the morning of both 2 January and 3 January 2020[9], despite arriving later the day on both days and then be charged with two counts of misconduct - late coming and absenteeism from work, he/she could argue that the charges have been split and/or duplicated, the reason being:

1. The facts that give rise to the charges of late coming and absenteeism from work is the same – that is the employees failure to come to work on the morning of 2- 3 January 2020, which is used as the basis for both late coming and absenteeism - the same set of facts are used for both the late coming charge and the absenteeism from work
2. The Late coming charge is very similar (if not the exact same) as the absenteeism from work charge.
3. Both late coming and absenteeism from work have the same consequences, that is work is not being done or performed as required.

The facts surrounding the employee's alleged misconduct is the same, with the allegations of misconduct amounting to the same or very similar offence, with the same consequences, consequently it amounts to a splitting or duplication of charges.

Where the employee's action has different factual components, compromise different offences and have distinguishable consequences, there has been no splitting and/or duplicating of charges.[10]

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[8] Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO - Nicolene Erasmus " Fair procedure" https://www.labourguide.co.za/discipline-dismissal/659-the-minimum-requirements-for-a-fair-disciplinary-hearing

[9] Ntshangane v Speciality Metals CC [1998] 3 BLLR 305 (LC) - Nicolene Erasmus " Fair procedure" https://www.labourguide.co.za/discipline-dismissal/659-the-minimum-requirements-for-a-fair-disciplinary-hearing

[10] Ntshangane v Speciality Metals CC [1998] 3 BLLR 305 (LC) - Nicolene Erasmus " Fair procedure" https://www.labourguide.co.za/discipline-dismissal/659-the-minimum-requirements-for-a-fair-disciplinary-hearing

It is a central principle of the South African Legal system that once an accused person has been tried and a court has imposed a sentence that person cannot be tried again on the same charges arising from the same facts. In this regard take note of the decision in Moyo / Avery Dennison SA (Pty) Ltd [2011] 4 BALR 347 (NBCCI) where it was held " "reinstatement of an employee in my view does not diminish an employer's right to hold an enquiry and determine whether an employee is guilty of misconduct even though the employee had initially been dismissed on the basis of one of the allegations of misconduct without an enquiry." It was further held " Where an employer dismisses an employee without following a fair process and then reinstates the employee and holds an enquiry, it has rectified a wrong that it had previously made. One cannot state that the holding of an enquiry subsequent to reinstatement is double jeopardy. It may have been double jeopardy had the employee been found not guilty of the charges and then charged again on the same offences and dismissed." [11]

The Labour Appeal Court has endorsed the principle that an employer dissatisfied with the sanction imposed by presiding officials may approach the Labour Court for relief, confirming that same would not constitute double jeopardy [12]

TIMING OF HEARING

The disciplinary hearing should take place as soon as possible after the alleged incident of misconduct to ensure that the facts of the matter remain clear and fresh in each parties mind. However, a delay in the disciplinary hearing will not by itself render the disciplinary hearing and disciplinary action taken in terms thereof unfair. The CCMA has held that it is only where evidence is led proving that the delay unfairly prejudiced the employee that the subsequent hearing and disciplinary action taken (such as dismissal) is unfair. [13]

OPPORTUNITY TO PREPARE FOR HEARING

The employer must provide the employee with a reasonable period of time, generally accepted to be at least 2 working days, in which to prepare for a disciplinary hearing. What is regarded as a reasonable period of time will however be dependant on the facts of the matter as well as on the complexity of the allegations made. The more complex the alleged misconduct is the more time will be required to contemplate and address the allegations.

[11] Nicolene Erasmus " Fair procedure" https://www.labourguide.co.za/discipline-dismissal/659-the-minimum-requirements-for-a-fair-disciplinary-hearing
[12] Nicolene Erasmus " Fair procedure" - https://www.labourguide.co.za/discipline-dismissal/659-the-minimum-requirements-for-a-fair-disciplinary-hearing
[13] ECCAWUSA obo JAFTA v Russells Furnishers [1998] 4 BALR 391 (CCMA) - Nicolene Erasmus " Fair procedure" - https://www.labourguide.co.za/discipline-dismissal/659-the-minimum-requirements-for-a-fair-disciplinary-hearing

Providing the employee with reasonable time within which to prepare relates directly to his/her right to be heard and present a defence. It ensures that the employee is provided

with sufficient opportunity to prepare his/her case, to obtain legal advice where needed, contemplate and answer each allegation against him/her and ask for representation by a trade union or fellow employee representative if they deem same would be in their favour.

Where a procedural error has occurred, such as the employer not providing the employee with a hearing at all or failing to provide the employee with a reasonable period of time within which to respond to the allegations, same can be rectified at a later date by offering a later hearing upon realisation of their error, however whether this would render the unfair disciplinary hearing fair would depend on the facts of each case and whether any prejudice would be suffered by the employee or not.

## UNBAISED CHAIRPERSON

The primary role of the chairperson of a disciplinary hearing is to consider the evidence for and against the employee, so that he/she may make a informed decision on the employee's alleged misconduct. Thus it is evident that the chairperson should, like all presiding officers, have a clear and objective mind, free of biases for or against the employee / employer.

It has been held that reasonable apprehension regarding a chairman's biases arises where all or some of the following factors are present: [14]

- Sits in judgement over matters concerning him/herself or person with whom he/she associates;
- Sits in matters in respect of which he/she has prior personal knowledge or experience;
- Sits in matters in which he/she has an interest in the outcome; or
- Sits in matters in which he/she has bias or an inclination in respect of the parties.

In the case of NUFAWSA obo Matiti v Svencraft, it was held that a chairperson that was the human resources manager and an employee of a company of 30 employees, with prior personal knowledge of the offence and who had been involved with the investigation, had an interest in the outcome of the hearing. Subsequently it was held that the chairperson lacked objectivity, with bias or inclination in favour of the employer, rendering the disciplinary hearing prejudicial to the employee which made it procedurally unfair, resulting in an unfair dismissal.

[14] NUFAWSA obo Matiti v Svencraft CC [2006] JOL 18717 (BCFMI) – Nicolene Erasmus – "Fair Procedure" - https://www.labourguide.co.za/discipline-dismissal/659-the-minimum-requirements-for-a-fair-disciplinary-hearing

## PROCESS OF HEARING

Labour legislation does not specify the process or steps to be followed at a disciplinary hearing. In light of this there is no fixed process to follow during the hearing, which will be subject to the employer's disciplinary code or collective agreement where same is applicable.

However the hearing should follow the process described here under, which serves as the CCMA guideline on conducting disciplinary hearings:[15]

The employer starts the disciplinary enquiry by confirming the allegations against the employee and providing evidence proving the allegations. This is followed by the employee who is given an opportunity to respond to each of the allegations and provide contrary evidence. Once both employer and employee has stated their case, the Chairperson may ask either the employer's or the employee's witness clarification questions to confirm and clarify any aspect of the allegations and defence and must thereafter make a decision on whether the employee is guilty of the misconduct as alleged by the employer.

In instances where the employee has been found guilty of the misconduct, the chairperson should request both employer and employee to make submissions regarding appropriate disciplinary action that should be imposed. After consideration of both employer and employee submissions, the chairperson will indicate what they deem to be the most appropriate sanction. It should be noted that the chairperson's decision is not necessarily final and binding and may only serve as a recommendation on which the employer may rely in making the final decision. Who bears the authority to make the final decision on what disciplinary action is to be imposed will depend on the employer's disciplinary code and the terms of a collective agreement where there is one.[16]

It should be noted that parties to a disciplinary enquiry may by way of mutual consent request the CCMA or applicable bargaining council to appoint a arbitrator to conduct a final and binding disciplinary hearing, the prescribed fee of which will need to be paid by the employer.

Once a final decision has been made on what disciplinary action will be imposed, it must be communicated to the employee.

## PARTIES

The following persons should be present at the enquiry:

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[15] CCMA – " Disciplinary Procedures" - https://www.ccma.org.za/Services/Individual-Employee-Employer/Disciplinary-procedures

[16] SARS v CCMA & others [2010] 3 BLLR 332 (LC); Country Fair Foods (Pty) Limited v Commission for Conciliation, Mediation and Arbitration & others [2003] 2 BLLR 134 (LAC) – Nicolene Erasmus – " Fair Procedure" - https://www.labourguide.co.za/discipline-dismissal/659-the-minimum-requirements-for-a-fair-disciplinary-hearing

- A chairperson;
- A management representative;
- The employee;
- The employee representative;
- Any witnesses for either parties; and
- An interpreter if required by the employee

## INDUSTRIAL ACTION[17]

Although all employee's have the right to participate in industrial action i.e strikes, not all industrial action is lawful. Where the industrial action does not comply with the requirements as set out in our Labour legislation it is deemed an illegal strike and participation in same is deemed to amount to misconduct. However, an employee's mere participation in an illegal strike does not necessarily warrant dismissal. Whether dismissal would be an appropriate disciplinary action to be imposed, should be determined in light of the facts of the case together with considerations of the seriousness of the contravention of labour legislation, any attempts that had been made to comply with labour legislation and whether or not the strike was in response to unjustified or unlawful conduct by the employer.

Prior to dismissal being imposed as sanction for misconduct, an employer must consult with a trade union official as soon as possible. The employer must clearly indicate what is expected of the employees by providing a clear ultimatum and providing in clear and certain terms what the consequences would be where the ultimatum is not complied with. The employer must provide the employees with sufficient time to consider the ultimatum and to respond, either by complying to it or rejecting it. Where they should reject the ultimatum and proceed with strike action the employer may proceed with disciplinary hearings as set out above, except where there are exceptional circumstances in which one cannot reasonably expect the employer to apply the pre-dismissal procedures to the employees.

## SUSPENSION OF EMPLOYEES

## PRECAUTIONARY V PUNITIVE SUSPENSION

Item 4 of Schedule 8 of the LRA provides that an employer may suspend an employee pending investigations into alleged misconduct.

A distinction is made between two types of suspension:[18]

- Punitive Suspension which is disciplinary action short of dismissal; or

[17] Schedule 8 -
The Code of Good Practice – Dismissal - https://www.labourguide.co.za/discipline-dismissal/461-code-of-good-practice-dismissal-general
[18] Gerrit Fyver – When is Suspension an Unfair Labour Practice – 2016 - https://www.seesa.co.za/when-is-suspension-an-unfair-labour-practice/

- Precautionary Suspension which is implemented pending an inquiry into alleged misconduct.

For suspension to be regarded as punitive it must be disciplinary in nature and intent, with the purpose of attempting to rehabilitate or remedy the behaviour of any employee following various written and final warnings. It may further only be implemented upon completion of the disciplinary investigations where the employee has been found to be guilty of the alleged misconduct. It is imposed as a penalty and is usually imposed without pay. Punitive suspension may only be imposed where either the contract of employment, employer's disciplinary code, collective agreement and/or legislation permits same. [19]

## PAID V UNPAID SUSPENSION

A further distinction is then made between paid and unpaid suspensions.

As a general rule, suspension of an employee will be with full pay unless the employee agrees otherwise or suspension has been imposed as a punitive measure following a disciplinary hearing in which the employee has been found guilty of serious misconduct.

In the case of Sappi Forests (Pty) Ltd v CCMA & others (2008) 17 LC 1.11.83, reported in [2009] 3 BLLR 254 (LC) it was held that suspending an employee without pay constitutes breach of the employment contract by the employer and that suspension without pay is only permissible where the employee agrees to same or it is permitted in terms of legislation or a collective agreement.[20]

While in the case of County Fair v CCMA & Others [1998] 6 BLLR 577 (LC) and South African Breweries Ltd (Beer Division) v Woolfrey & Others [1999] 5 BLLR 525 (LC) is was held that suspension without pay was permitted as a penalty where circumstances justified same, such as were the misconduct was serious and would generally justify dismissal, with suspension serving as penalty short of dismissal.[21]

In the case of suspension with pay, the suspension is imposed as a precautionary measure for purposes of removing the employee from the workplace pending the employer's investigation into alleged misconduct to prevent undue interference in the investigations and/or to prevent intimidation or undue influence of possible witnesses that could be called in the disciplinary hearing. It should be noted that an employee will be entitled to full pay during the period of suspension despite the employee requesting postponement of the

[19] Gerrit Fyver – When is Suspension an Unfair Labour Practice – 2016 - https://www.seesa.co.za/when-is-suspension-an-unfair-labour-practice/
[20] Jan Du Toit - " The Suspension of Employees" - https://www.labourguide.co.za/most-recent/1269-suspesnsion
[21] Jan Du Toit - " The Suspension of Employees" - https://www.labourguide.co.za/most-recent/1269-suspesnsion

disciplinary hearing and will not be deemed to be a valid reason to impose suspension without pay. [22]

While suspension without pay is imposed as a punitive disciplinary action as an alternative to dismissal and may only be imposed in instances where numerous final written warnings have failed to achieved the desired result. [23] Punitive suspension may only be imposed once a disciplinary hearing has been concluded and the employee has been found guilty of the serious misconduct. The seriousness of which together with the employee's previous tainted disciplinary record and any other relevant factor would in ordinary circumstances justify the dismissal of the employee, however the disciplinary hearing recommendations are that the employee should be suspended as an alternative to dismissal as an attempt to provide the employee with a final opportunity to correct his/her behaviour .[24]

It is recommended that where an employee should be suspended without pay, that the employee sign an agreement letter confirming their acknowledgment of suspension without pay as a penalty short of dismissal. [25]

Suspension of an employee may only be imposed as a disciplinary action where the misconduct is sufficiently serious and the correct procedure for suspension of an employee is followed. Failure to proceed with suspension for a fair reason and by way of a fair procedure may result in the suspension and any other disciplinary action being regarded as an unfair labour practice, as provided in Section 186(2)(b) of the LRA, which lists suspension as a possible unfair labour practice.

In the case of Mogothle v Premier of the North West Province & another [2009] 4 BLLR 331 (LC) the Labour Court provided that the suspension of an employee pending an inquiry into alleged misconduct is equivalent to an arrest, and should therefore be used only when there is a reasonable apprehension that the employee will interfere with investigations or pose some other threat.

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[22] Helena Roodt – Short Notes on: SUSPENSIONS IN THE WORKPLACE - HOW AND WHEN MUST THE EMPLOYER SUSPEND
EMPLOYEES - 2018 - https://www.schoemanlaw.co.za/wp-content/uploads/2018/05/Short-notes-on-Suspensions-in-the-workplace.pdf

[23] Helena Roodt – Short Notes on: SUSPENSIONS IN THE WORKPLACE - HOW AND WHEN MUST THE EMPLOYER SUSPEND - 2018 - https://www.schoemanlaw.co.za/wp-content/uploads/2018/05/Short-notes-on-Suspensions-in-the-workplace.pdf

[24] Helena Roodt – Short Notes on: SUSPENSIONS IN THE WORKPLACE - HOW AND WHEN MUST THE EMPLOYER SUSPEND - 2018 - https://www.schoemanlaw.co.za/wp-content/uploads/2018/05/Short-notes-on-Suspensions-in-the-workplace.pdf

[25] Jan Du Toit – " The Suspension of Employees" - https://www.labourguide.co.za/most-recent/1269-suspesnsion

Whether an employee should or may be suspended pending the outcome of a disciplinary investigations and a hearing, will be primarily dependant on the circumstances of the alleged misconduct[26] and should not be a resorted to lightly.

Suspension must meet the following criteria:[27]

1. The employer must have a justifiable reason to believe, prima facie at least, that the employee has engaged in serious misconduct. Thus the alleged misconduct should appear self evident from the circumstances .
2. There is some objectively justifiable reason to deny the employee access to the workplace. Thus a reasonable belief that the employee may interfere with the investigations or intimidate or influence co-employees or other persons that may be called as witnesses during the disciplinary hearing.
3. The employee is given the opportunity to state a case or to be heard before any final decision to suspend is made.

It should be noted that although it is preferred that employees be given an opportunity to make representations on why they should not be suspended pending investigations, which may be done by way of an informal hearings and/or presentation, failure by the employer to do same will not necessarily render the suspension and any subsequent dismissal following the disciplinary hearing unfair. The Constitutional Court recently held in the case of Long v South African Breweries (Pty) Ltd and Others [2018] ZACC 7, that 'there is no requirement' for an employer to afford an employee an opportunity to make representations why the employee should not be suspended (in the case of precautionary suspensions), prior to suspending the employee.[28]

The duration of the suspension is limited to the period provided in the Employer's disciplinary code, collective agreement, statutory regulations or employment contract, which ever may be applicable and any suspension that extends beyond the period stipulated may be regarded as unfair despite the fact that investigations may still be underway.

[26] Jan Du Toit - " The Suspension of Employees" - https://www.labourguide.co.za/most-recent/1269-suspesnsion
[27] Gerrit Fyver – « When is suspension an unfair labour practice?" - https://www.seesa.co.za/when-is-suspension-an-unfair-labour-practice/
[28] Tiaan Visagie – « What does current case law state regarding unfair suspension in terms of Section 186(2)(b) of the Labour Relations Act - 2019 - https://ceosa.org.za/what-does-current-case-law-state-regarding-unfair-suspension-in-terms-of-section-1862b-of-the-labour-relations-act/ ; Irshaad Savant – Suspending your Employee. The Long and Short of it – 2019 - https://www.golegal.co.za/suspension-employee-constitutional-rights/

The following should be considered prior to the suspension of an employee:

Suspension reasons checklist[29]

- Is there "on the face of it" reason to believe that the employee was involved in the misconduct?
- Is the alleged misconduct of a serious nature?
- Is there a possibility that the employee may interfere with witnesses?
- Is there a possibility that the employee may tamper with evidence?
- Is there a possibility that the accused employee may retaliate against the complainant, especially if the complainant is in a lower position that the accused employee?
- Is there a possibility that the employee may commit further similar acts of misconduct if he / s he is not suspended?

An employee should not be suspended where the first two questions are answered in the negative, while suspension of an employee may be considered where the first two considerations can be answered positively with at least one other consideration listed thereafter also answered in the affirmative.

PROCEDURE FOR FAIR SUSPENSION – WITH PAY

1. Notice

In terms of providing the employee with notice of the suspension two approaches may be followed. Either the employer may provide the employee with written notice indicating the reasons on which the employer intends suspending the employee depending on the outcome of disciplinary investigations or alternatively the employer may engage in informal discussions with the employee and an HR representative confirming the allegations and suspicions that have been raised in regard to the employee's conduct and for which suspension is being considered.

[29] Jan Du Toit - " The Suspension of Employees" - https://www.labourguide.co.za/most-recent/1269-suspesnsion

It must be clearly communicated to the employee, either in writing or orally, that the employee has been suspended pending the outcome and finalization of disciplinary investigations in to his/her alleged misconduct. The alleged misconduct and its seriousness together with reasons necessitating the suspension should also be provided to the employee so that there is no uncertainty as to the alleged misconduct for which he/she is being investigated and temporarily suspended.

Examples of serious misconduct for which an employee may be suspended pending investigations include, however are not limited too: theft, fraud, dishonesty and the reasons necessitating the suspension may include that investigations cannot be undertaken while he/she is present at the workplace and/or it is feared that he/she may unduly influence and/or intimidate witnesses while at the workplace while investigations are underway.

2. Employee submissions

Although the Constitutional Court has confirmed that there is no obligation on an employer to afford an employee the opportunity to make submissions on why the suspension pending investigations should not be imposed, it is preferable for same to be done, providing the employee with a reasonable period of time within which to state their defence or reasons on why he/she should not be suspended.

An employee is generally provided with 24 – 48 hours within which to respond to the notice of suspension and present their submissions. However, it is often deemed that by providing the employee with time to respond to the notice of suspension, opportunity is provided to the employee to interfere with or destroy evidence and/or influence or intimidate potential witnesses.[30]

3. Commencement of suspension and Return of Belongings

After informing the employee about his/her suspension, the employer must advise the employee on when they are expected to leave the work premises as well as what property

[30] Jan Du Toit - " The Suspension of Employees" - https://www.labourguide.co.za/most-recent/1269-suspesnsion

and/or belongs, if any, should be returned. This may include the company laptop and/or office keys.

Before the employee leaves the premises the employer must provide him/her with a copy of the notice of suspension while the original will be placed on the employer's personnel records.

Suspension discussion checklist[31]

- Was the employee informed of the reasons for the suspension?
- Was the employee allowed an opportunity to give reasons for not suspending him / her?
- Was the employee informed of the duration of the period of suspension and is it a fair period (normally not more than 30 days)?
- Was it explained to the employee what would happen at the end of the suspension period or as soon as the investigation has been finalized?

Should the disciplinary investigations indicate that the employee did commit the misconduct of which he/she is charged, the employer must issue a notice to the employee to attend a disciplinary hearing with the alleged misconduct listed as charges, clearly indicating the allegations the employee will need to defend at the hearing. Where the disciplinary investigations are inconclusive or prove the employee's innocence, the employee must be permitted to return to work and the suspension lifted as soon as possible.

It should be noted that the suspension may not be unreasonably long and the employer may not intentionally delay the finalization of the investigations as a means of preventing the employee's return to work. Unreasonable delay in the disciplinary investigation may be deemed to amount to an unfair labour practice as provided in the LRA.

## PROCEDURE FOR FAIR SUSPENSION – WITH PAY

Once all the steps required for a disciplinary hearing have been complied with, the disciplinary hearing itself has been concluded with the outcome that the employee is guilty of serious

[31] Jan Du Toit - " The Suspension of Employees" - https://www.labourguide.co.za/most-recent/1269-suspesnsion

misconduct and it is recommended that suspension be imposed as an alternative to dismissal , the employee should be given a Notice of Unpaid Suspension wherein it is confirmed that he/she is suspended without pay with clear terms indicating when the suspension is to commence , indicating when the employee is expected to leave the employer's premises, what items are to be returned and when the employee is expected to return to work.

Punitive suspension without pay is will valid for a period of 12 months, which means that should the employee return to work and within the 12 months committee the same breach, a disciplinary proceeding will be held once more and the employee will be dismissed.[32]

Disciplinary action must be properly carried out with fair reasons and by way of a fair procedure, failing which any disciplinary action taken may be regarded as an unfair labour practice for which an employee may approach the CCMA or Labour Court.

[32] Helena Roodt – Short Notes on: SUSPENSIONS IN THE WORKPLACE - HOW AND WHEN MUST THE EMPLOYER SUSPEND
EMPLOYEES - 2018 - https://www.schoemanlaw.co.za/wp-content/uploads/2018/05/Short-notes-on-Suspensions-in-the-workplace.pdf