

When and how should an employee be suspended pending a disciplinary inquiry?



Employers are often faced with situations where a decision must be taken whether an employee who was allegedly involved in misconduct should be suspended or not.

An employee may only be suspended if there are *prima facie* grounds to believe that such employee is guilty of serious misconduct and if there is some objectively justifiable reason for excluding the employee from the workplace, which would include a reasonable suspicion that-

- he/she will interfere with the investigation; or
- he/she poses some or other threat to the company/employer or other employees.

The fact that the employee may be guilty of serious misconduct does not in itself justify suspension pending an inquiry. The employer should also consider the second criterion in order to conclude whether suspension is appropriate.

Should the employee, for example, be charged with serious misconduct, but there is no reason to suspect that he/she will interfere with the investigation or pose any threat to fellow employees, but a reasonable suspicion that he/she will repeat the serious misconduct (which would pose a threat to the company), the suspension might be justified.

The above criteria should be considered and applied by the employer according to the circumstances of each individual case.

If an employee is suspended before the disciplinary inquiry, he/she must be paid in full. If not, it can be argued that the employee is being punished before he/she is found guilty. This is illegal.

In ***Allan Long v South African Breweries (Pty) Ltd and Others CCT 61/18***, the Constitutional Court endorsed and upheld the Labour Court's decision and reasoning that an employer is not required to give an employee an opportunity to make representations before a precautionary suspension. The Constitutional Court confirmed that a suspension pending an investigation and possible disciplinary action is a precautionary measure and does not constitute disciplinary action, and as such, the requirements of the Labour Relations Act, 1995 relating to fair disciplinary action do not apply.

The question is to suspend or not to suspend?

Various questions were raised as to what effect suspension, more specifically not suspending an employee, pending an inquiry has on an employer's argument that the trust relationship has been broken.

Should the employer be unable to suspend an employee pending an inquiry, would this negatively affect the employer's ability to argue that the trust relationship has been broken due to the employee's misconduct if the employer "allows" the employee to continue working pending the disciplinary hearing?

An important principle in our law is that an accused employee is presumed innocent until proven guilty. The decision as to whether the trust relationship has been broken due to the employee's misconduct is only taken once the employee has been found guilty of misconduct after a disciplinary inquiry.

When considering the above, the non-suspension of an employee pending the conclusion of a disciplinary hearing, should not negatively affect the employer's argument that the trust relationship has been broken due to the employee's misconduct.

Suspension pending an inquiry

Suspension pending an inquiry has been confirmed by the Labour Court as an action which might result in a serious infringement of the employee's rights or a possible claim for unfair labour practice, and which should not be taken lightly by the employer. Where an employee is allegedly guilty of misconduct and the employer suspends him/her before the disciplinary inquiry, a fair procedure must be followed.

Such suspension may have prejudicial consequences for the employee, both personal and social, such as damage to the employee's reputation.

Suspension also has detrimental implications for the employer, both financially and in terms of productivity. The suspended employee will be absent from the workplace while still being paid by the employer and his/her work still needs to be performed, either by other employees or by temporary employees at additional cost.

Should the employer, for good reason, immediately suspend an employee pending an inquiry, such employee should be served with a *Notice of Immediate Suspension (In Anticipation of a Hearing)*. He/she should also be informed that a disciplinary inquiry may be held in the future pending the results of the investigation. In addition, the employee must be informed that he/she will receive a *Notice to Attend a Disciplinary Inquiry* if it is decided to conduct an inquiry.

SERR Synergy assists employers in following the correct and fair procedure in suspension cases or situations by helping to draft and issue the required *Notice of Immediate Suspension (In Anticipation of a Hearing)* as well as the subsequent *Notice to Attend a Disciplinary Inquiry*.

About our Author: Henri Klopper joined SERR Synergy in 2014 as the Gauteng Labour Manager. He completed his LLB at the University of Pretoria in 2010 and attended Law School. He also completed the Advanced Course in Labour Law at the University of Pretoria and was admitted as an Advocate of the High Court of South Africa.

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