PRECAUTIONARY SUSPENSION IN THE SOUTH AFRICAN PUBLIC SERVICE

by

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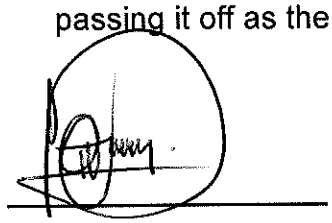

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Chapter 1

Introduction

1. Introduction

The prolonged and costly precautionary suspension of public servants is a thorny issue in the public service. The Public Service Commission (the "PSC") published a report on precautionary suspension in the public service in 2011. The report was for the 2008/2009 and 2009/2010 financial years. The report indicated that for the 2009/2010 financial year, a total of 369 public servants were placed on a precautionary suspension for the period in question and these suspensions cost the state R 45 721 875, 36.[1] Some observers argue that the salaries paid to suspended employees for the period in question was over R 45 million.[2]

The DPSA recently produced a report on precautionary suspensions in the public service for the first quarter of the 2022/2023 financial year. They reported that 305 public servants were placed on a precautionary suspension for the period in question, and the cost of suspensions was R 103 964 676, 15.[3] When comparing the recent figures with figures contained in the 2011 PSC report, it is evident that the situation is not improving. Therefore, there is a need to delve deeper into precautionary suspensions in the public service and make recommendations to improve the situation.

In view of the above, this dissertation will be conducting in-depth research on precautionary suspensions in the South African public service, with a view to determine the causes and implications of prolonged precautionary suspensions, which result in the state paying employees salaries for a prolonged period, for work not done.

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1 Public Service Commission 'Report on Management of Precautionary Suspension in the Public Service' https://www.psc.gov.za/documents/2011/Precautionary%20Suspension.pdf (accessed 22 April 2023).

2 D Fourie 'Procurement in the South African public service: a reflection of the ethical and legislative framework' (2015) 4 *Public and Municipal Finance* 42.

3 https://www.parliament.gov.za/storage/app/media/Docs/exe_rq_na/928ea649-3a90-43f4-8990-35fa22618e83.pdf (accessed 04 May 2024)

As stated above, the public service spends millions of rands on salaries of suspended employees, for work not done. This can no doubt be viewed as fruitless and wasteful expenditure. The Public Finance Management Act defines fruitless and wasteful expenditure as "expenditure which was made in vain and would have been avoided had reasonable care been exercised."[4]

This does not imply that public servants may not be placed on a precautionary suspension, the issue here is prolonged precautionary suspensions which have a significant financial implication for the state.[5] This also impacts negatively on service delivery, as the work these officials are employed to perform is not done while they are placed on prolonged precautionary suspensions.

The South African public service is diverse, made up of the local, provincial, and national spheres of government. As a result, the disciplinary codes used in these spheres of government differ. The disciplinary code that is applicable in the local government is different from what is applicable in the provincial and national government. Furthermore, the disciplinary codes used by the South African Police Services and Department of Education differs from what is applicable in other government departments. This complicates the development of a uniform approach in dealing with precautionary suspensions in the public service.

The disciplinary code that is applicable for public servants appointed on salary level 1 to 12 is the Public Service Co-ordinating Bargaining Council (the "PSCBC") resolution 1 of 2003 (The Disciplinary Code for the Public Service), and the disciplinary code that is applicable to employees appointed on salary level 13 to 16 is Chapter 7 of the Senior Management Services (SMS) Handbook.

The PSCBC resolution 1 of 2003 and the SMS Handbook (collectively referred to as "Disciplinary Codes") have identical provisions on precautionary suspension.[6] They

4 Public Finance Management Act 1 of 1999, sec 1.
5 'Prolonged public service precautionary suspensions are getting out of hand' *Daily Maverick* 10 April 2023.
6 PSCBC Resolution 1 of 2003, clause 7.2 and SMS Handbook Chapter 7, clause 2.7(2).

provide that the employer may place an employee on a precautionary suspension or transfer, if it is alleged that the employee committed serious act/s of misconduct, and the employee's presence in the workplace might interfere with the investigation or compromise the safety and wellbeing of other employees or state property.[7]

In other instances, not provided for in the Disciplinary Codes, an employee may be placed on a precautionary suspension if the employer is of the view that the employee is likely to repeat the misconduct,[8] or to protect the employer's reputation.[9]

The Disciplinary Codes further provide that when an employee is placed on a precautionary suspension, the disciplinary hearing must be held within a month or 60 days from the date of suspension.[10] However, the employer may apply to the Chairperson of the hearing for further postponements.[11] This provision was included in the Disciplinary Codes to prevent precautionary suspensions that subsists beyond the prescribed time limits.[12]

In the case of *Lekabe v Minister: Department of Justice and Constitutional Development* (the "*Lekabe*" case),[13] the Labour Court said should the employer fail to convene a disciplinary hearing within the prescribed period, the employee will be entitled to return to work. In the case of *Department of Public Works v Vukela (*the *"Vukela"* case)[14] the Labour Court aligned itself with the *Lekabe* case when it held that the suspension of public servants lapses after a period of 60 days, unless the Chairperson of the disciplinary hearing extends the suspension period.

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7 PSCBC Resolution 1 of 2003. clause 7.2(3) and SMS Handbook Chapter 7, clause 2.7(3).
8 C Makhuzeni *et al* 'Perceived effects of precautionary suspensions on service delivery in a South African provincial government department' 50 *Journal of Public Administration* (2015) 646.
9 M Conradie & J Deacon 'To suspend or not to suspend' (2009) 34 *Journal for Juridical Science* 42.
10 PSCBC Resolution 1 of 2003, clause 7.2(3) and SMS Handbook Chapter 7, clause 2.7(3).
11 KM Shabangu *et al* 'Critical Considerations for Effective Discipline Management in the Public Sector' (2022) 30 *Administratio Publica* 81.
12 *Lekabe v Minister, Department of Justice & Constitutional Development* 2009 JOL 23134 (LC).
13 *Lekabe v Minister, Department of Justice & Constitutional Development* 2009 JOL 23134 (LC).
14 *Department of Public Works and another v Vukela* 2022 JOL 54644 (LC).

The aim of this dissertation is to analyse authorities dealing with precautionary suspension in the public service, to gain a better understanding on how relevant prescripts are interpreted and applied. Furthermore, the dissertation will investigate the causes of delay in disciplinary cases of suspended employees in the public service, make recommendations on how the number of suspensions may be reduced, and how the duration of suspensions may be limited to the prescribed period.

2. Problem statement

As indicated above, the cost of prolonged precautionary suspensions in the public service is a concern. In addition to the cost, the services that the state departments are required to render to the public are also negatively affected when officials who are appointed to perform specific functions are placed on prolonged precautionary suspensions.[15]

Furthermore, prolonged precautionary suspensions have dire effects on employees who are suspended. The precautionary suspension negatively affects the employee's reputation, emotional wellbeing and career growth.[16] The Labour Court in the case of *SAPO Ltd v Jansen van Vuuren*,[17] aligned itself with the comments that were made by the court in the case of *Muller v Chairman of the Ministers Council House of Representative,* wherein the court said the following;

> "The implications of being barred from going to work and pursuing one's chosen calling, and of being seen by the community around one to be so barred, are not so immediately realized by the outside observer and appear, with respect, perhaps to have been underestimated in the Swart and Jacobs cases. There are indeed substantial social and personal implications inherent in that aspect of suspension. These considerations weigh as heavily in South Africa as they do in other countries."

The cases quoted above paints a vivid picture of how precautionary suspension negatively affects employees. It is for this reason that the plethora of decided court cases required employers to afford employees opportunities to make representations before being placed on a precautionary suspension, and for precautionary suspensions to be used sparingly.[18] In light of this, the question would be whether the

15 Makhuzeni (n 8 above) 655.
16 *SAPO Ltd v Jansen van Vuuren NO* 2008 8 BLLR 798 (LC).
17 *SAPO Ltd v Jansen van Vuuren NO* 2008 8 BLLR 798 (LC).
18 *Mogotlhe v Premier of the North-West Province* 2009 30 ILJ 605 (LC). Also see

fact that employees are paid while on suspension is enough to conclude that they do not suffer material prejudice as it was held in the *Allan Long v SA Breweries*[19] case that will be discussed in detail later.

3. Importance of the study

This dissertation will assist with the interpretation of applicable prescripts regulating precautionary suspensions in the South African public service. This will be done by gathering, consolidating, analysing, and discussing decided cases, journal articles, and other authorities dealing with precautionary suspension.

This dissertation will also identify the causes of prolonged precautionary suspensions and recommend practical solutions that will be of assistance to the public service to turn things around. More research is needed on this subject, and this dissertation strives to contribute to that body of research.

4. Research questions

In the following chapters of the dissertation, the questions listed below will be answered.

- What lessons, if any, can be gained from the International Labour Organization (the "ILO")?
- Should the employee be afforded an opportunity to make representations before being placed on a precautionary suspension?
- What causes delays in subjecting public servants who are placed on a precautionary suspension to disciplinary hearings?
- What should happen when the prescribed 60 days for placing employees on a precautionary suspension lapses?
- What must the state as the employer do when the employee prolongs the suspension by requesting postponements of the disciplinary hearing?

HOSPERSA v MEC for Health, Gauteng Provincial Government 2008 9 BLLR 861 (LC).

19 *Long v South African Breweries (Pty) Ltd* 2019 6 BLLR 515 (CC).

- What can be done in the public service to curb the number and cost of precautionary suspensions?
- What lessons can be learned from other countries?

5. Research methodology

This study will use a desktop method to analyse relevant material relating to precautionary suspensions in the public service. This will include analysis of the relevant legislation, collective agreements concluded in the public service, case law and journal articles.

The study will also conduct a comparative study with other countries to see how they manage cases of precautionary suspension. This study will do a comparison with other countries such as Kenya and the United Kingdom. The referencing style that will be used in this dissertation is the Pretoria University Law Press ("PULP").

6. Description of chapters

This dissertation will include the following chapters that will discuss the subject matter;

Chapter 1 will set the tone for the dissertation, introducing the reader to the topic and outlining what the dissertation will entail, what it seeks to investigate and achieve.

Chapter 2 will briefly discuss the role of labour law, more specifically, the role of common law and the position of common law regarding precautionary suspension. The chapter will proceed to discuss the role of the ILO and investigate whether there are any standards set by the ILO regarding precautionary suspension.

Chapter 3 will delve deeper into the definition and description of precautionary suspension in the workplace.

Chapter 4 will discuss the *audi alteram partem* rule in precautionary suspensions. This will entail a discussion on the history of this rule in precautionary suspension cases and the current law.

Chapter 5 will discuss the status of precautionary suspension cases in the public service. This will include statistics, implications and causes of prolonged precautionary suspensions.

Chapter 6 will conduct a comparative study with Kenya and the United Kingdom. This will entail a study of how these countries manage cases of precautionary suspension and the lessons that could be learned from them.

Chapter 7 will entail a summary of lessons learned locally and from other countries on the management of precautionary suspension cases. The chapter will also entail recommendation of what could be done to reduce the number of prolonged and costly precautionary suspensions in the South African public service.

Chapter 2

The Role of Labour Law and the International Labour Organization

1. Introduction

This chapter will focus on the role of labour law in the employment relationship. It will further provide a brief overview of the development of the South African labour law, more specifically, the impact of the common law. The chapter will also discuss precautionary suspension under the common law.

The chapter will further discuss the formation of the International Labour Organization (the "ILO"), the role played by the ILO and the ILO labour standards. Furthermore, it will discuss South Africa's membership to the ILO and how labour standards influenced the South African labour law. The chapter will conclude by investigating whether the ILO developed labour standards regulating precautionary suspension.

2. The role of labour law

The main aim of labour law is to regulate the employment relationship between employers and employees.[20] It regulates the employment relationship in two ways, one is through setting minimum conditions of employment and the other through endeavours to achieve an equilibrium in the inherently unequal employment relationship.[21]

Labour law sets minimum employment standards through legislation such as the Basic Conditions of Employment Act (the "BCEA"),[22] which sets the minimum conditions of employment for all employment contracts. Other examples include the National Minimum Wage Act,[23] which sets the minimum wage for all employees, and the Labour

20 J Grogan *Workplace law* (2022) 1.
21 A van Niekerk *et al Law@work* (2023) 4.
22 Basic Conditions of Employment Act 75 of 1997.
23 National Minimum Wage Act 9 of 2018.

Relations Act (the "LRA"),[24] which among others, prohibits unfair dismissals and unfair labour practices.[25]

In relation to achieving a balance of power in the employment relationship, the Constitution grants employees a right to form and join trade unions and a right to strike among others.[26] These rights assist employees to be on equal footing when bargaining with employers. As stated above, the employment relationship is inherently unequal, the employer possesses more power compared to employees. However, the playing fields are levelled when employees organise and join trade unions.

3. Common law and the South African labour law

In South Africa, one of the important sources of labour law is the common law.[27] The common law forms the foundation of our labour law. It remains relevant to date, although it is now subject to the Constitution and legislation such as the LRA.[28]

The common law is made up of the Roman-Dutch law and English law.[29] The common law contract of employment essentially fell under the contract of lease under the Roman Law. There were three types of contracts of lease under the Roman Law, which was the lease of things (*Locatio Conductio Rei*), the lease of services (*Locatio Conductio Operarum*) and the lease of a piece of work (*Locatio Conductio Operis*).[30]

The lease of services (*Locatio Conductio Operarum),* which is the employment contract as we know it today, was individualistic in nature. This meant that parties to the employment relationship were at liberty to decide on the terms of their contracts of employment. This placed employees in a vulnerable position because employers inherently had stronger bargaining powers than employees.[31] Therefore in terms of

24 Labour Relations Act 66 of 1995.
25 Van Niekerk (n 21 above) 4.
26 The Constitution of the Republic of South Africa, sec 23.
27 Grogan (n 20 above) 9.
28 D du Toit *et al Labour Relations Law: A Comprehensive Guide* (2023) 124.
29 Grogan (n 20 above) 2.
30 JV Du Plessis & MA Fouche *A practical guide to labour law* (2019) 9.
31 Grogan (n 20 above) 1.

the common law, employers could conclude contracts with employees which were exploitive in nature.

In the South African public service, the state is the employer. Inevitably, the state possesses more power than individual employees. It is for this obvious reason that majority of public servants are unionised.[32] The public servants are therefore represented by trade unions in the bargaining councils to bargain collectively with the employer and conclude collective agreements.

Furthermore, the common law contract of employment did not provide for collective bargaining between trade unions and employers. The collective labour law as we know it today was developed by legislations and not the common law.[33]

Although labour law developed over the years due to promulgated legislation, the common law remains relevant. This is evident from the provisions of the Constitution, which provides that the common law may be interpreted or developed to give effect to rights contained in the Bill of Rights. The rights contained in the Bill of Rights may also be limited by rules of the common law.[34] The exercise of the common law rights is also not restricted, provided that those rights are consistent with the Bill of Rights.[35] The Constitution also grant the courts (Constitutional Court, Supreme Court of Appeal, and the High Courts) the authority to develop the common law.[36]

In terms of the common law, employers could place employees on a precautionary suspension.[37] The precautionary suspension is generally with pay, unless parties agreed that remuneration will be withheld during this period.[38] Although employees have a duty to avail their services to the employer, they do not have the right to be provided with work. However, if their contracts make provision for the right to be

32 PSCBC Annual Report 2022/2023 https://pscbc.co.za/index.php/media-02/annual-report (accessed 23 August 2024).
33 Du Plessis (n 30 above) 3.
34 The Constitution of the Republic of South Africa, sec 8 (3).
35 The Constitution of the Republic of South Africa, sec 39 (3).
36 The Constitution of the Republic of South Africa, sec 173.
37 L Biggs & A Van der walt 'Aspects of unfair suspension at work' (2011) 41 *Obiter* 697.
38 Biggs (n 37 above) 699.

provided with work, placing them on a precautionary suspension would be a breach of their employment contract.[39]

4. The formation of the ILO

The ILO was established through a treaty of Versailles in 1919. The ILO is an agency of the United Nations responsible for labour matters. It was formed on the principle that social justice is a precondition for achieving everlasting peace.[40] The ILO has 187 member states that meet annually to discuss and set labour standards. The representatives from the member states includes government, organised labour (trade unions) and employer's organisations or business.[41]

5. The ILO standards

The ILO set international labour standards through conventions, declarations, and recommendations. The conventions are the most authoritative standards set by the ILO, as they impose obligations on member states that ratified them.[42]

The conventions are agreed upon by member states at the annual conference held in June of each year in Gineva. However, the member states have the freedom of ratifying conventions that are preferred by their respective countries. The ILO has 190 conventions, and out of these conventions, eight of them are core conventions.[43]

The core conventions include the Freedom of Association and the Right to Organise Convention, Right to Organise and Collective Bargaining Convention, Forced Labour Convention, Abolition of Forced Labour Convention, Minimum Age Convention, Worst Forms of Labour Convention, Equal Remuneration Convention and Discrimination (Employment and Occupation) Convention.[44]

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39 Biggs (n 37 above) 697.
40 D du Toit (n 28 above) 88.
41 Van Niekerk (n 21 above) 24.
42 Van Niekerk (n 21 above) 25.
43 Van Niekerk (n 21 above) 25.
44 Van Niekerk (n 21 above) 26.

The ILO monitors the implementation of the conventions ratified by member states in several ways. One of the monitoring tools is that member states are expected to report on the implementation of ratified conventions to the Committee of Experts on the application of Conventions and Recommendations.[45]

The trade unions and employer's organisations from member states may also lodge complaints with the ILO on the member states' failure to implement ratified conventions.[46] Complaints may also be lodged against a member state by other member states that ratified the same convention.[47] The trade unions, employer's organisations and member states may also report noncompliance with the Freedom of Association Conventions to the Freedom of Association Committee.[48]

The ILO also set international labour standards through Declarations and Recommendations. Recommendations are not binding but provide guidelines on the implementation of conventions and other matters.[49] The Declarations are also not binding but used as instruments to emphasise important principles of the ILO.[50]

6. South Africa as a member of the ILO

South Africa is a founding member of the ILO. However, its membership was suspended in 1966.[51] The membership of South Africa was reinstated on 26 May 1994, after South Africa was officially declared a democratic state. Since its reinstatement, South Africa ratified 28 of the 190 ILO conventions.[52] The conventions that are ratified by South Africa may only become law after they are considered and effected by parliament in a form of legislation.[53] This is evident from the promulgation of legislations such as the BCEA, LRA and the Unemployment Insurance Act, that were enacted, amongst other reasons, to give effect to the ratified ILO conventions.[54]

45 ILO Constitution, article 22.
46 ILO Constitution, article 24.
47 ILO Constitution, article 26.
48 Van Niekerk (n 21 above) 30.
49 Van Niekerk (n 21 above) 25.
50 Van Niekerk (n 21 above) 26.
51 Van Niekerk (n 21 above) 24.
52 Van Niekerk (n 21 above) 24.
53 Du Toit (n 28 above) 89.
54 Du Toit (n 28 above) 89.

The ILO standards deal with a wide range of labour issues, from safety, equality, and basic conditions among others. However, the ILO is yet to set standards on precautionary suspension. The ILO convention that deals with discipline in the workplace, and arguably closely related to precautionary suspensions is Termination of Employment Convention, 1982.[55] This convention deals with the variety of issues relating to the termination of employees' services, such as the grounds for dismissal, prohibited grounds for dismissal, employees' right to present their cases before termination of employment, right of employees to appeal the dismissal at external forums and the remedies available to employees for unfair dismissal among others.

These are all topics that are covered by the LRA, but strange enough, South Africa did not ratify this convention. Notwithstanding the non ratification of this convention by South Africa, this convention evidently influenced the South African labour law relating to termination of employment. The dissertation submits that the ILO must consider setting international standards on precautionary suspension to strive to achieve uniformity and curb possible abuse of this process by employers and employees.

7. Social justice and decent work

As stated above, when the ILO was formed, it perceived social justice as a gateway to achieving everlasting peace in the world. As part of striving to achieve social justice, the ILO is also advocating for decent work. These two concepts, social justice and decent work will be discussed briefly below.

Social justice entails the equal sharing of all advantages that are necessary for the wellbeing of people and the advancement of those who are less privileged.[56] It is concerned with the common good of the society and the recognition of fundamental, inviolable individual rights.[57] In 2008, the ILO issued a declaration on the Social Justice and Fair Globalisation. This declaration recognised the benefits of globalisation and

55 C158 – Termination of Employment Convention, 1982.
56 AM Honore 'Social justice' (1962) 8 *McGill Law Journal* 95.
57 M Novak 'What is social justice' (1992) 21 *Capital University Law Review* 883.

noted with concern the negative effects that globalisation have on social justice such as poverty, unemployment, income inequalities, and the vulnerable economy.[58]

Social justice also entails the provision of work to the unemployed and marginalised, not just any work, but decent work. Decent work means the provision of quality work, that recognises and protects the dignity of workers. The ILO has a decent work agenda that is based on four pillars. These four pillars include employment promotion, social protection, fundamental rights, and social dialogue.[59]

Decent work further entails the provision of a safe working environment, social security, equal opportunities in the workplace, the development of workers and a working environment that recognises workers' human rights and give effect to rights conferred by the ILO conventions.[60] Social justice and decent work cannot be separated, these two are interlinked. To achieve social justice, everyone must have access to decent work. [61]

The dissertation submits that precautionary suspension is in harmony with the decent work agenda of the ILO, provided it is effected for fair reasons and for a limited period.

8. Conclusion

In this chapter, the role of labour law was discussed, wherein it was stated that the role of labour law is to regulate the employment relationship. Thereafter, the chapter focused on the role of the common law in South Africa, whereby it was stated that the common law is made up of Roman-Dutch law and English law. It was further stated that the common law is still relevant, although it is now subject to the Constitution.

This chapter pointed out that the common law does make provision for the precautionary suspension of employees in the workplace. That precautionary

58 ILO Declaration on Social Justice for a Fair Globalization (2008), as amended in 2022.
59 https://www.ilo.org/global/standards/introduction-to-international-labour-standards/need-for-social-justice/lang--en/index.htm (accessed 23 March 2024).
60 https://www.ilo.org/global/topics/decent-work/lang--en/index.htm (accessed 23 March 2024).
61 JR Bellace 'Achieving Social Justice: The Nexus between the ILO's Fundamental Rights and Decent Work' (2011) 15 *Employment Rights & Emp Pol'y* J 23.

suspension is with full pay, unless parties to the employment contract agreed to suspension without pay.

The chapter thereafter went on to discuss the formation of the ILO, the ILO standards, and South Africa as a member of the ILO. The chapter discussed the role of the ILO which is to set international labour standards and how the ILO standards are influencing the South African labour law. The chapter further discussed the concepts of social justice and decent work, which are part of the ILO mandate.

The study observed that the ILO does not have standards regulating precautionary suspension in the workplace. The dissertation submits that this is something that the ILO will have to investigate as there are instances where precautionary could be used by employers to victimise employees in the workplace.

In the next chapter, the definition and the description of precautionary suspension will be discussed in detail. Thereafter, the dissertation will delve into the application of the *audi alteram partem* rule in precautionary suspensions.

Chapter 3

Definition and Description of Precautionary Suspension

1. Introduction

In this chapter, the dissertation will take a closer look at the definition of precautionary suspension. It is important to have an in depth understanding of what precautionary suspension entails before proceeding to other chapters.

The dissertation will explore various sources that defines precautionary suspension, including legislation and case law. Discuss the purpose of precautionary suspension, payment of remuneration during precautionary suspension, legislative provisions relating to precautionary suspensions and cases of unfair labour practice: suspension.

2. Defining precautionary suspension

The authorities that define precautionary suspension are limited; most authorities describe precautionary suspension instead of defining same. The word suspension, according to the Oxford English Dictionary, is defined as "the action of stopping or condition of being stopped, especially for a time; temporary cessation, intermission; temporary abrogation (of a law, rule)".[62]

This definition is quite broad, in that it does not refer to suspension in any specific context. However, as will be illuminated below, the temporary stoppage of work, is in essence what precautionary suspension in the workplace entails.

In the workplace context, suspension is defined as "temporary cessation of work or prevention from performing work".[63] It is further described as situations in which an employer declines to accept an employee's services but does not terminate the contract of employment.

62 https://www.oed.com/search/dictionary/?scope=Entries&q=suspension (accessed 17 August 2023).

63 *Aminto Precast and Civil Engineering CC v CCMA* 2023 6 BLLR 521 (LC).

The court in the case of *Lewis v Heffer*,[64] said the following in relation to precautionary suspension:

> "Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay, pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it... The suspension in such a case is merely done by way of good administration... The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply: See Furnell v Whangarei High School's Board."

Precautionary suspension was also described as the action of suspending the employee as a precautionary measure prior to instituting disciplinary action. Therefore, precautionary suspension itself is not a disciplinary action.[65] The employer at the time of placing an employee on a precautionary suspension, is not having the full details of the alleged misconduct, as same is still to be investigated.[66]

In 2015, the Department of Public Service Administration (the "DPSA") issued a circular on the guidelines for disciplinary sanction and precautionary suspension, in that document, the DPSA defined precautionary suspension as "an interim measure imposed, not as a disciplinary sanction, but for reasons of orderly administration".[67]

In *Koka v Director-General: Provincial Administration North-West Government* (the *"Koka"* case),[68] precautionary suspension was described as a "holding operation or as interim suspension". According to this description, precautionary suspension imply that the employment contract is temporarily put on hold and does not mean that the contract is terminated.

Considering the above, the definition of precautionary suspension is summarised as the temporary suspension of an employee from the workplace, to investigate serious allegations of misconduct.

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64 *Lewis v Heffer & Others* 1978 3 All ER 354 (CA).
65 *South African Municipal Workers' Union obo Dlamini v Mogale City Local Municipality* 2014 12 BLLR 1236 (LC).
66 *South African Municipal Workers' Union obo Dlamini and v Mogale City Local Municipality* 2014 12 BLLR 1236 (LC).
67 Department of Public Service Administration 'The public service guidelines for disciplinary sanctions and precautionary suspension' 4 December 2015 https://www.dpsa.gov.za/policy-updates/nlrrm/negotiations_and_labour_relations/policy/ (accessed 13 March 2024).
68 *Koka v Director-General: Provincial Administration North-West Government* 1997 7 BLLR 874 (LC).

3. Legislation and other authorities on precautionary suspension

In terms of the Constitution, the rights accorded to employees are coined in broad terms. The rights accorded to employees are encapsulated in section 23 of the Constitution, and they include the right to fair labour practice, and the right to join or form a trade union.

The LRA was later promulgated to give effect to section 23 of the Constitution, dealing with issues relating to individual and collective labour law. In section 186(2)(b) of the LRA, the legislation prohibits unfair labour practice of employees relating to suspension or any disciplinary action short of dismissal. This is the only instance where the LRA mention suspension. The act does not define precautionary suspension.[69]

The Public Service Act (the "PSA"),[70] which applies in the public service, does not contain provisions dealing with a precautionary suspension or any form of suspension. The PSA used to contain provisions regarding precautionary suspensions, which will be discussed below.

The authorities dealing with a precautionary suspension in the public service are the Disciplinary Codes. These documents provide for a precautionary suspension with full pay, the grounds for a precautionary suspension and the prescribed period for placing employees on a precautionary suspension.

4. The purpose of precautionary suspension

The primary purpose of effecting precautionary suspension is to remove or exclude the employee from the workplace in order to investigate serious allegations of misconduct against the employee.[71]

69 *Aminto Precast and Civil Engineering CC v CCMA* 6 BLLR 521 (LC).
70 Public Service Act 46 of 1997.
71 M McGregor et al *Labour Law Rules* (2017) 113.

In *Tsietsi v City of Matlosana Municipality*[72] it was held that the removal of an employee from the workplace is effected for many reasons. The reasons may include instances where there is possible interference with the investigation, possible intimidation of witnessess, or the possibility that the employee may repeat the alleged acts of misconduct. The employer may also suspend the employee if the legitimate business interests of the employer may be harmed by the continued presence of the employee in the workplace.[73]

5. Remuneration while placed on a precautionary suspension

The precautionary suspension of employees is generally with full pay.[74] The only time employees will not receive remuneration while on a precautionary suspension is when the employment contract,[75] collective agreement or legislations provides for such.[76]

The PSA, before it was amended, used to provide for precautionary suspension without pay. This legislation used to empower the Head of Department to use his or her discretion to pay the suspended employee's salary in full or in part.[77]

The dissertation submits that the time has come for the South African public service to consider amending the Disciplinary Codes, to make provision for a precautionary suspension without pay in some instances.

6. Disputes of unfair labour practice: suspension

The LRA prohibits unfair labour practice against employees in relation to promotion, demotion, probation, training, benefits, suspensions, any disciplinary action short of dismissal, refusal to reinstate employees and occupational detriment resulting from protected disclosures.[78]

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72 *Tsietsi v City of Matlosana Local Municipality* 2015 7 BLLR 749 (LC).
73 Du Plessis (n 30 above) 389.
74 *Member of the Executive Council for Education, North-West Provincial Government v Gradwell* 2012 33 ILJ 2033 (LAC).
75 *Sappi Forests (Pty) Ltd v CCMA* 2008 JOL 22700 (LC).
76 McGregor (n 71 above) 113.
77 *Koka v Director-General: Provincial Administration North-West Government* 1997 7 BLLR 874 (LC).
78 Labour Relations Act sec 186(2).

In the *Koka* case, the Labour Court held that cases of unfair labour practice relating to suspension include cases of precautionary suspension and where suspension is pronounced as a sanction in the disciplinary hearing.

In *City of Tshwane Metropolitan Municipality v South African Local Government Bargaining Council*,[79] the Labour Court held that cases of unfair labour practice: suspension are not limited to cases where the employer considers instituting disciplinary action. In this case, the employer placed employees who refused to sign fixed term contracts on suspension without pay. The Labour Court held that such cases also fall within the province of unfair labour practice relating to suspension. The Labour Court in *Heyneke v Umhlauze Municipality*,[80] held that the placement of employees on an indefinite special leave pending a disciplinary hearing is equivalent to a precautionary suspension and falls within the scope of unfair labour practice relating to suspension.

In *Mogotlhe v Premier of the North West*,[81] the Labour Court held that in order for the precautionary suspension to be fair, there must be *prima facie* evidence that the employee allegedly committed serious acts of misconduct, there must be an objectively justifiable reasons for denying the employee access to the workplace, and the employee must be afforded an opportunity to state reasons why he or she must not be placed on a precautionary suspension.

In *Minister of Labour v GPSSBC* [82] it was held that placement of an employee on a precautionary suspension for a period exceeding the period prescribed in the disciplinary code amounts to unfair labour practice.

The remedies that are available to employees who are subjected to unfair labour practice relating to suspension includes compensation of up to twelve months

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79 *City of Tshwane Metropolitan Municipality v South African Local Government Bargaining Council* 2021 JOL 53500 (LC).
80 *Heyneke v Umhlauze Municipality* 2010 31 ILJ 2608 (LC).
81 *Mogothle v Premier of the Northwest Province* 2009 ILJ 605 (LC).
82 *Minister of Labour v GPSSBC* 2007 5 BLLR 461 (LC).

remuneration.[83] In the case of *IMATU obo Sankhanyane v Emfuleni Local Municipality*,[84] the Labour Court held that the Commissioner ought to consider whether the employee is eligible for compensation in cases of unfair suspension.

7. Conclusion

In this chapter, precautionary suspension was defined as a temporary suspension of an employee from the workplace as a precautionary measure to investigate alleged acts of misconduct. Therefore, the main reason for placing employees on a precautionary suspension is to investigate allegations of misconduct while ring fencing the integrity of the investigation. The dissertation submits that this could also be achieved by placing employees on a precautionary transfer to other units or departments in some instances.

It was further stated that the precautionary suspension is effected with full pay, and that the only time a precautionary suspension may be effected without pay is when it is agreed to by parties in the employment contract, collective agreement or legislation. In the public service, precautionary suspension is generally with full pay.

This dissertation submits that the time has come for the state to return to the bargaining table and negotiate for suspension without pay in some instances. The law provides that suspension may be without pay if parties agreed to such; since the Disciplinary Codes are products of a collective bargaining process, the state must seek consensus from organised labour to curb the costs of suspensions in the public service. The state must in addition, consider maintaining the right of employees to make representations before being placed on a precautionary suspension without pay.

The study is of the view that Constitutional Court in the *Long* case did not fully consider the prejudice suffered by employees who are placed on a precautionary suspension. The right to make representations will be discussed in detail in the next chapter.

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83 Labour Relations Act sec 194(4).
84 *Imatu obo Senkhane v Emfuleni Local Municipality* 2016 296 (LC).

Chapter 4

Audi Alteram Partem Rule in Precautionary Suspensions

1. Introduction

This chapter analyses what used to be the burning issue in our labour law for a protracted period, which is the application of the *audi alteram partem* rule in respect of precautionary suspensions. This issue was eventually laid to rest by the Constitutional Court in the case of *Long v SA Breweries*[85] (the "*Long*" case) which will be discussed in detail later in this chapter.

Prior to the above judgement, there used to be two schools of thought in our labour law relating to *audi alteram partem* rule in precautionary suspensions. The one was advocating for employee's right to be heard before being placed on a precautionary suspension and the other was of the view that this was unnecessary.

The chapter discuss how different government departments inconsistently apply the *audi alteram partem* rule in precautionary suspensions. The chapter will also discuss implications of the *Long* case in the public service.

2. *Audi alteram partem* rule in precautionary suspensions

The *audi alteram partem* rule, which means affording the other party an opportunity to be heard before a decision affecting them is made,[86] is entrenched in our labour law. This is evident from the LRA, which requires employers to afford employees an opportunity to be heard before employees are dismissed.[87]

The application of the *audi alteram partem* rule in precautionary suspensions entail affording affected employees an opportunity to make representations before a

85 *Long v South African Breweries (Pty) Ltd* 2019 6 BLLR 515 (CC).
86 JT Baloyi-Ngobeni & KO Odeku 'Precautionary suspension in the workplace and employee's Right to be heard' (2013) 14 *Mediterranean Journal of Social Sciences* 800.
87 Labour Relations Act, Schedule 8: Code of Good Practice: Dismissal, Item 4 (1).

decision is made to place them on a precautionary suspension. The opportunity to be heard does not entail a formal enquiry.[88]

The concern with affording employees an opportunity to make representations before a decision is made to place them on a precautionary suspension arise in cases where employees committed serious acts of misconduct, and there is a concern that their continued presence in the workplace may result in them tempering with the evidence, intimidating witnesses, or repeating the acts of misconduct.

3. Schools of thought on *audi alteram partem* rule in precautionary suspensions

The question of whether employees should be afforded an opportunity to be heard before being placed on a precautionary suspension has been before the courts in numerous occasions, and the courts gave conflicting judgements on this issue.

The one school of thought advocated for employees to be afforded an opportunity to make representations before being placed on a precautionary suspension. According to the proponents of this school of thought, they were of the view that it would be unfair to suspend employees without affording them an opportunity to make representations.

In the case of *Mogotlhe v Premier of the North-West Province*[89] the Labour Court held that the employer is required to afford an employee an opportunity to state his or her case before deciding to place the employee on a precautionary suspension. In the case of *SAPO Ltd v Jansen van Vuuren NO*[90] the Labour Court agreed with the decision of a Commissioner who found that the employer committed an unfair labour practice when suspending the employee without affording him an opportunity to make representations. The court went on to state that "[S]uspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfilment".

88 *Mogotlhe v Premier of the North-West Province* 2009 30 ILJ 605 (LC).
89 *Mogotlhe v Premier of the North-West Province* 2009 30 ILJ 605 (LC).
90 *SAPO Ltd v Jansen van Vuuren NO* 2008 8 BLLR 798 (LC).

The other school of thought held that it is unnecessary to afford employees an opportunity to make representations prior to being suspended. This was based on the argument that employees do not suffer material prejudice as a precautionary suspension is often with full pay and employees are normally suspended for a short period. In the case of *Member of the Executive Council for Education, North-West Provincial Government v Gradwell* (the "*Gradwell*" case)[91] the Labour Appeal Court stated the following in relation to the right to a hearing before being placed on a precautionary suspension.

> "When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspensions tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimised. Secondly, the period of suspension often will be (or at least should be) for a limited duration. The SMS Handbook for example imposes a 60day limitation. And, thirdly, the purpose of the suspension the protection of the integrity of the investigation into the alleged misconduct risks being undermined by a requirement of an in depth preliminary investigation."

In the Labour Court case of *Ida v Department of Co-Operative Governance Human Settlements & Traditional Affairs Limpopo Province*[92] the court rejected the assertion by the applicant that the right to make representations before being placed on a precautionary suspension is implied in all contracts of employment. The court went further to alight itself with the statement quoted above in the *Gradwell* case and held that if the employer's disciplinary code does not make provision for the *audi alteram partem* rule before employees are placed on a precautionary suspension, employees do not enjoy such a right.

4. The current law on *audi alteram partem* rule in precautionary suspensions

The question of whether employees who are placed on a precautionary suspension are entitled to make representations was finally laid to rest by the Constitutional Court in the *Long* case.

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91 *Member of the Executive Council for Education, North-West Provincial Government v Gradwell* 2012 8 BLLR 747 (LAC).

92 *Ida v Department of Co-Operative Governance Human Settlements & Traditional Affairs Limpopo Province* 2016 JOL 37301 (LC).

In this case, Mr Allan Long was appointed by the South African Breweries as a District Manager. He was placed on a precautionary suspension in May 2015 to investigate allegations of misconduct against him, thereafter he was charged and dismissed. As a result, he declared two disputes with the CCMA relating to unfair labour practice: suspension and unfair dismissal; both arbitration awards were in his favour.

Regarding the dispute of unfair labour practice: suspension, the Commissioner held that his suspension was unfair as he was not afforded an opportunity to make representations before being placed on a precautionary suspension. This arbitration award was taken on review by the employer. The Labour Court held that rules relating to procedural fairness, specifically relating to *audi alteram partem*, are attenuated when it comes to precautionary suspensions.

The court said where an employee is paid while placed on a precautionary suspension, the employee does not suffer material prejudice and therefore, the precautionary suspension of an employee without affording him an opportunity to make representations does not amount to unfair labour practice.

The employee sought leave to appeal from the Labour Appeal Court, and such was refused. The employee then approached the Constitutional Court. The Constitutional Court upheld the decision of the Labour Court, holding that an employee who is placed on a precautionary suspension with pay need not be afforded an opportunity to make representations as the employee does not suffer material prejudice.

The current law relating to *audi alteram partem* rule in precautionary suspensions is that employees do not enjoy the right to be heard prior to being placed on a precautionary suspension, unless if this right is provided for in the contract of employment, collective agreement or other prescript regulating the employment relationship.

This dissertation submits that the Constitutional Court did not carefully consider prejudices suffered by employees who are placed on a precautionary suspension. Had it done so, it would have come to a different conclusion. The courts in different

judgements referred to above held that employees who are placed on a precautionary suspension suffer reputational harm, growth, fulfilment, and job security among others. The payment of remuneration is not a justifiable reason for depriving employees their basic right to be heard.

5. The current position in the public service

Considering the current law relating to the *audi alteram partem* rule in precautionary suspensions, the dissertation will now go through various disciplinary codes in the public service to determine whether they provide for a right to make representations before placing employees on a precautionary suspension.

The PSCBC is the bargaining council for the public service established in terms of the LRA.[93] The LRA further makes provision for the establishment of sectoral bargaining councils in terms of the constitution of the PSCBC.[94] There are four sectoral bargaining councils established under the PSCBC, they include the General Public Service Sectoral Bargaining Council (GPSSBC), Education Labour Relations Council (ELRC), Public Health and Social Development Sectoral Bargaining Council (PHSDSBC), and the Safety and Security Sectoral Bargaining Council (SSSBC).

The disciplinary code that applies to government departments falling under the GPSSBC is the PSCBC Resolution 1 of 2003. This disciplinary code does not make provision for the right to be heard before placing employees on precautionary suspensions. This disciplinary code also applies to government departments falling under auspices of the PHSDSBC.

However, government departments falling under the SSSBC and the ELRC have their own disciplinary codes. The parties falling under the SSSBC use the South African Police Discipline Regulations[95] and the ELRC use the Employment of Educators Act,[96] both these disciplinary codes make provision for the right to be heard before placing employees on precautionary suspensions.

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93 Labour Relations Act 66 of 1995, sec 35(1).
94 Labour Relations Act 66 of 1995, sec 37.
95 South African Police Service Regulation no 1361.
96 Employment of Educators Act 78 of 1998.

In relation to the local government, the employer and employees in this sector fall under the jurisdiction of the South African Local Government Bargaining Council (SALGBC). The disciplinary code that is applicable in the local government is Circular no1/2018: Disciplinary Procedure Collective Agreement, which provides for the right to be heard before placing employees on a precautionary suspension.

6. Conclusion

In this chapter, the question of whether the *audi alteram partem* rule is applicable when placing public servants on precautionary suspensions was discussed in detail. The two schools of thoughts, and the provisions of different disciplinary codes in the public service were also discussed.

As stated above, this issue was finally laid to rest by the Constitutional Court in the *Long* case, ruling that employees are not entitled to make representations before being placed on a precautionary suspension. The implication of this judgement is that employees do not have the right to be heard before being placed on a precautionary suspension, unless the right to be heard is provided for in their employment contract.

The dissertation advocates for the right to be heard before employees are placed on a precautionary suspension, unless doing so may prejudice the integrity of the investigation. This will also ensure that there is uniformity in the public service as other departments adhere to the *audi alteram partem* rule when placing employees on a precautionary suspension. The dissertation will later make recommendations on how the public service can prevent the possibility of employees interfering with the investigation while they are being afforded an opportunity to make representations.

Chapter 5

Precautionary Suspension in the Public Service

1. Introduction

The South African public service is often criticised for prolonged and costly precautionary suspensions, especially the precautionary suspension of senior managers. The duration of precautionary suspensions in the public service is often longer than the timeframes prescribed in the Disciplinary Codes.

In this chapter, the dissertation will discuss the high number of prolonged precautionary suspensions in the public service, the causes of prolonged suspensions and implications of prolonged precautionary suspensions in the public service. The dissertation will also propose measures that could reduce these costly suspensions.

2. Prolonged precautionary suspensions

The precautionary suspension of employees is generally required to be for a short period to allow the employer an opportunity to investigate the alleged misconduct without the employee interfering with the investigation.[97] There are often prescribed timeframes for placing employees on a precautionary suspension.

In terms of the Disciplinary Codes, employees may be suspended for a period of up to 60 calendar days, this period may be extended by the Chairperson of the disciplinary hearing, depending on the complexity of the investigation.[98]

In terms of the South African Police Service Discipline Regulations, the employee may be suspended for a period of 60 calendar days, this period may also be extended by the Chairperson of the disciplinary hearing. However, the extension period may not be

97 *Ida v Department of Co-Operative Governance Human Settlements & Traditional Affairs Limpopo Province* 2016 JOL 37301 (LC).
98 PSCBC Resolution 1 of 2003 Clause 7.2(c) and SMS Handbook Chapter 7, clause 2.7(2)(c).

longer than 30 days. The suspension will automatically be uplifted once the 60 calendar days or the extended period of 30 calendar days have lapsed.[99]

In terms of the Employment of Educators Act read with Schedule 2 of this act, the educator may not be suspended for a period exceeding three (03) months in a case of educators who committed acts misconduct outlined in section 17 of the act (serious misconduct). In cases of employees who committed acts of misconduct outlined in section 18, the precautionary suspension will be up to a month and may be extended by the Chairperson of the disciplinary hearing for a period not exceeding 90 days from the date the employee was placed on a precautionary suspension.[100]

The PSC published a report on the handling of precautionary suspension cases in the public service in 2011. This study found that there is a general noncompliance with the requirement that a precautionary suspension of employees must be up to a period of 60 days as prescribed in the Disciplinary Codes. The study found that on average it took departments three months or more to conclude investigations of employees who are placed on precautionary suspensions.

The dissertation observed that in the South African Police Service Discipline Regulations and the Educators Employment Act, the period of suspension is capped at 90 days and thereafter the suspension is automatically lifted. Whereas in the Disciplinary Codes, the Chairperson is vested with the power to extend the period of suspension (sometimes *sine die*) once the 60 days lapses. This approach causes prolonged suspensions and must be reviewed.

3. Implications of prolonged precautionary suspensions

In this part of the chapter, the dissertation will be discussing implications of prolonged suspensions in the public service. The implications include the costs associated with suspensions, the loss of production because of employees who are suspended and the morale of other employees who must perform the work of suspended employees.

99 South African Police Services Discipline Regulations section 10.
100 Employment of Educators Act 76 of 1998 Schedule 2 Item 2.

3.1. Cost of precautionary suspensions

The major implication of prolonged precautionary suspensions in the public service is the amount of money paid to suspended employees. As stated in chapter one, these costs amount to fruitless and wasteful expenditure because the state is spending money for services not rendered by suspended employees.

Recently in September 2022, there was a parliamentary question on the total number of employees placed on a precautionary suspension in the public service (specifically the national and provincial government); the cost of those suspensions and the number of senior managers placed on a precautionary suspension.

The DPSA responded to that question using the quarterly report of the Forum of South African Director-Generals (the "FOSAD") which was for the period of 01 April 2022 to 30 June 2022. This report showed that 305 employees were placed on a precautionary suspension for that period, the cost of suspensions was R 103 964 676, 15 and the total number of senior managers on a precautionary suspension was 57.[101] This information was only for the first quarter of the 2022/2023 financial year (April to June). The cost for the whole financial year will be a lot more than what is stipulated above.

The PSC in their newsletter, Pulse of the PSC, published a report on the state of public service precautionary suspensions for the period of October to December 2022. The report shows that during this period, 167 employees were placed on a precautionary suspension, and those suspensions cost the state an amount of R 25 762 722. The PSC raised concerns about the cost of suspensions and the fact that the suspensions were exceeding the prescribed period of 60 days. The longest suspension period according to the report was 883 days.[102]

This report shows a drastic decline in the number of suspended employees and the cost thereof in the third quarter of the 2022/2023 financial year (October to December). The dissertation submits that these numbers are highly improbable considering that in

101 https://www.parliament.gov.za/storage/app/media/Docs/exe_rq_na/928ea649-3a90-43f4-8990-35fa22618e83.pdf (accessed 04 May 2024).

102 https://www.psc.gov.za/newsletters/docs/pulse_newsletter/Pulse_of_the_PSC_Vol_23_Oct_Dec_2023.pdf (accessed 14 June 2024).

the same financial year, for the period of April to June 2022, the number of suspended employees was 305 and the cost of those suspensions was R 103 964 676,15.

3.2. Poor service delivery

The other effect of prolonged precautionary suspensions is poor service delivery. There was a study that was conducted in the North-West provincial departments to determine the effects of precautionary suspensions.

The study found that the performance of departments or units headed by the suspended senior managers tend to be below par, and eventually result in poor service delivery.[103] A manager in a division plays the role of an overseer and steering the division to achieving performance targets, once a manager is suspended for a prolonged period, it negatively affects the performance of the division.

3.3. Morale of other officials

The study found that prolonged precautionary suspensions, especially that of senior managers, have a negative effect on the morale of other employees and the performance of departments.

The study found that other employees remaining in the office would have to perform the work of suspended officials.[104] This tends to overburden other employees and affect their morale. The study also remarked that the suspension of senior managers for a prolonged period sends a wrong message.[105] It creates an impression that there are no implications for employees who are accused of committing serious acts of misconduct, instead they are paid their full salaries while sitting at home.

3.4. Unfair labour practice disputes

103 Makhuzeni (n 8 above) 652.
104 Makhuzeni (n 8 above) 647.
105 Z Mbandlwa *et al* 'Leadership challenges in the South African local government system' (2020) 7 *Journal of critical reviews* 1644.

Public servants who are placed on prolonged precautionary suspensions may declare disputes of unfair labour practice.[106] This could cause the state to incur more expenses in a form of compensations that could be awarded to employees.

4. Causes of prolonged suspensions

In this part of the chapter, the dissertation will be analysing the causes of prolonged precautionary suspensions. They include stalling tactics by employees, lack of proper training of labour relations officials, lack of proper monitoring of these cases and others.

4.1. Delay tactics by employees

There is a tendency, especially by senior managers who are subjected to disciplinary enquiries and placed on precautionary suspensions, to make use of all possible tactics to delay the finalisation of their disciplinary cases. These tactics include the abuse of sick leave, request for postponements due to the unavailability of their representatives, urgent court applications to interdict the disciplinary enquiries, etc.

This trend was observed by the Labour Court as far back as 2009 in the case of *Mosiane v Tlokwe City Council* [107] where the labour court remarked as follows;

> "[15] A worrying trend is developing in this court in the last year or so where this court's roll is clogged with urgent applications. Some applicants approach this court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment..."

The stalingrad tactics were demonstrated in the recent case of *Mokoena and Merafong Local Municipality*.[108] As stated above, this is a trend observed more often in the disciplinary cases of senior managers in the public service and this is just one of such cases. The dissertation will discuss what transpired in this case to show how officials apply stalingrad tactics to delay the finalisation of their disciplinary enquiries.

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106 MK Mathiba 'Deemed dismissals and suspensions in the public sector' (2015) 36 *Obiter* 223.
107 *Mosiane v Tlokwe City Council* 2009 30 ILJ 2766 (LC), para 15 to 16.
108 *Mokoena v Merafong City Local Municipality* 2020 JOL 48399 (LC).

In this case, the employee was appointed as the Municipal Manager at the Merafong Local Municipality. She was placed on a precautionary suspension on 13 March 2019. On 21 August 2019, the employee approached the Labour Court on an urgent basis to interdict the disciplinary hearing against her and challenge her precautionary suspension. This application was dismissed with costs by the Labour Court.

The employee was served with a notice of the disciplinary hearing on 14 October 2019. The disciplinary hearing was scheduled for 29 to 31 October 2019. The employee's representative sent correspondence to the employer on 24 October 2019, indicating that he is unavailable on 29 October 2019. The matter was then rolled over to 30 October 2019. On 28 October 2019, the employee representative presented a medical certificate declaring the employee medically unfit for the period of 28 October 2019 to 01 November 2019. The Chairperson then postponed the matter to 19 to 21 November 2019.

On 18 November 2019, the employee representative submitted a medical certificate declaring the employee medically unfit from 14 to 22 November 2019. As a result, the disciplinary hearing was postponed to 15 to 17 January 2020. On 15 January 2020, the employee alleged that she is not well. The disciplinary hearing was again postponed to 15 to 17 April 2020.

Due to the National State of Emergency that was declared in response to the Covid-19 pandemic, the Chairperson postponed the disciplinary hearing *sine die*. On 01 July 2020, the employee was informed that the disciplinary hearing was scheduled for 14 July 2020.

On 13 July 2020, the employee indicated that she consulted a medical practitioner who advised her not to return to work to mitigate against chances of her contracting the Covid-19 virus. The medical certificate was dated 10 July 2020. As a result, the disciplinary hearing was postponed to 11-12 August 2020, to be held virtually.

On 10 August 2020, the employee representative applied for the recusal of the Chairperson alleging that the Chairperson is bias. The Chairperson indicated that the application will be dealt with during the disciplinary hearing. On 11 August 2020, the

employee did not attend the virtual disciplinary hearing. The hearing then proceeded in her absence. Upon learning that the disciplinary hearing proceeded in her absence, she made another urgent application to the Labour Court for setting aside, and declaring the disciplinary hearing invalid, among others. The Labour Court dismissed the application with costs.

In this case, this employee was suspended in March 2019, and the disciplinary enquiry was only concluded in August 2020. This is unfortunately the trend in the public service. There are cases where employees prolong the conclusion of their disciplinary enquiries for almost three years while placed on a precautionary suspension.[109]

In relation to suspended employees who prolong the finalisation of the disciplinary hearing by requesting postponements. There are arbitration awards that suggests that the employer is not obliged to pay such employees from the date of postponement.[110] Recently the Labour Court also remarked that it is possible for the employee to be suspended without pay in cases where the suspended employee seeks a postponement as a strategy to delay the finalisation of the disciplinary hearing.[111]

4.2. Unavailability of parties involved in disciplinary enquiries

The other factor that affects the speedy finalisation of disciplinary enquiries and prolong precautionary suspensions is the unavailability of parties involved in the disciplinary enquiry, especially the Chairperson and employee representative.[112]

In terms of the PSCBC Resolution 1 of 2003, the disciplinary enquiries are presided over by officials employed in the public service.[113] These officials have their own work commitments in their respective divisions or departments, as a result their availability is constrained. However, in cases where senior managers are disciplined, a Chairperson may also be sourced from outside the public service.[114] The availability

109 *Luphondo v Pieterse NO* 2024 JOL 63954 (LC).
110 Du Plessis (n 30 above) 390.
111 *Strydom v Arcelormittal South Africa* 2023 JOL 63243 (LC) paragraph 34.
112 "Report on Management of Precautionary Suspension in the Public Service" Public Service Commission June 2011.
113 PSCBC Resolution 1 of 2003 clause 7.3 (b).
114 SMS Handbook Chapter 7 clause 2.7 (3)(b).

of such persons is also constrained, many of them are legal practitioners who are briefed on other cases.

To mitigate this issue, the dissertation submits that the DPSA must implement the recommendation made by the PSC in the 2011 report, which proposed the development of a database of Chairpersons in the public service.[115]

4.3. Legal representation

It is becoming a trend in the public service that employees would be represented by legal practitioners. The Disciplinary Codes do not allow legal representation however,[116] the Chairperson may allow legal representation after considering factors outlined in the case of *MEC Department of Finance, Economic Affairs and Tourism: Northern Province v Mahumani* (the *"Mahumani"* case).[117]

In the *Mahumani* case, the court held that the Chairperson may grant an application for legal representation after considering the nature of the charges, the degree of factual or legal complexity, potential seriousness of the consequences of an adverse finding and the nature of the prejudice to the employer in permitting legal representation.

In *CCMA v Law Society of the Northern Provinces*[118] the Supreme Court of Appeal held that there is no absolute right to legal representation and that the nature of labour disputes was such that they should be dealt with speedily and with the minimum of legal formalities.

The dissertation submits that the admission of legal practitioners in disciplinary hearings is against the spirit of the Disciplinary Codes. The Disciplinary Codes provide that legal representation should not be allowed,[119] and that "disciplinary hearings

115 Public Service Commission 'Report on Management of Precautionary Suspension in the Public Service' https://www.psc.gov.za/documents/2011/Precautionary%20Suspension.pdf (accessed 22 April 2023).
116 PSCBC Resolution 1 of 2003 clause 7.3 (f).
117 *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* 2005 2 BLLR 173 (SCA).
118 *CCMA v Law Society of the Northern Provinces* 2013 11 BLLR 1057 (SCA).
119 PSCBC Resolution 1 of 2003 clause 7.3 (f) and SMS Handbook Chapter 7 clause 2.7 (3)(e).

should not seek to imitate court proceedings".[120] The admission of legal practitioners must therefore only be granted in exceptional circumstances.

4.4. Formalising disciplinary enquiries

The dissertation observed that disciplinary enquiries in the public service has been overly formalised. This approach is contrary to the purport and spirit of the LRA and Disciplinary Codes.

In order to comply with the fair procedure when dismissing employees, Schedule 8 Code of good practice: Dismissal (the "Code"),[121] provides;

> "Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry...In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures."

In *SA Custodial Management (Pty) Ltd v UPSCO*[122] the court held;

> "[55] Item 4 of the Code of Good Practice requires an employee to be given an opportunity and if the employee spurns such an opportunity through vitriolic denunciation such an employee cannot be heard to complain about failure to be afforded an opportunity to be heard... The conduct of the dismissed employees and their legal team, when viewed as a whole, its sole intention was to frustrate the process. An employee party who systematically, as the dismissed employees did in the present instance, frustrates the process cannot be heard complaining about procedural unfairness."

The Labour Appeal Court in *Semenya v CCMA*[123] held that when an employee fails to make use of an opportunity to present his or her case, that employee cannot later claim that his dismissal was procedurally unfair.

In the case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA*,[124] the Labour Court made it clear that there is no place for formal, onerous procedures which

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120 PSCBC Resolution 1 of 2003 clause 2.7 and SMS Handbook Chapter 7 clause 2.2(g).
121 LRA, Schedule 8 Code of Good Practice: Dismissal, Item 4.
122 *SA Custodial Management (Pty) Ltd v UPSCO* 2024 2 BLLR 200 (LC).
123 *Semenya v CCMA* 2006 6 BLLR 521 (LAC).
124 *Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 9 BLLR 833 (LC).

seeks to imitate the criminal proceedings. The court emphasised that the purpose of the LRA was to introduce an informal, prompt, flexible pre-dismissal procedure.

The same sentiments were shared by the Labour Court in *Strydom v Arcelormittal South Africa*,[125] where the court observed with concern how employers ignore the simplified pre-dismissal process introduced by the LRA and held onto the old processes which are akin to the criminal procedure.

In *Department of Public Works v Vukela*.[126] the court made this remark.

> "The Labour Relations Act (LRA) sought to introduce a system for the resolution of workplace disputes that is cheap, accessible, quick and informal. This case demonstrates how elusive each of these goals remains…"

The dissertation observed how public servants who are placed on precautionary suspension play stalingrad tactics to delay the finalisation of their disciplinary hearings. The LRA under Schedule 8, envisaged an informal enquiry, therefore the state should not be allowed to be dragged into formal procedures which are akin to the formal criminal procedures.

The Code also makes provision for dispensing with the pre-dismissal procedure in cases where the employee is using stalingrad tactics to frustrate the disciplinary hearing. Where employees use stalingrad tactics, the state must consider obviating pre-dismissal procedures and perhaps invite the employee to make written representations against the employer's intention to effect dismissal.

4.5. Skills of labour relations practitioners

There is also a concern that labour relations practitioners in the public service lack the necessary skill to manage cases of precautionary suspensions. The practitioners are often found to be lacking understanding of the applicable Disciplinary Codes.[127]

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125 *Strydom v Arcelormittal South Africa* 2023 JOL 63243 (LC).
126 *Department of Public Works v Vukela* 2022 JOL 54644 (LC).
127 Public Service Commission 'Report on Management of Precautionary Suspension in the Public Service' https://www.psc.gov.za/documents/2011/Precautionary%20Suspension.pdf (accessed 22 April 2023).

4.6. Monitoring of precautionary suspension cases

The other factor that is causing the prolonged suspensions in the public service is the failure to properly monitor cases of precautionary suspension. As stated above, the cases of officials who are placed on a precautionary suspension must be expedited due to costs and other factors associated with such cases. The PSC found that there is no proper monitoring of these cases. Furthermore, the PSC found that departments do not have guidelines or policies for managing these cases.[128]

The dissertation submits that the DPSA must come up with mechanisms to monitor cases of precautionary suspensions. This could include requiring departments to report on all cases of precautionary suspensions that are outside the prescribed timeframe. The DPSA could further evaluate whether those suspensions are justified and make recommendations to departments.

5. Conclusion

In this chapter, the dissertation took a closer look at the status of precautionary suspensions in the public service. The chapter discussed the period of suspension; causes and implications of prolonged precautionary suspensions.

There were couple of factors that were discussed as causes of prolonged suspensions, which includes delaying tactics, lack of skills by labour relations practitioners, unavailability of parties involved in disciplinary enquiries, admission of legal practitioners, formalising the disciplinary enquiries and lack of proper monitoring. The implications of prolonged suspensions include costs, unfair labour practice disputes, poor service delivery, and demoralised officials.

The dissertation observed that in the Department of Education and the South African Police Service, there is a cap on the period of suspension, which is 90 days; once this

128 Public Service Commission 'Report on Management of Precautionary Suspension in the Public Service' https://www.psc.gov.za/documents/2011/Precautionary%20Suspension.pdf (accessed 22 April 2023).

period has lapsed, the suspension will automatically be lifted. The dissertation recommends that the Disciplinary Codes be reviewed to provide for a similar provision.

The dissertation further submitted that departments must appoint people with the relevant skills as labour relations practitioners and continue to develop their skills through training. The dissertation further recommended that the DPSA must devise monitoring mechanisms and intervene in cases of prolonged precautionary suspensions.

The dissertation also advocates for precautionary suspension without pay in cases where employees delay the finalisation of disciplinary hearings while they are placed on suspension. The recent Labour Court case remarked that it is possible to place employees on unpaid precautionary suspensions. The dissertation also remarked in previous chapters that precautionary suspension without pay is possible if same is provided for in the employment contract.

The dissertation also holds a view that the admission of legal practitioners to represent employees in disciplinary hearings should be granted in exceptional circumstances. The dissertation also holds a view that departments must dispense with pre-dismissal procedure when employees use stalingrad tactics to frustrate the disciplinary hearing. The state may invite the employee to make written representations against the employer's intention to dismiss the employee.

In the following chapter, the dissertation will analyse how other countries are managing cases of precautionary suspensions. In dealing with this issue, it is not necessary to reinvent the wheel, there is a lot that could be learned from observing how others deal with similar issues.

Chapter 6

Comparative Study

1. Introduction

In this chapter, the dissertation will conduct a comparative study with two countries to observe how they manage cases of precautionary suspension. The dissertation will conduct a comparative study with Kenya and the United Kingdom (the "UK").

The dissertation will study these countries' legislative framework and case law on precautionary suspension, including grounds for a precautionary suspension, period of suspension, the *audi alteram partem* rule in suspension cases, and remuneration of employees while placed on a precautionary suspension.

The chapter will conclude by highlighting the difference between how these countries and South Africa manage cases of precautionary suspensions, and lessons that could be learned from these countries.

2. Legislation and other authorities on precautionary suspensions

2.1 Kenya

The legislative framework regulating labour relations in Kenya is similar to that of South Africa. It includes the Constitution of Kenya, which provides for the right to fair labour practice among others.[129] The Employment Act,[130] which is mainly applicable in the private sector. The Public Service Commission Act,[131] the Public Service Regulations and the Public Service Commission: Discipline Manual (the *"Discipline Manual"*), which are prescripts regulating labour relations in the public sector.

129 The Constitution of Kenya, 2010 sec 41(1).
130 Employment Act 2008.
131 Public Service Commission Act 10 of 2017.

The Constitution of Kenya and the Employment Act do not contain provisions relating to precautionary suspension. However, the court in the case of *Sava v Kitui Cottages and Guest House*[132] acknowledged precautionary suspension as part of Kenyan labour law. In this case, the court dismissed as preposterous the averment by the applicant that his contract of employment did not provide for precautionary suspension, therefore he may not be placed on a precautionary suspension. The court in this matter held that precautionary suspension is part of the Kenyan employment law, although it is not provided for in the legislation.

The court in the case of *Luka Korir v Moi Teaching and Referral Hospital*[133] described precautionary suspension as follows;

> "[22] It is in essence a temporary separation from day-to-day duties of an employee suspected of committing a disciplinary offence. It is usually handed out to allow for investigations into the allegations against the employee concerned. It is as it were, quite a preliminary stage in the disciplinary process where the evidence in support of the allegations is subject to further investigations and the employee subject to suspension cannot conveniently continue to work when they are going on."

In the public service, the Discipline Manual makes provision for the suspension of public servants. This prescript defines suspension as follows;

> "Suspension means barring an accused officer from performing the functions of a public office on account of misconduct which is likely to lead to dismissal or upon having been convicted or charged with a serious criminal offence pending finalization of a case."

The dissertation observed that the definition and application of precautionary suspension in Kenya is similar to South Africa, which is to bar the employee from work pending the investigation into the alleged misconduct.

2.2 United Kingdom

The Constitution of the UK is not codified in a single document, their constitutional provisions are contained in various prescripts such as statutes, decided cases, conventions and treaties.[134]

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132 *Sava v Kitui Cottages and Guest House* (2022) KEELRC 1499 KLR.
133 *Luka Korir v Moi Teaching and Referral Hospital* (2022) eKLR - Case 207 of 2017.
134 https://www.parliament.uk/site-information/glossary/constitution/ (accessed 10 June 2024).

The Employment Rights Act[135] is the legislation regulating terms and conditions of employment in the private sector. This legislation makes provision for a wide variety of conditions such as leave, particulars of employment, right not to be unfairly dismissed, etc. However, this legislation does not make any provision for the precautionary suspension of employees.

In the public service, the Constitutional Reform and Governance Act[136] provides for the Minister of Civil Service to issue a code regulating the conditions of employment in the public service. In November 2016, the Minister issued the recent Civil Service Management Code.[137] This code makes provision for the precautionary suspension of public servants.

The departments and agencies are authorised by the Code to develop their own policies, and disciplinary codes relying on the principles outlined in the Code.[138] As a result, departments and agencies developed their own disciplinary codes which will be discussed below.

There are also guidelines that are issued by institutions such as the Advisory Conciliation Arbitration Service (ACAS), which is based in the UK and the Labour Relations Agency, which is based in the Northern Islands. The ACAS and Labour Relations Agency are independent bodies funded by the state, which provides labour advise (including conciliation and arbitration services) to the public and private sector.

3. Grounds for placing employees on a precautionary suspension

3.1 Kenya

In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company*,[139] suspension is described as follows;

135 Employment Rights Act 1996 c.18.
136 Constitutional Reform and Governance Act 2010 c. 25.
137 Civil Service Management Code 2016.
138 Civil Service Management Code 2016, sec 4.1.2.
139 *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR.

> "[37] A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, or poor performance or physical incapacity and wishes to remove such an employee from the workplace to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work any time to undertake disciplinary proceedings or upon terms and given by an employer."

The Discipline Manual further provides that an employee may be suspended from his or her duties when charged with a serious criminal offence, or when charged under the Anti-Corruption and Economic Crimes Act, or when convicted of a criminal offence or when the Authorised Officer is of the view that the employee must be suspended during the disciplinary enquiry.[140]

3.2 United Kingdom

The employment law in the UK makes provision for placing employees on a precautionary suspension to investigate allegations of misconduct. In the recent, highly quoted case of *Lambeth LBC v Agoreyo*,[141] the Local Education Authority (the "LEA") suspended a teacher who allegedly used unreasonable force to remove children from her class. The teacher resigned and claimed that the LEA constructively dismissed her by breaching the implied contractual term of mutual trust and confidence.

The LEA maintained that the suspension of the teacher was a neutral act to investigate allegations of misconduct. The County Court dismissed the employee's claim holding that the LEA's conduct did not breach the teacher's implied contractual term. The employee reviewed the County Court's decision at the High Court and the High Court ruled in her favor.

The LEA then appealed the decision of the High Court at the Court of Appeal, which ruled in favor of the LEA. The Court of Appeal held that the High Court used an incorrect test of reasonableness and necessity when considering the decision of the

140 Public Service Commission: Discipline Manual for the Public Service, Para 4.2.2 (1)
141 *Lambeth LBC v Agoreyo* (2019) WL 01028147.

LEA to suspend the employee. The court held that the correct test is whether the LEA had a reasonable and proper cause to suspend the employee.

In the case of *Gogay v Hertfordshire County Council*[142] the court held that the suspension should not be a knee-jerk reaction to every case which calls for an investigation. The court held that such conduct by the employer may be found to be unreasonable and without proper cause, it may further be found to have breached the employee's implied contractual term of confidence and trust.

The Civil Service Code provides that public servants may be placed on a precautionary suspension when undergoing criminal investigations and when subjected to disciplinary processes. According to the code, the suspension must be effected to protect the public interest. The code further provides that the suspension of public servants must be on full pay.[143]

4. Remuneration while placed on a precautionary suspension

4.1 Kenya

The suspension of employees is not effected with full pay in the Kenyan public service, employees are only entitled to half of their salary during the period of suspension. However, should an employee be vindicated after the conclusion of the disciplinary hearing, the salary that was withheld will be paid. However, should the employee be dismissed or a sanction short of dismissal be imposed after his disciplinary hearing, the employee will forfeit the withheld salary.

4.2 United Kingdom

The suspension of employees in the UK is generally with pay, suspension without pay may be held to be unfair. Employees may also resign and claim constructive dismissal

142 *Gogay v Hertfordshire CC* (2000) 7 WLUK 759.
143 Civil Service Management Code, paragraph 4.9.10.

if suspended without pay.[144] However, the employer may suspend the employee without pay if it is provided for in the employment contract.[145]

The Civil Service Management Code provides that the precautionary suspension of public servants must be on full pay, unless the employee's contract provides for a precautionary suspension without pay.[146] This means departments and agencies are at liberty to develop policies that provides for a precautionary suspension without pay.

This is the case with disciplinary codes for the House of Common Staff and the Office of the Rail and Road, which provides for suspension without pay. In the case of the House of Common Staff, their disciplinary code provides that if suspension is without pay, the payment withheld may be paid to the employee if the employee is exonerated after the conclusion of the hearing.[147]

5. The *audi alteram partem* rule in precautionary suspensions

5.1 Kenya

There is no requirement for a hearing before placing an employee on a precautionary suspension in Kenya. In the case of *Luka Korir v Moi Teaching and Referral Hospital*[148] the court held that the requirement of a hearing in terms of section 41 of the Employment Act, is applicable in cases relating to termination of employment, and not where the employee is placed on a precautionary suspension.

The court in the case of *Sava v Kitui Cottages and Guest House*[149] quoted with approval the abovementioned case when it held that employees do not have the right to be heard before being placed on a precautionary suspension. The court in this matter was also of the view that section 41 of the Employment Act only applies in cases of employment termination. The court further held that section 50 of the

144 Discipline and Grievance: The ACAS Guide.
145 *Batty v BSB Holdings (Cudworth) Ltd* (2002) EWCA Civ 648.
146 Civil Service Management Code, paragraph 4.9.10.
147 House of Commons Staff Handbook, Chapter 20: Disciplinary Procedures, Para 6.1.
148 *Luka Korir v Moi Teaching and Referral Hospital* (2022) eKLR - Case 207 of 2017.
149 *Sava v Kitui Cottages and Guest House* (2022) KEELRC 1499 KLR.

Constitution of Kenya which provides for the right to a fair hearing, applies in cases before the courts and not disciplinary hearings.

5.2 United Kingdom

The prescripts, case law and the disciplinary codes for departments and agencies in the UK hardly make provision for employees' right to be heard before being placed on a precautionary suspension.

The only disciplinary code which makes provision for the right to be heard out of all the disciplinary codes for departments and agencies analysed is the Police Staff Council Handbook, Part 3: Guidance to Police Staff Misconduct Procedures. This document provides that an employee or his trade union may, within seven days of the suspension, make representations to the employer against the latter's decision to suspend the employee.[150]

Such representations may also be made to the employer at any stage during the employee's suspension, in instances where the employee's circumstances have changed, which may necessitate the employer to reconsider the employee's suspension.[151]

6. The prescribed period of a precautionary suspension

6.1 Kenya

The Discipline Manual requires disciplinary hearings against public servants to be concluded within a period of six (06) months. In instances where a disciplinary hearing is not finalised within the prescribed timeframe, a report must be submitted to the Public Service Commission explaining reasons for the delay.[152] The Public Service Regulations further requires departments to report cases of precautionary suspension

150 Police Staff Council Handbook, Part 3: Guidance to Police Staff Misconduct Procedures, Para 19.8.
151 Police Staff Council Handbook, Part 3: Guidance to Police Staff Misconduct Procedures, Para 19.8.
152 PSC Discipline Manual for the Public Service, clause 4.0 (l).

that exceeded a period of six (06) months, and reasons for not concluding those cases within the prescribed period.[153]

In the case of *Humphrey Sitati v Board of Management Lenana School*[154] the court held that the employee's indefinite suspension amounted to a constructive dismissal. In this case, the employee was suspended indefinitely without pay on 04 March 2017. He then approached the court on 20 March 2018 claiming that he was constructively dismissed, the court ruled in his favour.

6.2 United Kingdom

The prescripts in the UK do not prescribe the period of a precautionary suspension. The departments and agencies also hardly prescribe the period of a suspension in their respective disciplinary codes. In most cases the disciplinary codes only contain a provision that requires that suspension be kept as brief as possible and be constantly monitored.

The Department that provides for the period of suspension in their disciplinary code is the House of Commons Staff. Their disciplinary code provides that employees may be suspended for a period of 7 to 14 days while the misconduct is investigated.[155]

7. Conclusion

This study observed how the understanding and use of precautionary suspension in the UK and Kenya is very similar to South Africa. There are however few lessons that could be learned from these countries that could assist with reducing cases of prolonged and costly precautionary suspensions in the South African public service.

The study observed that in Kenya, there is a requirement for government departments to report precautionary suspension cases that are outside the prescribed timeframe of six months and provide reasons for delays in finalising those cases. This is good

153 Public Service Commission Regulations, section 63 (g).
154 *Humphrey Sitati v Board of Management Lenana School* (2020) eKLR.
155 House of Commons Staff Handbook, Chapter 20: Disciplinary Procedures, Para 6.3.

practice as it puts pressure on departments to ensure cases involving suspensions are expedited.

The dissertation observed that most public service disciplinary codes in the UK require precautionary suspensions to be monitored regularly. The disciplinary codes also require departments and agencies to continually review whether grounds to place employees on suspension still exist. This is also good practice that monitors whether suspension is still necessary at different stages of the disciplinary hearing, as there may be times during the disciplinary process when suspension may need to be uplifted.

The study observed that in Kenya and the UK, employees may be suspended without pay, and the withheld salaries will only be paid to suspended employees should they be exonerated after the conclusion of the disciplinary hearing. The study strongly supports this practice for the South African public service, however strict measures must be put in place to ensure that departments do not abuse the practice by using suspension without pay to punish employees. The withholding of salary will also deter public servants from prolonging the conclusion of their disciplinary hearings.

Chapter 7

Conclusions and Recommendations

1. Introduction

The dissertation in this chapter will be summarising the findings, conclusions and making recommendations to resolve the problem faced by the South African public service regarding a high number of prolonged and costly precautionary suspensions.

The issue of prolonged and costly precautionary suspensions has been haunting the South African public service for years. The PSC conducted a study on this issue and made recommendations as far back as 2011, but the situation is yet to improve, instead things are getting out of hand.

The dissertation will analyse the recommendations made by the PSC and determine whether those recommendations were implemented by the public service. The dissertation will also make its own recommendations that will assist with reducing the number of prolonged and costly suspensions.

2. Findings

The dissertation in chapter 2 found that a precautionary suspension is part of common law. That in terms of common law, precautionary suspension is effected with pay, unless parties agree otherwise in the employment contract. The dissertation also found that there are no ILO standards regulating precautionary suspensions.

The dissertation in chapter 3 discussed the definition of precautionary suspension in detail, referring to case law and other prescripts. In essence, suspension was defined as temporary suspension of an employee from the workplace to investigate alleged acts of misconduct without the employee interfering with the investigation.

In chapter 4, the dissertation found that employers are not obliged to afford employees an opportunity to be heard before being placed on a precautionary suspension, unless

this right is provided for in the employment contract. The study also found that there are inconsistencies in the public service with regards to affording employees opportunities to make representations before placing them on a precautionary suspension.

The dissertation in chapter 5 found that the state is spending millions of rands on salaries of suspended employees; this was labelled as fruitless and wasteful expenditure in chapter 1. The dissertation further diagnosed the causes and implications of prolonged suspensions.

3. Recommendations

As stated above, the PSC made recommendations on how departments may curb the number of prolonged suspensions. Some of those PSC recommendations will be discussed below. The dissertation will also discuss additional recommendations emanating from this study;

3.1 The development of departmental policies

The PSC recommended the development of the departmental policies on managing cases of precautionary suspension. The dissertation supports this recommendation, the only concern is that such policies might create inconsistencies on the management of precautionary suspensions in the public service and might also contravene the Disciplinary Codes. The best option would be to amend the Disciplinary Codes to address shortfalls in the management of precautionary suspension cases.

3.2 Training

The PSC made a recommendation that managers be provided with training on disciplinary processes. The PSC further recommended that training be provided to managers on presiding over disciplinary cases and investigating misconducts cases. The dissertation supports this recommendation. In addition, the dissertation recommends that training must also be provided to labour relations practitioners on how to manage precautionary suspension cases.

3.3 Precautionary transfer

The PSC recommended that departments must consider transfer before placing employees on a precautionary suspension. The dissertation is fully behind this recommendation. The precautionary transfer serves the same purpose as a precautionary suspension. However, with transfers, employees would still be gainfully employed by the state.

3.4 Review of the prescribed 60 days

The PSC recommended that the prescribed 60 days of placing employees on precautionary suspension should not be reviewed. The dissertation submits that considering the time it takes to investigate cases, and initiating disciplinary hearings, it has become evident that maintaining the 60 days amounts to setting up the public service for failure. The period of suspension should therefore be reviewed and set at 90 days. This would be consisted with the timelines prescribed in the Depoartment of Education and the South African Police Services. The amended Disciplinary Codes may also include a provision that after the expiry of the 90 days period, the suspension will automatically be lifted, and the employee must return to work or be placed on a precautionary transfer.

3.5 Precautionary suspension without pay

The dissertation submits that the state may also consider precautionary suspension without pay. The Disciplinary Codes must be amended to provide for the employer to make an application to the Chairperson to place an employee on a suspension without pay. The Disciplinary Codes may provide that this application may only be made to the Chairperson once the period prescribed for placing employees on suspension has lapsed. The dissertation submits that by vesting the power to effect suspension without pay on the Chairperson will prevent the state from abusing this power. The state and employees will still have the recourse of reviewing the decision of the Chairperson to grant or not to grant suspension without pay.

3.6 The *audi alteram partem* rule

The dissertation submits that the state must consider affording employees the right to be heard before being placed on a precautionary suspension. The *Long* case does not prevent employers from extending the right to be heard to employees if same is provided for in the employment contracts. The model used by the UK Police Department, which provides for the employee's right to make representations within 7 days after suspension, is an ideal approach. This approach will prevent scenarios where employees interfere with the investigation while being afforded an opportunity to make representations.

3.7 Legal representation in disciplinary enquiries

The dissertation submits that the applications for legal representation in disciplinary hearings should not be easily granted, and the factors outlined in the *Mahumani case* should be seriously considered by presiding officers before granting such applications.

3.8 Pre-dismissal procedure

The dissertation submits that the state must review the Disciplinary Code to align them with the purport and spirit of the LRA, which is to provide for an informal, quick, cost-effective pre-dismissal procedure. The Disciplinary Codes must also make provision for the disciplinary hearing to be conducted through written submission. Conducting a disciplinary hearing in this fashion serves the same purpose as the oral hearing, which is to afford an employee an opportunity to be heard.

4. Conclusion

The time has come for the public service to act decisively in managing the issue prolonged precautionary suspensions. This issue is costing taxpayers exorbitant amounts of money and is also affecting the already substandard service delivery.

The major step would be to go back to the bargaining table and make proposals to amend the Disciplinary Codes and consider some of the proposed changes discussed above. Thereafter, ensure that all parties involved are on board, and executes what is expected of them.

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