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# Pre-suspension hearings, no more?

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Over the past 10 years, employers in the private sector where thrust into conducting a precautionary suspension hearing to avoid a claim of an unfair labour practice (public sector employers already played in that arena). So, an employer was required to afford an employee an opportunity to make representations prior to a suspension. This is no longer the position, at least as a general proposition.

In mid-February 2019 the Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others* held that where the suspension of an employee is precautionary and not punitive, there is no requirement that the employee be afforded an opportunity to make representations to avoid a suspension.

Briefly the facts were these: Mr Allan Long, a former district manager at SAB, was investigated for alleged misconduct. To ensure the investigation was unhindered, Long was placed on precautionary suspension. Long was paid for the period of his suspension. Subsequent to the suspension a disciplinary inquiry was held and Long was eventually dismissed.

Long referred an unfair suspension and unfair dismissal dispute to the CCMA. The Commissioner concluded that there was a valid reason to suspend Long, however, as he had not been given an opportunity to make representations why he should not be suspended, the suspension was unfair. In respect of his dismissal, the Commissioner found that Long did not commit the misconduct as charged and that there had been no breakdown in the trust relationship. There was accordingly no valid reason for SAB to have terminated Long and the dismissal was held to be substantively unfair.

SAB sought to review the CCMA award in the Labour Court. The court ruled that where a suspension is precautionary, there is no requirement that an employee be given an opportunity to make representations. Instead, the suspension must be linked to a pending investigation and serve to protect the integrity of that ongoing process. The suspension must further be on full pay to ameliorate any prejudice to the employee.

Almost a decade of law (in the private sector) imposing a requirement for a pre-suspension hearing was wiped out. In respect of the dismissal, the court found that the arbitration award

was unreasonable and the dismissal was fair. Long petitioned the Labour Appeal Court but was not successful. The Constitutional Court was prepared to entertain the appeal and upheld the decision of the Labour Court.

## What are the practical implications:

- Employees in the private sector no longer have an automatic right to a hearing prior to being suspended; this is subject to the qualifications below.
- The judgment does not entirely preclude a claim of an unfair labour practice relating to a precautionary suspension, but rather restricts the claim in the CCMA.
- Employers who have suspension processes either in contract or policy will need to comply with those provisions until changed. Though policies are mostly guidelines.
- Employers should review disciplinary policies that deal with pre-suspension processes. As a general rule the process of a pre-suspension hearing should be excluded.
- The judgment does not impact public sector employers who having their own regulatory environment.



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