Suspension pending a hearing – what are the employee's rights?

Suspension pending a hearing is often imposed indiscriminately by employers on the flimsiest of grounds and, in most cases, without due process. The recent decision of the Labour Court in *Mogothle v The Premier of the Northwest Province & Another* confirms that –

- suspension pending a hearing must be on full pay (because the employee remains willing and able to work);
- the employer must have good grounds for believing, at least on a prima facie basis, that the employee has committed *serious misconduct*;
- there must be an objectively justifiable reason for denying the employee access to the premises (e.g. potential harm to the employer or others, or possible interference with investigations); and
- the employee must be given a prior opportunity to provide reasons why the suspension should not be imposed, before a final decision to suspend is taken. This need not be in the form of a formal hearing.

What are the remedies of an employee who believes that his or her suspension was not warranted? Apart from a possible claim under the LRA on the basis of unfair labour practice, the *Mogothle* decision confirms that the employee may also bring a claim based on breach of the recently recognized contractual right of 'fair treatment', which includes the employee's right to a hearing before a decision is taken that is adverse to his/her interests. (The Supreme Court of Appeal has unequivocally established a contractual right to fair dealing that binds all employers, public and private; which has both a substantive and procedural component; and which exists independently of any statutory protection against unfair dismissal and unfair labour practices. It is not for the employee to request a hearing, but for the employer to offer one).

Employers would be well advised to adapt their disciplinary policies and procedures to provide for stricter measures before this type of suspension is used. Each case also has to be considered on its own merits.

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