

EMPLOYMENT

Is a pre-suspension hearing necessary for a precautionary suspension?

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ISSUE

Whether there is a requirement for a pre-suspension hearing in the case of a precautionary suspension.

SUMMARY

In the case of a precautionary suspension, an employer is not obliged to hold a pre-suspension hearing if the suspension is for a fair reason and causes no undue prejudice to the employee.

COURT'S DECISION

THE FACTS

The applicant, Allan Long ("**Long**"), had been employed by South African Breweries (Pty) Ltd ("**SAB**") as district manager since 2008. His responsibilities included ensuring that SAB complied with all of its legal obligations in its operations within the Border District. These included the legal obligations relating to SAB's fleet of vehicles.

During December 2012, Long was informed of problems relating to the fleet of vehicles, including that the vehicles were being operated without valid licences and without the necessary maintenance having been undertaken. On 21 December 2012 Long instructed the fleet and depot managers to rectify the problems. Despite this, a subsequent investigation by SAB revealed various discrepancies in the fleet records and that many vehicles were still being operated without the required licenses or in an unroadworthy state.

SAB also investigated a fatal accident which occurred on 10 May 2013 and which involved one of SAB's trailers. The vehicle was found to have been in a state of disrepair and unlicensed. Long was informed that he was being investigated for dereliction of duty and gross negligence.

A fleet audit was done on 19 May 2013 which revealed that several vehicles were still unlicensed and unroadworthy. Furthermore, it was found that no corrective action had been taken by Long following the fatal accident earlier in May. Long was suspended to ensure that the further investigation by SAB could be conducted unhindered. The suspension endured from May to August 2013 during which time SAB conducted its investigation.

On 19 August 2013 Long was given a notice to attend a disciplinary hearing ("**Notice**"). The Notice contained three charges: (a) gross dereliction of duties; (b) gross negligence, dishonesty and derivative conduct; and (c) bringing the company name into disrepute. Long was acquitted on the charge of dishonesty but found guilty of gross dereliction of duties, gross negligence and bringing the company name into disrepute. He was subsequently dismissed by SAB on 14 October 2013.

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION ("CCMA")

Two arbitrations were held at the CCMA. The first dealt with Long's suspension. Long argued that his suspension amounted to an unfair labour practice. The CCMA found that there was a valid reason to suspend Long but that he was not given an opportunity to make representations as to why he should not have been suspended. The CCMA found that the suspension of three months was unreasonably long and became punitive and was thus unfair. Long was awarded compensation equivalent to two months' remuneration.

The second arbitration dealt with Long's dismissal. Long alleged that SAB applied disciplinary action inconsistently, that he had not committed the alleged misconduct and that, even if he had, dismissal was too harsh a sanction. The CCMA found that Long did not commit misconduct as the failures alleged did not fall within his responsibility. Furthermore, the CCMA found that there had been no breakdown in the trust relationship and accordingly no valid reason to dismiss Long. The CCMA found that the dismissal was substantively unfair though procedurally fair. SAB was thus directed to reinstate Long with retrospective effect to the date of dismissal.

LABOUR COURT

SAB decided to review both CCMA decisions. The first issue the Labour Court had to consider was the fairness of Long's suspension. The Labour Court held that where a suspension is precautionary, there is no requirement that an employee be given an opportunity to make representations before the suspension is implemented. It held that the suspension should instead be linked to a pending investigation and serve to protect the integrity of that ongoing process.

The Labour Court held that the CCMA's finding that Long's suspension was unduly long and had become punitive, was flawed. The CCMA had erred in its consideration of the nature of a pending investigation. The Labour Court held further that any prejudice Long might have suffered was mitigated by the fact that he was paid during the suspension period. The Court accordingly held that the suspension was not an unfair labour practice and that the CCMA's decision in finding otherwise was unreasonable.

In relation to the dismissal, the Labour Court rejected the arbitrator's award on the basis that he failed to consider material evidence and did not reasonably and rationally evaluate and determine the evidence. The Labour Court considered Long's seniority and the nature of his position and held that he was indeed guilty of dereliction of duty. There had been a breakdown in the trust relationship and Long's misconduct was of a serious nature. The Labour Court found that Long's dismissal was substantively fair (procedural fairness was not in dispute).

THE CONSTITUTIONAL COURT

Aggrieved by the Labour Court's decision, Long approached the Constitutional Court. Long argued that the Labour Court's finding that employees are not entitled to a pre-suspension hearing is unconstitutional. The Constitutional Court however had no issue with the Labour Court's ruling. It found that the suspension imposed on Long was a precautionary measure, not a disciplinary one and as such, the requirements relating to fair disciplinary action under the Labour Relations Act 66 of 1995 were not applicable.

In determining whether the precautionary suspension was fair a two-pronged assessment is necessary. The first question is whether there is a fair reason for suspension. The second question is whether the suspension prejudices the employee. The Constitutional Court thus concurred with the Labour Court that the suspension was precautionary and did not cause Long any prejudice despite there being no opportunity for pre-suspension representations.

IMPORTANCE OF THE CASE

It is not necessary to have a pre-suspension hearing when imposing a precautionary suspension. Such a suspension will be fair if there is a fair reason for the suspension and the suspension does not prejudice the employee.

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