

BALANCING DUE PROCESS AND WORKPLACE SAFETY: AN ANALYSIS OF THE
APPROPRIATE TIMEFRAME FOR PRECAUTIONARY EMPLOYEE SUSPENSION IN
KENYA.

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Declaration

I, NDOLO SHEILA MWIKALI, do hereby declare that this is my research and that to the best of my knowledge and belief, it has not been previously, in its entirety or part, been submitted to any other university for a degree or a diploma. Other works referred to have been indicated and acknowledged as complete references.

Signed 

Date – 7th March 2024

This dissertation has been submitted for examination with my approval as university supervisor.

Signed 



Ms. Janet Njambi

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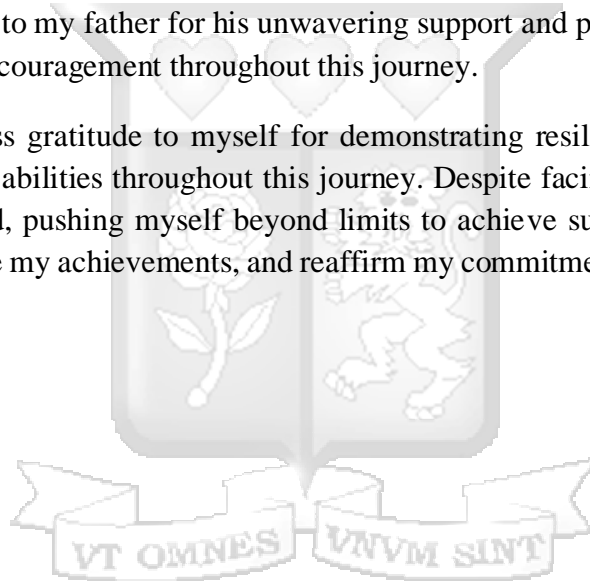
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May God bless you all.



List of Case law

Kenyan case law

1. Batholomew Wanyama v Moses Gitari & 2 others [2011] eKLR.
2. Donald C. Avude v Kenya Forest Service [2015] eKLR.
3. Mulwa Kombo v Kenya Airways Limited [2013] eKLR.
4. Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR.
5. Chrispus Kinuva v County Government of Kitui and Another [2020] eKLR.
6. Fred Obare v Kenyatta University [2017] eKLR.
7. Grace Muriithi v Kenya Literature Bureau [2012] eKLR
8. James Njuguna Muchiri v Armed Forces Canteen Organization (AFCO) [2016] eKLR
9. Cecilia Muthoni Njoroge v Nairobi Stock Exchange [2014] eKLR.
10. Josephat Ngigi Ndegwa v Equity Bank Limited [2013] eKLR:
11. Gregory Otieno Owuoth v Mumias Sugar Co. Limited [2016] eKLR
12. Joseph Ndung'u v Mastermind Tobacco (K) Ltd [2014] eKLR
13. Miguna Miguna v Permanent Secretary, Office of the Prime Minister and the Attorney General [2011] eKLR
14. Shedd Dennies Simotwo v Speaker, Narok County Assembly & Another [2015] eKLR.
15. Kenya Plantation & Agricultural Workers Union v Finalys Horticulture Kenya Ltd [2015] eKLR.
16. Edith Kathure Munyua v Moi Teaching and Referral Hospital and 3 others [2019] eKLR
17. Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR,
18. Peterson Ndung'u & 5 others v Kenya Power and Lighting Company Limited [2014] eKLR.
19. Francis Okumu Oketho v Buzeki Enterprises Limited [2019] eKLR.
20. Martin Situma Bakuli v African Express Airways [2021] eKLR.
21. Kenya Magistrates and Judges Association v Judicial Service Commission & 2 others [2020] eKLR

22. Maureen Cherono Nyigei v Chief Justice and President of the Supreme Court of Kenya & another [2021] eKLR.
23. Fredrick Saundu Amolo v Principal Namanga mixed Day Secondary School & 2 Others [2014] eKLR.
24. Joseph Mutuura Mberia & Another v Council of Jomo Kenyatta University of Agriculture and Technology [2013] eKLR.
25. Baraza v Judicial Service Commission [2012] eKLR.
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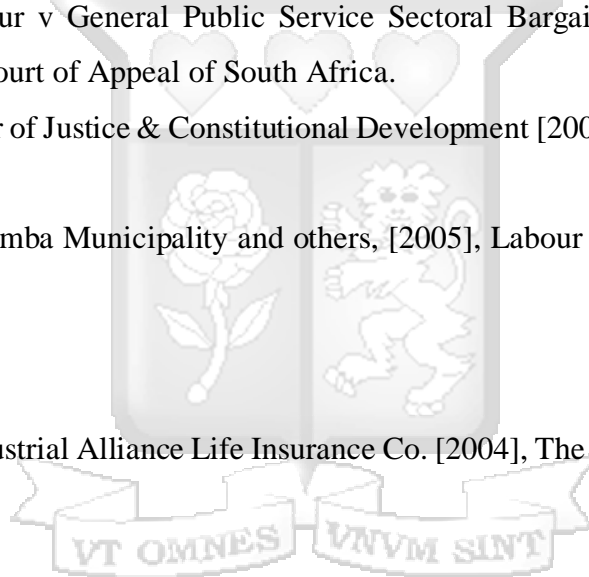
South African case law

1. Mabilo v Mpumalanga Provincial Government & Others, [1999], Labour Court of South Africa.
2. National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Ors [1996], Supreme Court of Appeal of South Africa.
3. NEHAWU v University of Cape Town [2003], The Constitutional Court of South Africa.
4. Long v South African Breweries (Pty) Ltd and Others [2018], The Constitutional Court of South Africa.
5. John Mettler v Nelson Mandela Bay Municipality Case no: P 487/2018 (Delivered on 2 July 2019) Unreported.
6. Ortileb v Khulani Springbok Patrols [1994], The Commission for Conciliation, Mediation and Arbitration.
7. Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others [2006], Labour Court of South Africa.
8. POPCRU obo Sephanda v Provincial Commissioner, Gauteng Province [2012], Labour Court of South Africa
9. Sappi Forests v CCMA [2009], Labour Court of South Africa.
10. Biyase v Sisonke District Municipality and another [2012], Labour Court of South Africa.
11. Mogothle v Premier of the Northwest Province and another [2009], Labour Court of South Africa.

12. Baloyi v Department of Communications and others [2009], Labour Court of South Africa.
13. Tsaperas v Clayville Cold Storage (Pty) Limited [2002], The Commission for Conciliation Mediation and Arbitration.
14. Miller and Others v Chairman of the Ministers Council House of Representatives and Others [1991], Labour Court of South Africa.
15. SAEWA obo Members and Aberdare Cables [2007], Metal and Engineering Industries Bargaining Council
16. Burger and SA Post Office Ltd [2008], Commission for Conciliation, Mediation and Arbitration.
17. Heyneke v Umhlatuze Municipality, [2010], Labour Court of South Africa.
18. Minister of Labour v General Public Service Sectoral Bargaining Council and Others [2010], Labour Court of Appeal of South Africa.
19. Lekabe v Minister of Justice & Constitutional Development [2009], Labour Court of South Africa.
20. Jonker v Okhahlamba Municipality and others, [2005], Labour Court of Appeal of South Africa.

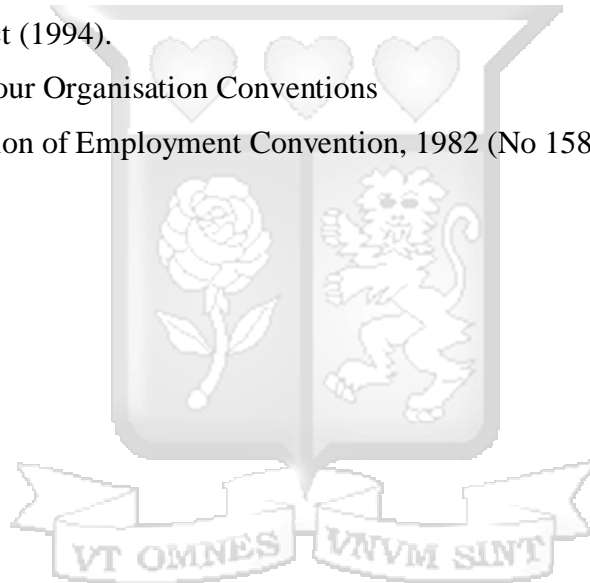
Canadian case law

1. Cabiakman v Industrial Alliance Life Insurance Co. [2004], The Supreme Court of Canada



List of Legal Instruments

1. Constitution of Kenya (2010).
2. Employment Act (2007).
3. Labour Relations Act (2007).
4. Fair Administrative Action Act (2015).
5. Anti-Corruption and Economic Crimes Act (2003).
6. Public Service Commission Act (2017).
7. Constitution of the Republic of South Africa (1996).
8. Labour Relations Act (1995).
9. Basic Conditions for Employment Act (1977). (BCEA)
10. Public Service Act (1994).
11. International Labour Organisation Conventions
 - a) Termination of Employment Convention, 1982 (No 158).



List of Abbreviations

1. ILO- International Labour Organisation
2. BCEA- Basic Conditions for Employment Act
3. CCMA- The Commission for Conciliation, Mediation and Arbitration



Abstract

This paper delves into the complexities surrounding precautionary suspensions within employment contracts, an issue posing challenges to both employers and employees in Kenya. With the absence of clear legal provisions and procedural guidelines, injustices have prevailed, leaving employees vulnerable to arbitrary treatment by employers. Issues such as the proper time frame for precautionary suspensions including procedures to be followed such as the right to be heard and remuneration form the purpose of this research.

The aim of the study is to analyse the existing legal framework as regards the administrative suspension of employees in Kenya. Additionally, a comparative analysis will be undertaken using the labour laws of South Africa to determine some of the features that Kenya can borrow from their legislation when it comes to precautionary suspensions. Employing a doctrinal research methodology, the paper draws insights from literature in both domestic and foreign jurisdictions.

The findings of the study seek to bridge the existing knowledge gap concerning precautionary suspensions in Kenyan labor laws, aiming to enhance understanding and contribute to legal refinement in this area. By advocating for the incorporation of principles of substantive and procedural fairness, the research outcomes endeavor to promote equitable treatment within the employment sphere. Moreover, the paper proposes the establishment of subsidiary legislation to provide clearer guidelines on precautionary suspensions in Kenya, ultimately striving for a more just and transparent employment landscape.

Chapter 1

1.0 Introduction

Non-commodification of labor is encapsulated as the motto of the International Labor Organization whose mandate is to establish protective standards for every working person.¹ The right of every worker to fair labor practices is entrenched in the Constitution of Kenya 2010.² The Employment Act 2007, Kenya governs the relationship between employers and employees in Kenya³ ensuring that the workers function successfully as market transactions and at the same time extending protection to them against the economic logic of commodification of labor.⁴

An ideal employment contract has an authority structure at its core whereby an employer bargains for the right to direct the workforce to perform in the most productive manner in return for the payment of wages.⁵ Part V of the Employment Act encompasses the fundamental minimum employment conditions, including provisions for annual leave, the entitlement to at least one rest day, and the affordable housing levy, to which every employee is entitled.⁶ Consequently, it also reserves the right of the employer in matters such as regulation of the working hours of their employees,⁷ recruitment, setting up of policies and procedures to be followed in the working place including the disciplinary rules that will apply to the employees.⁸ Employees also possess both rights and duties regarding their employment. During the performance of their work, they are required to meet the employer's expectations failure to which they may face disciplinary

¹ ILO www.ilo.org/global/about-the-ilo/lang-en/index.htm#:~:text=The%20main%20aims%20of%20the,dialogue%20on%20work-related%20issues .

² Article 41, Constitution of Kenya (2010).

³ Preamble, Employment Act (2012). '...an act of Parliament to declare and define the fundamental rights of employees, to provide basic conditions of employment for employees...'

Section 3, Employment Act (2012). 'The act applies to all employees employed by any employer under a contract of service.'

⁴ Collins H, 'Labor is not a commodity' in Hugh C (ed), 2nd ed, Employment Law, Oxford University Press, 2010, 3.

⁵ Collins H, 'Labor is not a commodity', 10.

⁶ Part V, Employment Act (2012).

⁷ Section 27(1), Employment Act (2012).

⁸ Section 12, Employment Act (2012).

procedures set out by the employer resulting in either some wage deduction,⁹ suspension from the workplace¹⁰, or even termination of employment.¹¹

Suspension in employment is the temporary removal from office or function, for a period determined by the employer.¹² Grogan defines it as an instance in which an employer declines to accept an employee's services but does not abrogate the contract.¹³ There exist two types of suspension: disciplinary suspension also referred to as punitive, and administrative also known as precautionary suspension.¹⁴ A disciplinary suspension is a punitive measure for a reproachable act made during work while administrative suspension is a preventive measure that can be taken when the interests of the employer's business require it, even in the absence of an act made by the employee while working.¹⁵

Precautionary suspension is applied when an employer suspects an employee of violating the company's rules or employment terms.¹⁶ This measure is taken due to the nature of the alleged misconduct, the absence of conclusive evidence, and the concern that the employee may interfere with the investigation.¹⁷ During precautionary suspension, the employee is fully paid, including benefits, while the investigation is ongoing.¹⁸ Punitive suspension is a disciplinary measure enacted when an employee is found guilty of misconduct or violating employment terms. It serves as a punishment following a disciplinary hearing, functioning as an alternative to dismissal.¹⁹ During punitive suspension, the employee is not entitled to pay or benefits.²⁰ Employers possess the prerogative to deal with the discipline of their employees, but such prerogative can be curtailed where there is apparent illegality or violation of the constitution.²¹

⁹ Section 19(1, b), Employment Act (2012).

¹⁰ Batholomew Wanyama v Moses Gitari & 2 others [2011] eKLR '...suspension as an interim measure and not an end as a termination of employment...'

¹¹ Section 44(4), Employment Act (2012).

¹² Merriam Webster Dictionary, 4th ed.

¹³ Grogan J, 'Dismissal, Discrimination and Unfair Labour Practices, 2nd ed, Cape Town, Juta, 2007, 61.

¹⁴ Cabiakman v Industrial Alliance Life Insurance Co. (2004), The Supreme Court of Canada.

¹⁵ Donald C. Avude v Kenya Forest Service [2015] eKLR.

¹⁶ <https://wo.co.za/2022/02/19/punitive-and-precautionary-suspension/> .

¹⁷ Cabiakman v Industrial Alliance Life Insurance Co. (2004), The Supreme Court of Canada.

¹⁸ <https://journals.co.za/doi/pdf/10.10520/EJC122554> 3.

¹⁹ <https://www.labourprotect.co.za/Suspension.htm> .

²⁰ <https://wo.co.za/2022/02/19/punitive-and-precautionary-suspension/> .

²¹ Mulwa Kombo v Kenya Airways Limited [2013] eKLR.

Issues arising out of suspension emanate from suspension pending a disciplinary hearing in the administrative type²² whereby it is common for employers to debar their employees from employment and terminate their employment unfairly²³ or even send them away for inordinate periods.²⁴ This results in employees becoming victims of unfair suspensions.²⁵ The courts have different opinions on the payment of employees during suspension whereby some are of the view that the employee ought to be paid,²⁶ whereas some hold that they should not be paid for the reason that they do not offer any services to their employers during that period thus entitling them to remuneration would be detrimental to the employer.²⁷ Suspension is always as a rule on full pay unless the employee agrees to suspension without pay.²⁸ In the persuasive South Africa case of *Sappi Forests (Pty) Ltd v CCMA & others*, Judge Pillay stated that “the position at common law has always been that an employer who suspends an employee without pay commits a breach of the contract of employment. An employer may suspend an employee without pay if the employee so agrees, or legislation or a collective agreement authorizes the suspension.”²⁹

²² Cheadle H, ‘Regulated Flexibility: Revisiting the LRA and BCEA’ Development Policy Research Unit, Policy Brief series, 2007, 25.

http://www.dpru.uct.ac.za/search/?cx=002153019866612815917%3Aypcbmithgw&cof=FORID%3A11&query=07%2Fp12&op=Search&form_build_id=form-Om1x4hu4QI8e-3OmqCAj-vRcmcfSA5YQ4ecu3tr_BNc&form_id=google_cse_results_searchbox_form, 6.

²³ Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR.

²⁴ Chrispus Kinuva v County Government of Kitui and Another (2020) eKLR:

There is also the challenge of arbitrary decisions that are given by employers as it was in the case of James Mugeru v Public Service Commission of Kenya [2014] eKLR.

²⁵ Donald C. Avude v Kenya Forest Service [2015] eKLR.

²⁶ Fred Obare v Kenyatta University [2017] eKLR:

Transport Workers Union vs African Safari Diani Adventure [2013] eKLR it was stated; thus, “Unless there is a contractual or statutory basis for withholding salary during a period of suspension it is not open to an employer to suspend an employee without pay. The legal obligation at common law on an employer is to pay wages not to provide work. Unless it is varied by statute or contract the obligation continues even during suspension.”

²⁷ Grace Muriithi v Kenya Literature Bureau [2012] eKLR:

The court asserted that when an employee faces suspension, there is a reasonable expectation that they will receive full payment for their services if they are ultimately found not guilty after the disciplinary process. Conversely, if the employee is proven to have committed the alleged misconduct and fails to exonerate themselves by the end of the disciplinary proceedings, the court believes they should not expect to be paid for the suspension period. Therefore, the court emphasized that whether an employee is compensated during suspension depended on the disciplinary outcome. Denying payment to an innocent employee during suspension is deemed an unfair labor practice, just as requiring an employer to pay a culpable employee during suspension would also be considered unfair.

²⁸ James Njuguna Muchiri v Armed Forces Canteen Organization (AFCO) [2016] eKLR.

²⁹ *Sappi Forests (Pty) Ltd v CCMA & others* [2008], Labour Appeal Court of South Africa.

In formulating the statement of disciplinary rules of the organization,³⁰the employer has the discretion to determine the instances under which an employee can be sent for suspension and the period within which they should report back to work.³¹ The courts in deciding cases on indeterminate periods of suspension pending disciplinary hearing have held that staff regulations should place reasonable time limits within which disciplinary processes should be concluded.³² However, there seems not to be a settled opinion on the maximum time limit that employees should be sent on suspension as some judges deem it lawful to send employees for suspension for more than a year³³ while some are of the view that indefinite suspension amounts to constructive dismissal.³⁴

1.2 Statement of the problem

Disciplinary action in the workplace is regarded as sine qua non for the orderly conduct of employees to enhance their productivity.³⁵ Suspension as a precautionary or disciplinary action is a practice that has been adopted by most if not all workplaces. The Kenya Employment Act grants employers the right to formulate disciplinary rules that are to be followed in the workplace.³⁶ It is noted, however, that the law does not provide a clear framework as to how suspensions are to be conducted. During suspensions pending a disciplinary hearing, employers frequently suspend their employees for extended periods of time, and most often, without remuneration. It is in light of these unfair practices that occur during suspension that the right to fair labor practices enshrined in both the Constitution of Kenya³⁷ and as one of the guiding principles of the International Labor Organization is not achieved. This study aims to investigate whether it is necessary to establish a

³⁰ Sec 12, Employment Act (2012).

³¹ Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR ‘...suspension is a disciplinary process initiated by an employer thus has the ability to call if off...’

³² Cecilia Muthoni Njoroge v Nairobi Stock Exchange [2014] eKLR.

³³ Josephat Ngigi Ndegwa v Equity Bank Limited [2013] eKLR:

In Gregory Otieno Owuoth v Mumias Sugar Co. Limited [2016] eKLR, the claimant was suspended for a period of six months despite the provisions of the Staff Manual stating that it should not be longer than 21 days.

³⁴ Joseph Ndung’u v Mastermind Tobacco (K) Ltd [2014] eKLR: ‘...which is an unfair dismissal from the workplace...’

³⁵ Kaul B, ‘Disciplinary action and powers of Industrial Adjudicator: A critique of judicial intervention’, Journal of the Indian Law Institute, (2007), 309.

<https://www.jstor.org/stable/43952119>.

³⁶ Section 12, Employment Act (2012).

³⁷ Article 41, Constitution of Kenya (2010): ILO [www.ilo.org/global/about-the-ilo/lang--en/index.htm#:~:text=The%20main%20aims%20of%20the,dialogue%20on%20work-related%20issues,j](http://www.ilo.org/global/about-the-ilo/lang-en/index.htm#:~:text=The%20main%20aims%20of%20the,dialogue%20on%20work-related%20issues,j)

specific time frame for employee suspensions and whether employees should be compensated during this period of suspension pending a disciplinary inquiry in Kenya.

1.3 Research objectives

1. To analyze the concept of fairness in treatment of employees and the fundamental principles that govern the suspension of employees.
2. To analyze the Regulatory framework governing suspension in Kenya and the inadequacies it might have.
3. To analyze how the existing laws can be expanded to endorse a clear procedure and time frame to be followed during precautionary suspensions through a comparative study with South Africa labour laws.

1.4 Research questions

1.
 - a) What does the term ‘fairness to a worker’ require?
 - b) What are the general principles governing the suspension of employees?
2.
 - a) What existing framework does Kenyan employment law provide with regard to the suspension of employees?
 - b) What deficiencies does the current legal framework in 2(a) have in terms of employee suspension?
3. What lessons can be drawn from South Africa regarding the ideal time duration and procedure that would bring about certainty and clarity in employee suspension.

1.5 Hypothesis

Kenya’s labour laws have proven to be quite inadequate in ensuring protection of workers from unfair labour practices especially when it comes to precautionary suspension. Thus, a revision of the Employment Act and Labor Relations Act in Kenya is necessary to strike a balanced approach that safeguards the rights of employees while also addressing the interests of employers.

1.6 Justification

In disciplining their employees, employers tend to suspend employees pending disciplinary hearings for inordinate periods,³⁸ and without following due procedure, leading to unfairness. Due to this, some employees leave their jobs early, which may constitute constructive dismissal. Suspensions pending a disciplinary inquiry are prone to arbitrary decisions against employees and protracted suspension periods. Suspensions tend to jeopardize an employee's reputation including interfering with their right to work.³⁹ The ambiguity in the law relating to suspension has also contributed to the adverse effects that employees face when sent for protracted periods of suspension without following due procedure. The uniqueness of this treatise will be examining the appropriate time frame upon which employees should be sent on suspension pending a disciplinary hearing. The address of this gap will be of importance to adjudicators who are often faced with questions of protracted holding operations, and it will help them interpret the law on matters of suspension in relation to labor law. Furthermore, it will be crucial for lawmakers in making amendments on the laws relating to suspension as well as employers in reformulating their workplace policies regarding suspension to conform with these minimum standards of treatment suggested by the treatise. This paper will also be of help to researchers working in the field of employment rights.

1.7 Theoretical framework: Balancing of Interests Theory

All employers and employees have fundamental interests that they seek to pursue through the employment relationship; all forms of this relationship are mediated by labor markets and states; and each instance of this relationship is governed by some form of contract.⁴⁰ Employers seek to maximize profits⁴¹ while employees' expectations are to earn a living through the provision of their services; trading their labor for a pay.⁴² Owing to this contractual form of relationship whereby both parties have different interests, Roscoe Pound's theory of Balancing interests will

³⁸ In *Miguna Miguna v Permanent Secretary, Office of the Prime Minister and the Attorney General* [2011] eKLR, the court held that an employer has the right to commence the disciplinary action while the employee has a duty to justify why they should be retained.

³⁹ Cheadle H, 'Regulated Flexibility', 25.

⁴⁰ Budd J, and Bhave D, 'The Sage Handbook of Human Resource Management, 'The Employment Relationship', 51.

⁴¹ Budd J, and Bhave D, 'The Employment Relationship', 53.

⁴² Collins H, 'Labor is not a commodity', 3.

form the underpinning of this treatise to elaborate on how legislators and courts⁴³ can implore it to curtail the unfair practices that employees go through while on inordinate suspensions pending an inquiry. The theory received its fullest explication from Pound whereby he set forth his view that the task of the legal order was the identification and weighing of interests⁴⁴ whereby the task requires consideration of all relevant interests whether traceable to the constitution or to the society at large.⁴⁵ This adopts the view that law is a means to an end and to attain those ends, it needs to implore the reasons for desiring that end⁴⁶ therefore it requires a textual scrutiny of the social interests at stake in a controversy of interests.⁴⁷

Balancing as a metaphor refers to theories of constitutional interpretations that are based on the identification, valuation, and comparison of competing interests.⁴⁸ A conflict of interest occurs when individuals or groups make claims that contradict one another because it is rare for the claims to be satisfied at the same time.⁴⁹ The notion of balancing interests/rights takes two distinct forms. First is the notion that one interest outweighs the other, where courts place the interests on a set of scales and make a ruling on them similar to the scales tip.⁵⁰ The second one is that of striking a balance between the conflicting interests where the image is one of balanced scales with constitutional doctrines calibrated according to the relative weights of the interests.⁵¹ Benditt and

⁴³ Sweet A, 'The Judicial Construction of Europe, 1st ed, The European Court and integration, OUP, 2004, 11. The author posits that the task of balancing rights is shared by the courts and the legislature. The legislative power determines which right should prevail in the specific cases where the norm is applicable thus the choices made by legislators thus constitute an 'in advance' balance that is generally applicable to all possible lawsuits in which the norm will be applied by courts.

⁴⁴ Pound R, 'A Survey of Social Interests', *Harvard Law Review*, 57(1), 14.
<https://doi.org/10.2307/1334970>

⁴⁵ Aleinikoff T, 'Constitutional Law in the Age of Balancing', 977.

⁴⁶ Schwarz J, 'Oliver Wendell Holmes's "The Path of the Law": Conflicting Views of the Legal World', *The American Journal of Legal History*, 29(3), 1895, 242.

⁴⁷ Aleinikoff T, 'Constitutional Law in the Age of Balancing', 958.

⁴⁸ Aleinikoff T, 'Constitutional Law in the Age of Balancing', *The Yale Law Journal*, 96(5), 945.
<https://doi.org/10.2307/796529>.

⁴⁹ Benditt T, 'Law and the Balancing of interests', *Social Theory and Practice*, 3(3), 1975, 325.
<http://www.jstor.org/stable/23557739>:

Aubert V, 'Competition and Dissensus: Two Types of Conflict and of Conflict Resolution', *Journal of Conflict Resolution* 7, 1963, 27. The author implies that conflicts of interest arise in concrete cases, where two (or more) parties are pursuing incompatible ends, one of which is in the interest of one but not the other, and the other of which is in the interest of the second but not the first.

⁵⁰ Aleinikoff T, 'Constitutional Law in the Age of Balancing', 946.

⁵¹ Aleinikoff T, 'Constitutional Law in the Age of Balancing', 946. An overriding of interests does not occur since each survives and is accorded to its due.

Giovanella also hold the same view of the second notion of balancing where they state that both conflicting rights are weighed and the solution adopted in that situation allows one of the rights to be applied with the least sacrifice to the other.⁵²

Definitional balancing also referred to as rule-based balancing⁵³ which is this treatise proposes courts to adopt, implies a more general and universal balancing where courts identify a specific rule that could also be applied to future cases which involve a balancing of the same rights.⁵⁴ Volokh further defines it as a categorical form of balancing⁵⁵ whereby a standard rule is formed by the courts to be applied in cases of the same type; the exceptions and idiosyncrasies that characterize specific cases do not influence the balancing.⁵⁶ It is different from ad hoc balancing also referred to as result-based balancing⁵⁷ which refers to situations in which balancing is attained on a case-by-case basis that results in a decision that is applicable to the specific case in issue. The type of balancing proposed by this treatise will be definitional balancing since its rules are both explicit and stable, occasioning certainty to the law by establishing a substantive constitutional principle of general application.⁵⁸

Courts in Kenya need to implore the use of definitional balancing of interests to set up a standard rule and procedure that can be followed for there to be certainty in the law. By allowing courts and the legislature to set up rules that can be applied in future cases, the definitional balancing allows the rule to be applied notwithstanding subsequent enactment of a new legislation that in some different manner attempts to protect an interest in the promotion of fair labor practices.⁵⁹ Definitional balancing further prevents judges from being swayed by their judgments in the balancing of interests.⁶⁰ Therefore, under the definitional balancing of interests, in relation to employment laws, especially as regards the suspension of workers, the state should work on a more

⁵² Benditt T, 'Law and the Balancing of interests', 329: Giovanella F, 'Conflicting rights in balance: The thorny issue of balancing or rights', In Copyright and Information Privacy, EEP, 2017, 11-
https://www.elgaronline.com/view/9781785369353/08_chapter1.xht on 1 March 2023.

⁵³ Aleinikoff T, 'Constitutional Law in the Age of Balancing', 598.

⁵⁴ Nimmer M, 'The Right to Speak from Times to Time', 944.

⁵⁵ Volokh E, 'Crime-Facilitating Speech', Stanford Law Review, 57, 2004, 1095.

⁵⁶ Giovanella F, 'The thorny issue of balancing or rights', 12. Applies to all the cases under scrutiny.

⁵⁷ Aleinikoff T, 'Constitutional Law in the Age of Balancing', 597.

⁵⁸ Aleinikoff T, 'Constitutional Law in the Age of Balancing', 948.

⁵⁹ Nimmer M, 'The Right to Speak from Times to Time', 945.

⁶⁰ Nimmer M, 'The Right to Speak from Times to Time', 940.

efficient framework that sets out the procedure to be followed and stipulates a definite time in the interest of the employer to conduct investigations and that of the employee to work. This will be an effort to get rid of the uncertainties that characterize that sector and also ensure that both the rights of the employees and the employer are upheld.

1.8 Literature review

There has been an ongoing discussion by various scholars in Kenya regarding the need for a regulatory framework to govern suspension in the workplace to aid in the resolution of inordinate suspension, but no coherent position has been laid forth. Khabongo opines that employers need to afford employees both procedural and substantive fairness before sending them on suspension.⁶¹ Similarly, Odongo postulates in his article that suspensions ought to be communicated to employees in writing and should not continue for longer than necessary to investigate the allegations.⁶² According to Owele, in handling disciplinary issues in the Kenyan civil service, the civil servants should be educated on the procedure to be followed including the allocation of clear time frames to the steps involved to enhance the speedy resolution of the process. Further, she adds that the employees be allowed to give their defense before the advisory committee.⁶³ Oketch further discusses indefinite suspension without pay as a means of constructive dismissal.⁶⁴

⁶¹ Khabongo B, 'Technicalities of employment suspension in Kenya: A review of the current legal framework' Unpublished LLB Thesis, Strathmore University, Nairobi, 2021, 30:

He lists down the procedure to be followed by an employer in a punitive suspension including issuing of an oral warning to the employee followed by a written warning, after which where no change is noted, a show-cause letter may be written. He further argues that after presenting the show cause letter to the employee, the employer may take disciplinary action against the employee which is to be initiated by a suspension that has a defined period.

⁶² Odongo G, 'Basic Tips on Use of Employee Suspension as Part of Disciplinary Process in Kenya, HG.Org Legal Resources, <https://www.hg.org/legal-articles/basic-tips-on-use-of-employee-suspension-as-part-of-disciplinary-process-in-kenya-53614> on 11 January 2023.

⁶³ Owele M, 'Employees' Perception of Disciplinary Procedures in the Kenyan Civil Service: A Study of Selected Ministries' Unpublished MA in Sociology Thesis, University of Nairobi, Nairobi, 2007, 71.

⁶⁴ Oketch D, 'Constructive Dismissal: A Critical Analysis of its Legal Perspective in Kenya, 2014, https://www.academia.edu/8498556/Constructive_Dismissal_A_Critical_Analysis_of_its_legal_Perspective_in_kenya_14.

He discusses the case of *Benuel Mariera v Anwad Enterprises Ltd* [2014] eKLR where the claimant was given a suspension letter and instructed to surrender the company property including the company car and telephone line. As he never received any payment, nor was he informed about his status and the court held that indefinite suspension of the claimant without pay or communication amounted to constructive dismissal.

1.8.1 On the right to fair labor practices.

An employment contract is regarded as the fulcrum upon which the employer-employee relationship is established, its existence creates rights and liabilities in favor of the parties to it.⁶⁵ Some of the rights are inherent as others are implied through contractual undertakings which provides basis for their legal protection.⁶⁶ The right to fair labor practices has been encapsulated in a majority of constitutions whereby states undertake to form laws that govern the employment contract and is an unusual constitutional guarantee.⁶⁷ The right to fair labor practices was unknown at common law because the contract of employment was based on contractual freedom and the employer could pressure an employee into agreeing to almost anything.⁶⁸

According to Grogan,⁶⁹ the general right to fair labor practices has significant implications on how civil courts understand the rights of parties to employment contracts. Conradie opines that to determine the exact meaning and scope of the right to fair labor practices, not only should the right itself be analyzed but also the historical development that led to the origin of the right.⁷⁰ Vettori⁷¹ holds the position that the right is capable of precise definition while Kasuso⁷² argues that it cannot be defined.

With regards to the persons protected under this right, Denevish is of the opinion that juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person.⁷³ According to Chirambwe, the reality of a legal person's connection with an employer ought to be taken into consideration since in as much as a

⁶⁵Agomo C, 'Nigerian employment and labor relations law and practice', Concept Publications Limited, Lagos, 2011, 68.

⁶⁶ Agomo C, 'Nigerian employment and labor relations law and practice', 68. Whereby an employee is considered to have the inherent right to resign from employment whether provided for in the contract or not.

⁶⁷ Nierek-Van A, Christianson M, McGregor M, Smit N, and Van-Eck B, 'International Labor Standards, Lexis Nexis, Law @ Work, 2012, 38.

⁶⁸ Brassey M, Cameron E, Cheadle H, and Oliver M, 'The New Labor Law: Strikes, dismissals and the unfair labor practice in South African Law', 1987, 5. Common law did not confer protection to an employee against arbitrariness.

⁶⁹ Grogan J, 'Parties to the Employment Relationship' 13th ed, Workplace Law, Juta and Co, South Africa, 2013, 13.

⁷⁰ Conradie M, 'A critical Analysis of the right to fair labor practices', Unpublished LLM thesis, University of Free State, Bloemfontein, 2013, 2.

⁷¹ Vettori M, 'Alternative ways to regulate the employment relationship in the changing world of work', Unpublished LLD thesis, University of Pretoria, Pretoria, 2006, 297.

⁷² Kasuso G, 'Transfer of undertaking under section 16 of the Zimbabwean Labor Act, 1, Midlands State University Law Review, 2014, 22.

⁷³ Denevish G, 'A commentary on the South African Bill of Rights', Butterworth, 1999, 22-23.

contract is signed between a legal body and an employer, the phenomenon of self-employment comes into play because it is actually the person providing the services thus needs to be protected.⁷⁴ Cheadle and Davis⁷⁵ are of the view that employers are also entitled to the fair right to labor practices considering that employment laws and labor relations bring about the advancement of social justice and democracy in the workplace. Chirambwe⁷⁶ in his article cites a judgment by Smalberger JA in the case of *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Ors* where he states that in order to make a fair evaluation, it is necessary to consider both the position and interests of the employer as well as those of the employees.⁷⁷

1.8.2 On unfair practices during the suspension of a worker

Suspension as a state of affairs in the workplace is effectuated when there is a contract of employment in force, but no work is done in pursuant of it nor remuneration paid.⁷⁸ Unfairness of an act of suspension occurs where both procedural and substantive fairness have not been followed.⁷⁹ It is held that at common law, an employer may only suspend an employee without pay if a contract to that effect was signed at the time the employment contract was signed if a collective agreement or regulation provides for such a penalty, or if the employee faces dismissal and agrees to suspension without pay as a penalty.⁸⁰ Brassey opines that suspension without pay is a breach of contract; however, in the absence of a contrary agreement, payment of remuneration during an employee's suspension satisfies the employer's contractual obligations, unless there is a right to work in a given instance an example being where an employee is paid by results on commission.⁸¹ Both Khabongo and Grogan opine that the labor statutes regulate the instances upon

⁷⁴ Chirambwe J, 'The Constitutional Guarantee to Fair Labor Practices: The Recommendations to inform policy', Unpublished LLB thesis, 2006 ,12.

⁷⁵ Cheadle H, and Davis D, 'South African Constitutional Law: The Bill of Rights, Labour Relations, Lexis Nexis, 2005,

⁷⁶ Chirambwe J, 'The Constitutional Guarantee to Fair Labor Practices', 12.

⁷⁷ *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Ors* [1996], Supreme Court of Appeal of South Africa.

⁷⁸ Freedland M, 'The Contract of Employment', Oxford, Clarendon Press, 1976, 77.

⁷⁹ Khabongo B, 'Technicalities of employment suspension in Kenya', 29.

⁸⁰ Grogan J, 'Dismissal, Discrimination, and Unfair Labour Practices', 62. When an employee agrees to suspension without pay as a penalty, the employer has to prove that the employee feely and without duress agreed to the variation of the original contract.

⁸¹ Brassey M, 'The contractual right to work', *Industrial Law Journal*, 3(Part 4), 1982, 253. The right or obligation of an employee to work depends on the terms of the agreement, 255.

which employees' salaries can be deducted and suspension is not provided for thus unilateral deductions from employees' remuneration are prohibited.⁸²

Regarding the different types of suspension, and their ability to occasion unfair labor practices to a worker, Du Toit is of the opinion that both categories may establish an unfair practice.⁸³ The distinction between both is considered not to be of much value since both have the same effects such as stoppage or reduction of benefits, anxiety of an employee, disruption of an employee's life, lack of a hearing being held, and an unreasonably lengthy holding suspension.⁸⁴ The procedural fairness of a suspension includes the notice of the intention to suspend and issuing of warnings before suspending an employee, providing the employee with an opportunity to respond, and a speedy resolution of the dispute and duration of the suspension. Substantive fairness entails providing the employee with reasons for suspension and the provision of benefits.⁸⁵

As Cornadie notes, when it comes to giving the notice to suspend, employers often fail to give the workers notice of the intended suspension.⁸⁶ Furthermore, some of the notices given fail to indicate the procedural steps that the employer intends to take as well as a lack of details of the proposed suspension.⁸⁷ On the issuing of warnings before suspending an employee, Khabongo stipulates that the first process should be the issue of an oral warning, which is then followed by a written warning, and after the written warning whereby no change is detected, a show-cause letter is written to the employee. Where the show cause letter has been written and replied to by the employee, the employer may stop there or take disciplinary action against the employee.⁸⁸ The right to be heard, the audi alteram rule, emanates from principles of natural justice whereby it is considered advisable to have a hearing or afford an employee an opportunity to respond if the

⁸² Khabongo B, 'Technicalities of employment suspension in Kenya', 16:

Grogan J, 'Dismissal, Discrimination and Unfair Labour Practices', 62.

⁸³ Toit D, Conradie B, Giles Graham, Godfrey S, Cooper C and Cohen T, *Labour Relations Law: A Comprehensive Guide*, 6th ed, Lexis Nexis, South Africa, 2006, 470.

⁸⁴ Conradie M and Deacon J, 'To suspend or not to suspend', *Journal for Juridical Science*, 34(1), 2009, 44.
<https://journals.ufs.ac.za/index.php/jjs/article/view/2988/2895> on 1 March 2023.

⁸⁵ Conradie M and Deacon J, 'To suspend or not to suspend', 45.

⁸⁶ Conradie M and Deacon J, 'To suspend or not to suspend', 46.

⁸⁷ Conradie M and Deacon J, 'To suspend or not to suspend', 46. Failure to give details or particulars related to the reason for suspension renders the employee unable to respond meaningfully to the allegations against them: In *Gregory Otieno Owouth v Mumias Sugar Co. Limited* [2016] eKLR, the court held that it is not necessary for an employer to communicate the reasons for suspension to an employee.

⁸⁸ Khabongo B, 'Technicalities of employment suspension in Kenya,' 30.

employee is suspended as a punitive measure.⁸⁹ Ngobeni and Odeku however hold a different view and state that a preventative suspension may also be unfair where there is a right to be heard prior to the suspension but that is not observed by the employer.⁹⁰ The latter view is also supported by Freedland as he states that in instances where an employee is working for a public authority and is suspended pending a disciplinary inquiry, the employee must be given the opportunity to be heard as per the requirements of administrative law; abeyance of which will be tantamount to unfair labor practice.⁹¹

On the substantive fairness of an employment contract, Eyondi and Ochu hold that in as much as it is trite law that in a master-servant employment relationship, an employer can terminate the employment of an employee for any reason whether good or bad or no reason at all, in the case of a suspension, an employer cannot suspend an employee for no reason as this would amount to an unfair labor practice.⁹² In the case of an administrative suspension, the mere fact that an investigation will be conducted as regards an employee's misconduct is not sufficient reason for the suspension of the employee.⁹³ Miller is of the view that the employer must be able to present a prima facie case that the employee had committed some kind of misconduct and that there is a valid reason to disallow the employee at the workplace for an administrative suspension to be ruled fair.⁹⁴ In addition to that, Grogan states that an unfair labor practice occurs where an administrative suspension is used to punish the employee rather than to carry out the investigations in this case being converted to a punitive suspension yet it was administrative.⁹⁵ As regards punitive suspensions, Du Toit submits that it will be permitted in circumstances similar to those where

⁸⁹ Cornadie M and Deacon J, 'To suspend or not to suspend', 48. They opine that when an employee is suspended pending a disciplinary hearing, it is not necessary for a hearing to be held since a hearing is not always a question of fact with preventative suspension.

⁹⁰ Ngobeni J, and Odeku K, 'Precautionary Suspension in the Workplace and the Employees' Right to be Heard', *Mediterranean Journal of Social Sciences*, 4, 2013, 799.

⁹¹ Freedland M, 'The Contract of Employment,' 77.

⁹² Eyongdi D, and Ochu G 'The Marsh of Employee suspension and the contract of employment in Nigeria: Matters Arising' 15(1), *Unizik Law Journal*, 2019, 7.

⁹³ Cornadie M and Deacon J, 'To suspend or not to suspend', 46. The employer needs to adduce evidence to the fact that the employee's presence in the workplace may prejudice the investigations.

⁹⁴ Gregor C, 'Suspension in the Disciplinary Process' Published LLM thesis, Nelson Mandela Metropolitan University, Port Elizabeth, 2013, 14.

⁹⁵ Grogan J, 'Dismissal, Discrimination, and Unfair Labor Practices', 63:

This goes against the principle of Innocence till proven guilty as it imposes punishment before investigations have been carried out and concluded.

dismissal would have been justified.⁹⁶ On the issue of pay, Conradie and Deacon opine that suspension without pay if it is not prohibited by statute or the contract of employment itself, is recommended as an alternative sanction to dismissal.⁹⁷

1.8.3 Contribution

This study agrees with the trajectory of the scholars⁹⁸ with regard to the practice of fair labor practices in the disciplinary action of employees by employers as regards suspension. This treatise also proposes the establishment of a legal mandate requiring employers to conduct and conclude disciplinary hearings within a standardized period of sixty days as with regards to suspensions pending a disciplinary hearing.⁹⁹ This initiative aims to expedite the disciplinary process¹⁰⁰ as well as counterbalance the emoluments that employers should pay employees sent on such suspensions.¹⁰¹ Additionally, it will provide detailed insights into the recommended procedure for employers to follow when placing an employee on administrative suspension, encompassing considerations for compensating employees during such suspensions.

1.9 Methodology

This study is qualitative in nature, relying on evidence gathered from secondary sources such as books, articles, and reports. A few primary sources are used, including the Constitution of Kenya 2010, the Employment Act 2007, the Labor Relations Act 2007, and case laws. In general, the study takes a deductive approach, with the first two chapters each establishing a premise from

⁹⁶ Toit D et al, Labour Relations Law: A comprehensive guide, 499:

Punitive suspensions can be used as substitutes to dismissal based on misconduct.

⁹⁷ Conradie M and Deacon J, 'To suspend or not to suspend', 47.

⁹⁸ Conradie M and Deacon J, 'To suspend or not to suspend', 38. They argue that procedural fairness is a critical aspect to consider when it comes to the suspension of employees:

Grogan J, 'Dismissal, Discrimination, and Unfair Labor Practices', 23:

Gregor C, 'Suspension in the Disciplinary Process' Unpublished LLM thesis, Nelson Mandela Metropolitan University, Port Elizabeth, 2013, 64.

⁹⁹ Makhuzeni C, Barrhuizen N and Maubane J, 'Perceived effects of Precautionary Suspensions on Service Delivery in a South African Provincial Government Department', Journal of Public Administration, 2015, 650:

The rationale behind the sixty days period is in line with the Department of Public Service and Administration's aim to expedite the investigation process and afford the employees the opportunity to report back to work and to minimise the exceeding expenditure that the various departments pay to employees who are on administrative suspensions.

¹⁰⁰ To realise the employees' right to work and fair labour practice.

¹⁰¹ This is implemented to strike a balance between the expenses borne by the employer in compensating suspended employees who, during that time, are not actively contributing their services to the employer, thereby promoting fairness in the employer's practices.

which the main claim will be derived. The first chapter demonstrates the meaning of fairness to a worker while the second one establishes the existing framework governing suspension of employees in Kenya and the last chapter argues the main claim that the treatise suggests.

The study incorporates a philosophical approach where it relies on the work of philosophers through their articles and books to discuss the principles of fairness to a worker. It also encompasses a doctrinal approach where reference will be made to case laws, the Employment Act, the Labor Relations Act, and international resolutions to determine the aspects that govern suspension of employees in the workplace.

The study thereafter discusses the legal framework governing the suspension of workers in Kenya and point out the deficiencies that it possesses. This mainly entails a doctrinal analysis of court decisions on the matter of inordinate suspensions as well as referring to books and articles on the same. The analysis establishes a failure of a clear procedure and set a time period for holding suspensions in Kenya. The analysis is used to make a prescriptive claim that Kenya's regulatory framework on suspensions is still vague and thus prone to occasion unfairness to workers leading to violation of the rights enshrined in the Constitution as well as its international obligations.

Lastly, to establish optimal international standards for defining the duration and process to be implemented in Kenya's labor laws, with the aim of enhancing transparency and certainty in suspension matters, a comparative study is undertaken. This study uses South Africa as a reference country, where a doctrinal analysis of its laws and case laws regarding suspension are considered. This analysis is undertaken to assess whether the time frames for suspension pending a disciplinary hearing in South Africa could be incorporated into the suspension framework in Kenya. Firstly, both nations have legal systems deeply entrenched in British common law traditions.¹⁰² Secondly, they share the commonality of being classified as developing countries¹⁰³, which offers a comparable context for examining their legal frameworks. Thirdly, both countries' constitutions

¹⁰² Meredith M, *The State of Africa: A History of 50 Years of Independence*, Jonathan Ball Publishers, Cape Town, 2006, 92; citing Kenyatta, the former President of Kenya, as saying in this regard: "We do not forget the aid and direction we have received over the years from persons of British stock... Our legal system, governance system, and many other facets of our daily lives are based on British ideals and justice." Zeffertt T and Paizes P, *The South African Law of Evidence*, 2 ed, Lexis Nexis, South Africa, 2007, 10-12 in reference to the South African context.

¹⁰³ <https://www.nacosti.go.ke/2022/02/25/kenya-among-top-5-african-countries-with-the-most-developed-startupsecosystems> .

encourage a comparative analysis with foreign legal instruments when interpreting the provisions contained within their respective constitutions.¹⁰⁴ Fourth, both have recently adopted progressive constitutions featuring enforceable Bills of Rights, with the primary objectives of safeguarding fundamental human rights, advancing socio-economic rights, and upholding the principles of the rule of law.¹⁰⁵ Finally, concerning the framework of their employment laws, both countries incorporate internal disciplinary policies and measures established by employers, while also emphasizing the importance of fairness in implementing these disciplinary measures.¹⁰⁶

1.10 Chapter Breakdown

Chapter 1: Introduction to the study: It describes the research objectives, conceptual framework, and study justification, providing background as well as a time of reference that serves as the groundwork for the subsequent chapters.

Chapter 2: An analysis of the general principles governing the suspension of employees: It evaluates the aspect of fairness to a worker while elaborating on the principles that govern disciplinary action, especially as regards the two types of suspension: Punitive suspension and suspension pending a disciplinary inquiry.

Chapter 3: An analysis of Kenya's legal framework as regards suspension: This chapter entails an assessment of the regulatory framework that exists in Kenya as regards suspension and outline the deficiencies that it possesses. It makes the argument that its framework is deficient in clarity on time and procedure.

Chapter 4: An examination of timelines for suspension and a case for amendment and incorporation of an ideal timeline to be used for employee suspension: This chapter

¹⁰⁴ Baraza v Judicial Service Commission [2012] eKLR, where the court held that decisions from foreign jurisdictions with similar Constitutions may be useful in helping with the interpretation of the Constitution.

Article 39 (1c), The Constitution of the Republic of South Africa, 1996 provides that when interpreting the Bill of Rights, the courts may consider foreign law.

¹⁰⁵ The right to work is recognized as a socio-economic right protected under both Constitutions. Therefore, it should be actively promoted and shielded from any violations, particularly when employers exceed their discretionary authority in the context of administrative suspensions:

Article 41, Constitution of Kenya 2010, 'Every person has the right to fair labour practices':

Article 23, Constitution of the Republic of South Africa, 1996.

¹⁰⁶ Section 188 of the Labour Relations Act of South Africa (1995).

Section 12 and section 35(4) of the Employment Act (2012).

encompasses a comparative study, examining South African labor laws, so as to thereafter propose a clear procedure and time frame that will be followed during precautionary suspensions to remedy the aspect of unfairness that arises during administrative suspension.

Chapter 5: Conclusion and Recommendations:

The chapter presents suggestions for potential amendments to the legal framework pertaining to employee suspensions that would support the implementation of a defined duration for administrative suspensions and outline the appropriate due process to be followed. Subsequently, it serves as the conclusion to the study.



Chapter 2

2.1 Introduction

Business organizations are commonly perceived as economic entities and whether implicitly or explicitly, this "rational" viewpoint has influenced the way many employers interact with their workforce.¹⁰⁷ In numerous instances, organizations highlight a reciprocal arrangement, wherein monetary compensation is exchanged for the completion of specific tasks.¹⁰⁸ These tasks are often methodically defined through job analysis and formally assessed by a supervisor; the hierarchical authority in such structures is justified by the manager's specialized knowledge or expertise.¹⁰⁹ In as much as businesses are undeniably economic institutions, their identity extends beyond mere economic functions.¹¹⁰ Adhering solely to this paradigm, without considering alternative perspectives, can lead to problematic consequences. For instance, the efficacy of merit pay is occasionally uncertain,¹¹¹ downsizing and can have enduring negative effects; bureaucratic management may stifle workers and hinder innovation ultimately causing unfairness to employees.¹¹²

While economic considerations are important, it is crucial to recognize a sense of duty that goes beyond narrowly defined quid pro quo exchanges, encompassing ethical obligations between parties.¹¹³ Members within an organization seek more than just tangible benefits; they yearn for something more profound; a deeper connection.¹¹⁴ Justice and fairness act as catalysts, transforming exchange relationships from predominantly economic transactions to more socially

¹⁰⁷ Ashforth B, and Ronald H, 'Emotion in the Workplace: A Reappraisal.' 48 *Human Relations*, 2, 1995, 107. <https://doi.org/10.1177/001872679504800201>.

¹⁰⁸ Barley S, and Kunda G, 'Design and Devotion: Surges of Rational and Normative Ideologies of Control in Managerial Discourse.' 37 *Administrative Science Quarterly*, 3, 1992, 366. <https://doi.org/10.2307/2393449>. Accessed 15th November 2023.

¹⁰⁹ Miller P, and Ted O'L. "Hierarchies and American Ideals, 1900-1940." 14 *The Academy of Management Review*, 2, 1989, 258.

JSTOR, <https://doi.org/10.2307/258419>. Accessed 15th November 2023.

¹¹⁰ Cropanzano R, Bowen D, and Gilliland S, (2007). 'The Management of Organizational Justice.' 21 *Academy of Management Perspectives*, 4, 2007, 34. <http://www.jstor.org/stable/27747410>.

¹¹¹ Ashforth B and Ronald H, 'Emotion in the Workplace: A Reappraisal.' 108.

¹¹² Barley S and Kunda G. 'Design and Devotion: Surges of Rational and Normative Ideologies of Control in Managerial Discourse.' 368.

¹¹³ Cropanzano R, Bowen D, and Gilliland S, 'The Management of Organizational Justice.' 34.

¹¹⁴ Cropanzano R, Bowen D, and Gilliland S, 'The Management of Organizational Justice.' 34.

oriented interactions.¹¹⁵ Organizational justice, reflecting how members perceive the moral appropriateness of their treatment, acts as the cohesive force that nurtures effective collaboration and becomes the cornerstone of individuals' relationships with their employers.¹¹⁶ In stark contrast, injustice an example, the conduct of unfair suspensions operates as a corrosive solvent capable of eroding the bonds within a community.¹¹⁷

2.2 What does the term 'fairness to a worker' require?

Fairness in the workplace is the yardstick by which thoughtful and impartial judgment is employed to ensure just and equitable treatment for employees.¹¹⁸ Primarily, it is associated with the fairness of procedures and impartial judgment.¹¹⁹ Some of the factors that contribute to fair treatment at work encompass mutual respect, robust interpersonal connections, and transparent communication.¹²⁰ It transcends being a mere buzzword or fleeting management trend within organizations,¹²¹ and implies respect for the human rights of each individual within an organisation.¹²²

Extensive research in organizational studies over several decades has validated the importance of fairness, showcasing its substantial benefits for both individuals and the organizations in which they operate.¹²³ Multiple studies have underscored the existence of fairness within an organization plays a pivotal role in influencing the attitudes, and behaviors of employees in the workplace.¹²⁴ When employees perceive fairness, it is often reflected in their commitment to the

¹¹⁵ Gberville M, 'The motivational basis of organizational citizenship behavior. Research in Organizational Behavior.' 12 JAI Press Inc Res, 1990, 47.

¹¹⁶ Cropanzano R, Bowen D, and Gilliland S, 'The Management of Organizational Justice.' 34.

¹¹⁷ Cropanzano R, Bowen D, and Gilliland S, 'The Management of Organizational Justice.' 34.

¹¹⁸ <https://www.indeed.com/career-advice/career-development/fairness-in-the-workplace#:~:text=Fairness%20in%20the%20workplace%20is%20the%20metric%20by%20which%20good,behavior%20and%20the%20work%20environment%20.>

¹¹⁹ [Fairness | Cornell University Diversity and Inclusion.](#)

¹²⁰ [Fairness | Cornell University Diversity and Inclusion.](#)

¹²¹ Promoting fairness in the workplace: Identifying and overcoming the barriers to managerial fairness in organizations. Waterloo: Wilfrid Laurier University, 2015, 13.

¹²² [https://performhr.com.au/why-is-fairness-important-in-workplace/.](https://performhr.com.au/why-is-fairness-important-in-workplace/)

¹²³ Colquitt J, and Zapata-Phelan U, 'Fairness, and employee reactions. Annual Review of Organizational Psychology and Organizational Behavior.' 2, 2015, 80.

<https://doi.org/10.1146/annurev-orgpsych-032414-111457> .

¹²⁴ Greenberg J, 'The social side of fairness: interpersonal and informational classes of organizational justice. In: Cropanzano, R. (Ed.) *Justice in the Workplace: Approaching Fairness in Human Resource Management*. s.l.:Lawrence Erlbaum Associates, Englewood Cliffs, NJ, 1993, 87.

organization, satisfaction with their work, and trust in their managers.¹²⁵ On the contrary, instances of unjust treatment can lead to negative outcomes such as lower performance, manifested through increased absenteeism or reduced work effort, and may even result in unethical actions.¹²⁶

Organizational justice concerns how employees perceive fairness in their workplace,¹²⁷ focusing on whether individuals believe that their organization's processes, decisions, and norms embody principles of fairness and equity.¹²⁸ It is assumed to be a globally accepted attribute to predict the outcome of employees as well as the organization as a whole.¹²⁹ The concept of equity within the organization is closely tied to employee motivation hence, the equitable treatment of employees within the organization not only shapes their behavior but also influences their motivation.¹³⁰ Organizational justice, on the other hand, is a multifaceted notion that includes distributive, procedural, interactional, and informational justice elements.¹³¹

Distributive Justice refers to the distribution of goods within a system, business, or organization, that operates on a proportional basis, with persons viewed as members of the sections to which they belong.¹³² It is viewed in terms of fairness of outcomes, such as pay and promotions¹³³ that is determined by comparing one's inputs to what similar individuals receive, what one has received in the past, or what one could reasonably expect to receive.¹³⁴ It consists of elements of equity;

¹²⁵ Alexander S, and Ruderman M, 'The role of procedural and distributive justice in organizational behavior', *Social Justice Research*, 1, 1987, 181-182.

¹²⁶ Skarlicki P and Folger R, "Retaliation in the Workplace: The Roles of Distributive, Procedural, and Interactional Justice", *82 Journal of Applied Psychology* 3, 1997, 437.

¹²⁷ McCardle G 'Organizational Justice and Workplace Deviance: The Role of Organizational Structure, Powerlessness, and Information Salience.' Published PhD Thesis, Central Florida University, Orlando, USA, 2007, 6.

¹²⁸ <https://www.charthop.com/resources/blog/dei/organizational-justice-fairness-workplace/> .

¹²⁹ Mulgund S. 'Importance of Distributive Justice, Procedural Justice and Fairness in Workplace, 1.

<https://www.ijmh.org/wp-content/uploads/papers/v8i6/F1419018622.pdf>

¹³⁰ Adams S, 'Inequity in Social Exchanges.' *Advances in Experimental Social Psychology*, Academic Press, New York, 1965, 271.

¹³¹ Neveu P and Kakavand B, 'Endangered Resources: The Role of Organizational Justice and Interpersonal Trust as Signals for Workplace Corruption.' *74 Industrial Relations*, 3, 2019, 502.

<https://doi.org/10.7202/1065170> .

¹³² Sadurski W. 'Commutative, Distributive, and Procedural Justice – What Does it Mean, What Does it Matter?' 2009, 6.

<https://ssrn.com/abstract=1471022> .

¹³³ Tung P, 'The sense of fairness in attitudes of treatment at the workplace and working motivation of the lecturers.' 2018, 58.

¹³⁴ Folger R. 'Reformulating the preconditions of resentment: A referent cognitions model. In J. C. Masters & W. P. Smith (Eds.), *Social comparison, justice, and relative deprivation: Theoretical, empirical, and policy perspectives*', 1987, 190.

outcomes allocated in terms of contribution, equality; equal distribution of outcomes among the persons concerned and necessity; outcomes allocated according to need.¹³⁵

Procedural justice pertains to an individual's perception of the fairness of administrative components within a social system that governs the allocation of resources.¹³⁶ It focuses on how outcomes are allocated, rather than the outcomes themselves.¹³⁷ Its focus is on the fairness and transparency of decision-making processes.¹³⁸ Unlike Distributive Justice, which is concerned with equitable distribution, Procedural Justice centers on ensuring fair play.¹³⁹ Rules of procedural justice encompass appropriateness in decision-making procedures, including Process Control (offering opportunities for voice), Decision Control (providing influence over outcomes), Consistency (ensuring uniformity across individuals and time), Unbiased procedures, Accuracy, Correctability (allowing appeals of outcomes), Representativeness (considering concerns of subgroups), and Ethicality (upholding high moral standards).¹⁴⁰

Interactional justice refers to the dignity and respect with which one is treated,¹⁴¹ and the extent to which one is timely, honestly, and accurately informed about personally relevant issues.¹⁴² It consists of two aspects: Informational justice which justice rules reflect the appropriateness of the explanations offered for procedures entailing truthfulness and justification, and Interpersonal justice which refers to the respect and dignity with which one treats another.¹⁴³ Interactional justice emphasizes on one-on-one transactions thus employees mostly encounter it with figures of

¹³⁵ Cropanzano R, Ambrose M, Colquitt J, and Rodell J, 'Measuring Justice and Fairness. The Oxford Handbook of Justice in the Workplace,' 2015, 189.

<https://doi.org/10.1093/OXFORDHB/9780199981410.013.8>.

¹³⁶ Leventhal G, 'What Should Be Done with Equity Theory?' In Social Exchange, eds K. Gergen, M. Greenberg, and R. Willis (New York, NY: Springer), 1980, 128.

¹³⁷ Cropanzano R, Bowen D, and Gilliland S, 'The Management of Organizational Justice.' 38.

¹³⁸ Cropanzano R, Bowen D, and Gilliland S, 'The Management of Organizational Justice.' 38.

¹³⁹ Mulgund S. 'Importance of Distributive Justice, Procedural Justice and Fairness in Workplace, 1.

¹⁴⁰ Cropanzano S, Ambrose L, Colquitt A and Rodell B, (2015). 'Measuring Justice and Fairness' 189.

¹⁴¹ Cropanzano R, Ambrose M, Colquitt J, and Rodell J, 'Measuring Justice and Fairness,' 190:

Coloquitt defines it as the just treatment that an employee receives as a result of managerial decisions.

¹⁴² Bies J, and Moag S, 'Interactional justice: Communication criteria of fairness. Research on negotiation in organizations,' 1, JAI Press, 1986, 46.

¹⁴³ Knippenberg L and Cremer D, and Wisse B. 'Leadership and Fairness: The State of the Art. European Journal of Work and Organizational Psychology.' 16, 2007, 7.

authority.¹⁴⁴ One is considered to be interactionally just if he or she appropriately shares information(truthfulness), justifies their decisions, is respectful, and avoids rude or cruel remarks(propriety).¹⁴⁵

Justice and fairness are continual concerns throughout employees' professional journeys. Employees often contemplate justice-related occurrences and entities, especially when uncertainty arises. Their thoughts and emotions regarding justice and fairness are intertwined with their perceptions of their relationship with the employer and the extent of their commitment to the organization. These reflections play a significant role in influencing various behaviors, including cooperation, engagement, and both positive and negative spontaneous actions.

The various concepts of justice enunciated above are relevant to the suspension of employees as they constitute elements of both procedural and substantive fairness. While employers have the prerogative to send employees on suspension, they must have valid reasons for doing so, incorporating interactional and informative concepts of justice. Ensuring fairness in outcomes, where the same suspension policy is applied to all employees, is necessary and aligns with the distributive concept of justice. Additionally, as employees undergo suspension, the audi alteram partem rule, or the right to be heard, also applies, as will be demonstrated in the preceding segments of this chapter.

2.3 General Principles Governing Employee Suspension.

Addressing procedural and substantive fairness is a legal imperative in the realm of labor law, and it is crucial for employers to uphold these standards to prevent unnecessary legal disputes in employment matters.¹⁴⁶ Suspension of an employee during an investigation is only recommended when the outcome of the hearing will be negatively affected by having the employee on the premises of the workplace during the time of the investigation.¹⁴⁷ The unfair suspension falls under

¹⁴⁴ Cropanzano R, Ambrose M, Colquitt J, and Rodell J, 'Measuring Justice and Fairness,' 191.

¹⁴⁵ Colquitt J, 'On the dimensionality of organizational justice: a construct validation of a measure.' 86 Journal of Applied Psychology, 3, 2001, 390.

¹⁴⁶ Moela M, 'The Unfair Labour Practice Relating to Suspension,' Published LLM thesis, Nelson Mandela Metropolitan University, Port Elizabeth, 2018, 20.

¹⁴⁷ Gregor C, 'Suspension in the Disciplinary Process' Unpublished LLM thesis, Nelson Mandela Metropolitan University, Port Elizabeth, 2013, 4.

the heading of unfair labour practice and an unfair suspension may well render the disciplinary procedure to be unfair.¹⁴⁸

Procedural fairness, specifically in the context of suspension, requires employers to adhere to the "audi alteram partem" principle.¹⁴⁹ This involves clearly stating the allegations in the letter provided to the employee for representation. The employer must also grant the employee adequate time to respond to the proposed suspension and carefully consider any representations made by the employee before deciding whether to proceed with the suspension.¹⁵⁰ On the other hand, substantive fairness necessitates the existence of a "prima facie" case against the employee, which the employee must address.¹⁵¹ A valid and justifiable reason must serve as the foundation for the suspension, thus suspension should only be considered with good cause.¹⁵²

2.3.1 Objectives of suspension

Before employers resort to suspending their employees, they need to ensure that there is an objectively fair reason to suspend them.¹⁵³ Section 2 of the Labour Relations Act 2007 states that a suspension from work is imposed by an employer as a temporary measure and not one to terminate the employment contract.¹⁵⁴ Also, suspension is deemed to be lawful if it either has a contractual or statutory underpinning.¹⁵⁵

2.3.2 Types of suspension

There exist two primary types of employee suspension; both of which are awarded differently depending on the circumstances surrounding the suspension. The first type of suspension is referred to as "preventative suspension," and it entails barring an employee from attending the workplace to guarantee that they do not interfere with the investigation of disciplinary action.¹⁵⁶ The second type, known as "punitive suspension," is used as a disciplinary remedy after a

¹⁴⁸ Gregor C, 'Suspension in the Disciplinary Process' 4.

¹⁴⁹ Khabongo B, 'Technicalities of employment suspension in Kenya' 30.

¹⁵⁰ Khabongo B, 'Technicalities of employment suspension in Kenya' 30.

¹⁵¹ Moela M, 'The Unfair Labour Practice Relating to Suspension' 20.

¹⁵² Gregor C, 'Suspension in the Disciplinary Process' 5.

¹⁵³ Gregor C, 'Suspension in the Disciplinary Process' 6.

¹⁵⁴ Section 2, Labour Relations Act, 2007.

¹⁵⁵ Shedd Dennies Simotwo v Speaker, Narok County Assembly & Another [2015] eKLR.

Kenya Plantation & Agricultural Workers Union v Finalys Horticulture Kenya Ltd [2015] eKLR.

¹⁵⁶ <https://lwo.co.za/2022/02/19/punitive-and-precautionary-suspension/>.

disciplinary hearing and serves as an employer could only suspend an employee without pay if the employee agrees, or legislative form of punishment.¹⁵⁷ Preventative suspension implies that the employee will be suspended with full pay, whereas punitive suspension implies that the employee will be suspended without pay.¹⁵⁸

Suspension may occur as a "cautionary suspension" at a disciplinary hearing or as a disciplinary action. The distinction between the two is determined by the employer's intent in implementing the suspension. It is termed a holding operation suspension if the objective is to assist the employer in an inquiry rather than to penalize the employee.¹⁵⁹

2.3.2.1 Precautionary (Preventative/ Administrative) suspension

This type of suspension is imposed as a form of holding or cautionary suspension pending a disciplinary hearing.¹⁶⁰ Practically, it occurs when the employer suspends an employee until a formal inquiry or disciplinary hearing is held.¹⁶¹ In the case of *Francis Okumu Oketho v Buzeki Enterprises Limited* the court held that administrative suspension is a neutral action aimed at achieving unfettered investigations into allegations against an employee.¹⁶² The court cautioned against using administrative suspension as a disciplinary action. While observing the distinction between precautionary suspensions and punitive suspensions, there are specific guidelines employed to guarantee fairness towards employees.

2.3.2.1.1 Payment during Interdiction

The position at common law is that an employer can suspend an employee without remuneration, only if it is provided in the employment contract from the onset,¹⁶³ or in the event of a collective agreement regulation that provided for such a penalty.¹⁶⁴ The same position was taken in the case of *Sappi Forests (Pty) Ltd v CCMA & Others* where Pillay J ruled that an employer who suspends

¹⁵⁷ <https://lwo.co.za/2022/02/19/punitive-and-precautionary-suspension/> .

¹⁵⁸ <https://lwo.co.za/2022/02/19/punitive-and-precautionary-suspension/> .

¹⁵⁹ Miller C, 'Suspension in the Disciplinary Process' Published LLB Dissertation, Nelson Mandela Metropolitan University, Port Elizabeth, 2013, 7.

¹⁶⁰ *Cabiakman v Industrial Life Insurance* [2008], The Supreme Court of Canada.

¹⁶¹ The reasoning behind this action is to remove the employee from the workplace so as to prevent interference from the employee with the investigation or intimidation of witnesses by the employee.

¹⁶² *Francis Okumu Oketho v Buzeki Enterprises Limited* [2019] eKLR.

¹⁶³ Moela M, 'The Unfair Labour Practice Relating to Suspension,' 12.

¹⁶⁴ Grogan J, *Employment Rights*, 2010, 131.

an employee without pay commits a breach of the employment contract.¹⁶⁵ The judge went further on to state that an on or a collective bargaining agreement authorizes the suspension.

Thus, unilateral deductions from employees' wages are prohibited.¹⁶⁶ The issue of payment of employees sent on administrative suspension has been in contention in Kenyan court whereby some hold that employees should be paid regardless of the outcomes of the investigations¹⁶⁷ while some are of the view that they should not be paid pending the outcome of the disciplinary proceedings.¹⁶⁸ In *Thomas Sila Nzivo v Bamburi Cement Limited*, the court was of the opinion that there exists no provision under the law that allows an employer to deny a suspended employee their monthly salary.¹⁶⁹ This implies that suspension without pay offends the principles of Fair Labour practices and Protection of Wages.

A similar position was taken in *Peterson Ndung'u & 5 others v Kenya Power and Lighting Company Limited*, where the court held that the practice of withholding of Employee's emoluments during the disciplinary process on scrutiny, indeed has no foundation in the Employment Act thus has no legal validity.¹⁷⁰ Also, in *Francis Okumu Oketho v Buzeki Enterprises Limited*, the court held that;

*“Ordinarily, suspension is a neutral action aimed at achieving unfettered investigations into allegations against an employee; it is not a disciplinary action. This means that an employee on suspension is entitled to full salary unless withholding of salary is sanctioned by a statute or internal disciplinary rules.”*¹⁷¹

¹⁶⁵ *Sappi Forests v CCMA* [2009], Labour Court of South Africa.

¹⁶⁶ Grogan, *Dismissal Discrimination*, 62.

¹⁶⁷ *Edith Kathure Munyua v Moi Teaching and Referral Hospital and 3 others* [2019] eKLR: The court held that the respondent acted unlawfully by placing the claimant on suspension regardless of the eventual outcome of the process of investigation.

¹⁶⁸ *Grace Gacheri Muriithi v Kenya Literature Bureau* [2012] eKLR: The court held that it would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable.”

¹⁶⁹ *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR,

¹⁷⁰ *Peterson Ndung'u & 5 others v Kenya Power and Lighting Company Limited* [2014] eKLR.

¹⁷¹ *Francis Okumu Oketho v Buzeki Enterprises Limited* [2019] eKLR.

Scholars also hold the same position premised on the presumption of innocence till proven guilty.¹⁷² It thus becomes procedurally unfair to send employees on precautionary suspension without payment and goes against the principle of fair labour practices.¹⁷³

2.3.2.1.2 Suspension Unjustifiably Prolonged

It is imperative that suspensions are not prolonged for unreasonable timeframes and that a speedy resolution of the dispute is found. Hearings, when applicable, should thus be held within reasonable timelines and the investigation which is done before a hearing should also be done without unreasonable delay. In *Edith Kathure Munyua v Moi Teaching and Referral Hospital and 3 others* the court held that;

*“On the other hand, it is well established that disciplinary process should be concluded within a reasonable time especially where an employee has been placed on suspension with or without pay. This principle is on the basis that an employee ought not to be subjected to unfair labour practice in violation of Article 41 of the constitution and that any administrative action taken against an employee should be expeditious, efficient, lawful, reasonable and procedurally fair in terms of Section 47(1) of the constitution as read with Section 4 of Fair Administrative Action Act, 2015.”*¹⁷⁴

The reasons that justify a quick investigation were set out in the case of *Mabilo v Mpumalanga Provincial Government & Others*¹⁷⁵ and are as follows: (i) To prevent the unnecessary disruption in the life of the employee. (ii) To minimise the anxiety and concern of the employee. (iii) To limit the possibility that the employee will not be allowed a fair hearing. (iv) To resolve the dispute expeditiously. Thus, preventive suspension must only be imposed for a reasonable period in which to enable an employer to take disciplinary action. The courts could find that the preventive suspension had become punitive, should this period be extended, in which case it would then be unfair, since the employee had not been found guilty of any misconduct as yet.¹⁷⁶ In *James*

¹⁷²Khabongo B, 'Technicalities of employment suspension in Kenya,' 28.

¹⁷³ *Edith Kathure Munyua v Moi Teaching and Referral Hospital and 3 others* [2019] eKLR:
Martin Situma Bakuli v African Express Airways [2021] eKLR.

¹⁷⁴ *Edith Kathure Munyua v Moi Teaching and Referral Hospital and 3 others* [2019] eKLR.

¹⁷⁵ *Mabilo v Mpumalanga Provincial Government & Others* [1999], Labour Court of South Africa.

¹⁷⁶ Miller C, 'Suspension in the Disciplinary Process', 10.

Njuguna Muchiri v Armed Forces canteen organization (AFCO),¹⁷⁷ the claimant was placed on suspension from the period of December 2001 to June 2006 and the court held this to be an unfair labor practice. In *Donald C. Avuda v Kenya Forest Service*,¹⁷⁸ the court held that suspension ought to be for a determinate period where such is imposed without pay otherwise it would constitute inhuman treatment.

In *Joseph Ndung'u v Mastermind Tobacco (K) Ltd*,¹⁷⁹ the court expressed the view that keeping an employee on indefinite suspension was impermissible and that the claimant's continued suspension amounted to constructive dismissal thereby constituting unfair termination of employment. Instances like these suggest that employers may misuse their authority to implement suspensions for reasons other than those intended, leading to unfair practices towards employees. The court in the case of *Kenya Magistrates and Judges Association v Judicial Service Commission & 2 others*,¹⁸⁰ applied article 28 of the constitution of Kenya 2010¹⁸¹ to determine that it would amount to inhuman treatment to subject employees to indefinite suspension as they are normally left in limbo over whether or not they have a job. Therefore, as determined by some courts, it is deemed appropriate to establish a defined period for suspending employees.¹⁸² Suspension prejudices employees through reduction of income and impeding their right to work thereby impacting their dignity. Consequently, it becomes necessary to establish specific timelines for suspensions to ensure certainty, and accountability, and to prevent interdiction or suspension from being imposed in a manner that resembles punishment for the employees.

2.3.2.2 Disciplinary/ Punitive suspension

Punitive suspension has been defined as a punitive measure for a reproachable act made during work.¹⁸³ Preventive suspensions are different from punitive suspensions in so far as that in such suspensions the employee had not been found guilty of an alleged offence whereas in punitive

¹⁷⁷ James Njuguna Muchiri v Armed Forces canteen organization (AFCO) [2016] eKLR.

¹⁷⁸ Donald C. Avuda v Kenya Forest Service (2015) eKLR.

¹⁷⁹ Joseph Ndung'u v Mastermind Tobacco (K) Ltd [2014] eKLR.

¹⁸⁰ Kenya Magistrates and Judges Association v Judicial Service Commission & 2 others [2020] eKLR.

¹⁸¹ Article 28, Constitution of Kenya 2010.

¹⁸² Donald C Avude v Kenya Forests Services Limited (2015) eKLR.

¹⁸³ Cabiakman V Industrial Alliance Life Insurance Co. [2004], The Supreme Court of Canada.

suspensions the employee indeed was found guilty of an alleged misconduct and the suspension is imposed as a sanction after the disciplinary hearing. This implies that the procedural requirements for a fair preventive suspension would also differ from those of a punitive suspension where the normal norms subject to all disciplinary punishments apply such as the employee must have been afforded a fair hearing and must have been proven guilty of the offense and the sanction must be appropriate.¹⁸⁴

This kind of suspension can only take place as a sanction after a disciplinary hearing has been held and a verdict given as to the employee's guilty status.¹⁸⁵ However, punitive suspensions can only be issued where the employment contract, code of conduct, the Collective Bargaining Agreement, or the law provides for it.¹⁸⁶ The normal rules of substantive and procedural fairness during misconduct hearings should be applied at all times. This type of suspension could be without benefits and is usually the kind of penalty to punish severe misconduct and to retain the skills of the employee.¹⁸⁷ As stated, the legislation does not give detailed guidance on this, and one is reliant on case law to give guidance on when suspensions would be appropriate in this process. Suspension as a punitive measure must be substantially and procedurally fair and the reason for the suspension must be serious enough to justify a dismissal and must follow a disciplinary hearing.¹⁸⁸ It is usually utilised by an employer as a form of disciplinary measure short of dismissal, though the employer is not compelled to take this route¹⁸⁹ when deciding on a suitable sanction.

During a disciplinary suspension, the employer is required to conduct a disciplinary hearing and during the disciplinary hearing, it is important to consider the audi alteram partem principle, which means 'let the other side be heard too' as a principle of natural justice.¹⁹⁰ In the matter of *Joseph Mutuura Mberia & Another v Council of Jomo Kenyatta University of Agriculture and Technology*,¹⁹¹ the court held that it was feasible to give an employee a hearing before suspension and it was only necessary to give reason where an employee is required to respond to the charges

¹⁸⁴ Miller C, 'Suspension in the Disciplinary Process' 13.

¹⁸⁵ Maureen Cherono Nyigei v Chief Justice and President of the Supreme Court of Kenya & another [2021] eKLR.

¹⁸⁶ Fredrick Saundu Amolo v Principal Namanga mixed Day Secondary School & 2 Others [2014] eKLR.

¹⁸⁷ Maureen Cherono Nyigei v Chief Justice and President of the Supreme Court of Kenya & another [2021] eKLR.

¹⁸⁸ Du Toit et al Labour Relations 499.

¹⁸⁹ Miller C, 'Suspension in the Disciplinary Process' 14.

¹⁹⁰ Khabongo B, 'Technicalities of employment suspension in Kenya' 13.

¹⁹¹ Joseph Mutuura Mberia & Another v Council of Jomo Kenyatta University of Agriculture and Technology.

against the employee. However, it must be remembered that the contractual requirement that an employee should agree to a suspension without pay remains.¹⁹² In instances of variation of original contracts of employment to allow for suspension without pay as a penalty, the employer has to prove that the employee has agreed to the variation of the original contract freely without duress.¹⁹³

2.3.2.2.1 Adherence to owner's policy and suspension

Many workplaces have established policies governing the behavior and performance of their employees. These policies encompass disciplinary codes and procedures that must be adhered to during misconduct investigations. In certain cases, contractual agreements or disciplinary codes and procedures may contain provisions specifying whether an employee must be allowed to be heard before being suspended, the opportunity of being legally represented, and the period during which interdictions should last.¹⁹⁴

In situations where such provisions exist, it is incumbent upon the employer to adhere to the stipulations outlined in the disciplinary code or the terms of the employment contract.¹⁹⁵ Compliance with such provisions is essential to ensure a fair and lawful process when considering the suspension of an employee as both the employer and employee are bound by the terms of the employment contract. In the matter of *Gregory Otieno Owouth v Mumias Sugar Co. Limited*,¹⁹⁶ the claimant was placed on suspension for four months, yet the Staff Manual provided the time limit for suspension to be twenty-one days. The breach of the rules of suspension in the Staff Manual was held to be unprocedural and unfair thus the court lifted the burden of the suspension from the Claimant.

2.4 Conclusion

A prolonged precautionary suspension may be deemed unfair when contested by an employee. Additionally, employers should ensure consistency in the application of suspensions, treating similar cases uniformly. Moreover, in situations where multiple employees have been implicated

¹⁹² Grogan J 'Dismissal, Discrimination, and Unfair Labour Practices' 64.

¹⁹³ Grogan J, 'Workplace Law', Juta Law 2005, 102.

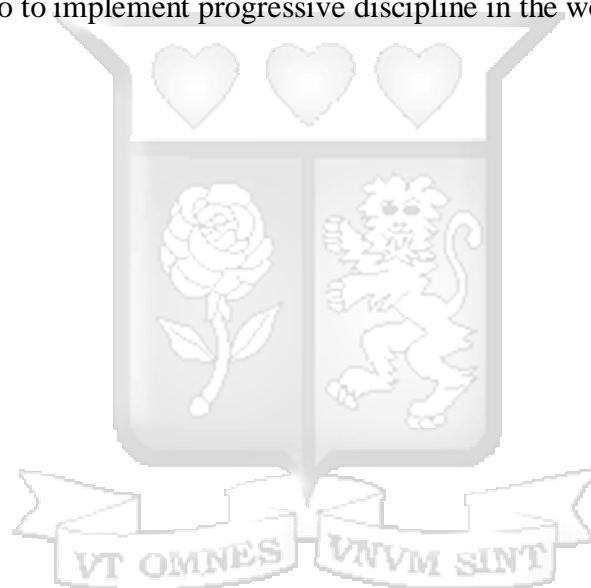
¹⁹⁴ Dennis Nyagaka Ratemo v KenyaFilm Commission & another [2014] eKLR.

¹⁹⁵ Moela M, 'The Unfair Labour Practice Relating to Suspension' 24.

¹⁹⁶ Gregory Otieno Owouth v Mumias Sugar Co. Limited [2016] eKLR.

in the same transgression warranting suspension, each employee needs to be subject to potential suspension.

It is established legal practice that employees placed on suspension should be granted the opportunity to make representations. Employers who disregard their own policies and procedures governing suspension risk violating the law. However, in formulating such policies and implementing suspensions, employers must be guided by various laws in the country, including the Constitution of Kenya 2010, the Employment Act 2007, and the Labour Relations Act, as will be discussed in the next chapter. Undoubtedly, suspension plays a crucial role in maintaining workplace discipline, and employers are encouraged to utilize it not only to enforce fair procedures in dismissal cases but also to implement progressive discipline in the workplace.



Chapter 3: Legislative framework governing suspension in the workplace

3.1 Introduction

The primary goal of this chapter is to provide a comprehensive overview of the legislative framework governing workplace suspensions. Having elucidated various notions of fairness applicable to employees with respect to suspension in the previous chapter, this chapter delves into the legal parameters surrounding suspension. Furthermore, it examines and analyzes case laws concerning suspension in both private and public sectors. A focal point of discussion is the Employment Act of 2007, the key legislation implicitly addressing the concept of administrative suspension as a possible unfair labor practice.¹⁹⁷ This Act draws its authority from the Constitution, the supreme law of the country.

3.2 The Constitution of Kenya 2010 and Suspension

The right to fair labour practices once delineated by the courts, has now been constitutionally elevated to a fundamental right. However, its inherent nature is broad and adaptable, less tethered to the inherent right to equal treatment and more influenced by external factors, encompassing commercial rationale to legal and constitutional rights.¹⁹⁸ Additionally, it is a dual-sided concept, vested in both employers and employees. Generally, it involves a balance between the commercial interests of the employer and the employees' countervailing rights. Article 41(1) provides that every person has the right to fair labour practices, but it does not categorically prescribe as to what fair labour practices are, and which ones are unfair.¹⁹⁹ To constitute an unfair labour practice, the act or omission complained of must be between an employee and an employer. An unfair labour practice as guaranteed in the constitution is defined as an unusual constitutional right that is primarily concerned with the exercise of private rather than public power.²⁰⁰

Courts have pronounced themselves affirmative in this matter stating that fair labor practices, as envisioned by Article 41 of the Constitution, are at the heart of employment relationships in the

¹⁹⁷ Employment Act, 2007.

¹⁹⁸ Du Toit D "The evolution of the concept of 'unfair discrimination' in South African labour law" 27 ILJ (2006) 1316.

¹⁹⁹ Article 41 (1), Constitution of Kenya 2010.

²⁰⁰ Le Roux R "The New Unfair Labour Practice" 2012 Acta Juridica, 41.

country, going beyond what is lawful or legal.²⁰¹ Article 3(1) requires all citizens to respect, uphold, and defend the Constitution.²⁰² Furthermore, the Constitution encourages legal interpreters to construe its provisions in a way that promotes the rule of law, as well as the Bill of Rights' human rights and fundamental freedoms.²⁰³ The courts in upholding the supremacy of the constitution have held that the right to fair labour practices takes prominence as the right to employment has an essential bearing on the right to life as it was held in *VMK v CUEA*.²⁰⁴

Article 2(4) provides that laws made inconsistent with the Constitution are void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.²⁰⁵ Therefore, a statute enforcing a basic right is not limited to providing simply the bare minimum required under the Constitution. On the contrary, the legislature is free to provide even more comprehensive and generous protection. Any limitation of a basic right, on the other hand, must be interpreted restrictively and the Constitution lays down the criteria for such limitations.²⁰⁶ This notion is not a product of constitutionalism; it is well-established in case law.²⁰⁷ Thus, according to the courts, the right to "fair labor practices" includes constitutional and statutory provisions, as well as established workplace conventions or usages that give effect to the clarifications outlined in Article 41 or foster and safeguard fairness at work, including provisions for basic fair treatment of employees.²⁰⁸

The Constitution further states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.²⁰⁹ Administrative action is defined as an act, omission, or decision of any person, body, or authority that affects the legal rights or

²⁰¹ Joseph Maina Theuri v Gitonga Kabugi & 3 others [2017] eKLR.

²⁰² Article 3(1), Constitution of Kenya 2010.

²⁰³ Article 259 (1), Constitution of Kenya 2010.

²⁰⁴The Judge observed, 'This court has held that right to life to a workman would include right to continue in permanent employment, which is not a bounty of the employer, nor can its survival be at the volition and mercy of the employer. Income is the foundation to enjoy many fundamental rights and when work is the source of income, the right to work would become as such a fundamental right. Fundamental rights can ill* afford to be consigned to the limbs of undefined premises and uncertain application.'

²⁰⁵ Article 2(4), Constitution of Kenya 2010.

²⁰⁶ Article 24, Constitution of Kenya 2010.

²⁰⁷ Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651 (ECJ).

²⁰⁸ Kenya County Government Workers' Union v County Government of Nyeri & another [2015] eKLR.

²⁰⁹ Article 47 (1) Constitution of Kenya 2010:
Section 4, Fair Administrative Action Act, 2015.

interests of any person to whom such action relates.²¹⁰ In the matter of *Edith Kathure Munyua v Moi Teaching and Referral Hospital and 3 others*, the court ruled that any administrative action taken against an employee ought to be expeditious, efficient, lawful, reasonable, and procedurally fair in terms of Section 47(1) of the constitution as read with Section 4 of Fair Administrative Action Act, 2015.²¹¹ This upholds the fact that the Bill of Rights lays down a foundation of rights rather than a limit to them.²¹² The rights of employees during administrative action include a) The right to be given written reasons for any administrative action taken against them. b) Prior and adequate notice of the nature and reasons for the proposed administrative action. c) Opportunity to be heard and make representations.²¹³ These elements are requisites whenever administrative suspensions are taken against employees.

Suspension or interdiction is considered to be more than a mere administrative act as its detrimental effect impacts an employee's reputation, advancement, job security, and fulfillment.²¹⁴ Often, employers tend to regard suspension as a legitimate measure of first resort to the most groundless of misconduct, or worse still, to view suspension as a convenient mechanism to marginalise an employee who has fallen from favour.²¹⁵ This limits an employee's freedom to engage in productive work as it forms an important component of human dignity.²¹⁶ In the Administrative type of suspension, which forms the cornerstone of this thesis, both procedural and substantive fairness need to be adhered to whenever employers intend to send their employees on suspension. In the constitutional context, substantive fairness entails the reason for suspension whereby the employer must have a justifiable reason to believe that the employee has engaged in serious misconduct and thus must have a prima facie case against the employee.²¹⁷

As regards procedural fairness, the process of such removal must be rational, reasonable, and conveyed to the employee in sufficient detail to enable the employee to defend himself in a meaningful way. The employee must be informed formally in writing of the allegations of

²¹⁰ Section 2, Fair Administrative Action Act, 2015.

²¹¹ *Edith Kathure Munyua –versus- Moi Teaching and Referral Hospital and 3 others* [2019] eKLR.

²¹² Du Toit D, "The Evolution of the Concept of 'Unfair Discrimination' 1337–1339.

²¹³ Section 4, Fair Administrative Action Act, 2015.

²¹⁴ *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others* [2014] eKLR.

²¹⁵ *Joseph Mburu Kahiga et al versus KENATCO Co. Ltd et al.*

²¹⁶ *Mogothle versus Premier of the North-West Province et al* [2009] 4 BLLR:

²¹⁷ *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others* [2014] eKLR.

misconduct that precipitated the interdict.²¹⁸ Additionally, the employees must be allowed to defend themselves against any adverse findings that may arise from the investigations carried out during suspension.²¹⁹ Suspensions have the result of denying an employee access to the workplace and when done without due process and due regard to both substantive and procedural fairness, the ultimate result is to negate the principles of natural justice.

3.3 The ‘Employment Act 2007’ and ‘Labour Relations Act 2007’, and Suspension

Section 2 of the Employment Act and Labour Relations Act state that a suspension is imposed by an employer as a temporary measure and not necessarily for reasons of termination of the employment contract.²²⁰ However, both Acts do not give a definition of what suspension entails and the procedures to be followed. Under section 12 of the Employment Act (hereby referred to as the Act), the procedure to be followed during a disciplinary case should be well set out in the initial employment contract.²²¹ However, organisations with over 50 employees are required to formulate a human resource manual that contains persons to whom an employee may apply if dissatisfied with any disciplinary decisions made against them and how an application can be made to seek redress of any grievance relating to their employment.²²² This is where suspensions should be provided.²²³ Therefore, for the suspension of employees to be lawful, it must be provided for in the company’s policies such as the human resources manual that governs the employer-employee relationships.

Administrative suspensions are conducted for investigatory purposes. This occurs when an employer who suspects an employee to have been involved in misconduct, of poor performance or physical incapacity removes such an employee from the workplace to enable further investigations without subjecting the employee to further commission of more acts of misconduct, underperformance, or physical incapacity.²²⁴ Punitive suspensions on the other hand are implemented as disciplinary sanctions against employees who have been found guilty of

²¹⁸ Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others [2014] eKLR.

²¹⁹ Bartholomew Wanyama Vs Moses Gitari and 2 Others

²²⁰ Section 2, Employment Act No.11 of 2007:

Section 2, Labour Relations Act No. 11 of 2007.

²²¹ Section 12, Employment Act No 11 of 2007.

²²² Section 12, Employment Act No. 11 of 2007.

²²³ <https://www.corporatestaffing.co.ke/2017/02/kenyan-labour-law-on-suspension/> .

²²⁴ Mercy Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR.

misconduct in the workplace.²²⁵ The implication of this is that suspensions can be used as part of the disciplinary procedures in the workplace if provided for in the company's policies.²²⁶ Therefore rules of disciplinary procedures and processes provided for in section 41 of the Employment Act also apply *mutatis mutandis* to suspension of employees.

Under part VI of the Act that entails termination and dismissal of contracts, an employer is required, before terminating an employee's contract based on reasons such as misconduct, poor performance, or physical incapacity, to communicate the grounds for termination to the employee in a language that the employee can comprehend.²²⁷ The employee is entitled to have another employee or a representative of their choice during this communication.²²⁸ Furthermore, the employer is mandated to listen and take into account any representations made by the employee regarding misconduct or poor performance.²²⁹ The aforementioned provisions stem from the *audi alteram partem* rule of natural justice that requires the other side to be accorded an opportunity to present their case. This implies that one must be given a written notice that contains substantial information with sufficient details to enable him to ascertain the nature of the allegations against him.²³⁰ The same must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.²³¹ Such basic minimum requirements provided for become a legal basis for the institution of claims where they have been violated. Therefore, when granting that right, it is incumbent upon the courts or administrative body, or person concerned not to make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it.²³²

The aspect of fairness of the opportunity to be heard has been held not to be determined solely by its oral nature; it can also be conducted through the exchange of written correspondences.²³³ Whether an oral hearing is necessary depends upon the subject matter and circumstances of the

²²⁵ Donald C. Avude v Kenya Forest Service [2015] eKLR.

²²⁶ Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & Another [2015] eKLR.

²²⁷ Section 41, Employment Act No. 11 of 2007.

²²⁸ Section 41(1), Employment Act No. 11 of 2007.

²²⁹ Section 41(2), Employment Act No. 11 of 2007.

²³⁰ County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Service Board & 6 others [2015] eKLR.

²³¹ County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Service Board & 6 others [2015] eKLR.

²³² Maasai Mara University & 3 others v Kisirkoi (Civil Appeal 255 of 2018) [2021] KECA 217 eKLR.

²³³ Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR.

particular case and upon the nature of the decision to be made.²³⁴ During punitive suspensions courts in determining whether employers have violated the fairness of procedures used have held that it is feasible to give an employee a hearing before suspension; and that it is necessary to give reasons thereafter an employee is required to respond to the charges against them.²³⁵ In the matter of *Menginya Salimi Murgani Vs Kenya Revenue Authority*, where the suspension of the claimant led to his termination as he was found culpable of the offenses, Ojwang J held that the accused employee ought to have shared a forum with his accusers so that differing views could be resolved through an informed process for it to be consistent with the requirements of a fair hearing.²³⁶ Therefore, in terms of procedural fairness, the Employment Act has set forth essential safeguards that are designed to be upheld during punitive suspensions.

As regards administrative suspensions, there are no established statutory guarantees thus courts are left to make different interpretations on what procedural fairness in such types of suspension should entail. This is evident where courts have the opinion that the aspect of fair hearing does not apply to this type of suspension. Essentially, since it is a temporary separation from the day-to-day duties of an employee suspected of committing a disciplinary offense; to require an employer to hear an employee in such a preliminary stage before handing the suspension does not sound practical.²³⁷ Whereas some contracts provide for a hearing before suspension, it is not mandatory since an employee proceeding on suspension is usually called upon to react to the preliminary charges which is usually considered vis-a-vis the final investigations report before escalating the issue to a disciplinary hearing.²³⁸ The hearing that should be given to the employee should be based on the merits of the case as a cardinal rule and not revisit the decision to suspend or interdict.²³⁹ The hearing is aimed at determining the allegations leveled against the employee and the defenses the employee wishes to make and only after the close of the hearing or investigation is a sanction issued to the employee.

As regards substantive fairness, the Act provides that an employer is required to prove the reasons for termination, and where the employer fails to do so, the termination shall be deemed to be

²³⁴ *Local Government Board v Arlidge* [1915] A.C 120.

²³⁵ *Joseph Mutuura Mberia & Another v Council of Jomo Kenyatta University of Agriculture and Technology*

²³⁶ *Menginya Salimi Murgani Vs Kenya Revenue Authority* [2006] eKLR.

²³⁷ *Luka Korir vs Moi Teaching and Referral Hospital* [2022] eKLR.

²³⁸ *Sava v Kitui Cottages And, Guest House (Cause 1280 of 2017)* [2022] KEELRC 1499 (KLR)

²³⁹ *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others* [2014] eKLR.

unfair.²⁴⁰ A termination of employment is deemed to be unfair if the employer fails to prove that the reason for termination is valid, the reason relates to the employee's conduct, capacity, or compatibility.²⁴¹ Applying this to suspension, both administrative and punitive require employers to have justifiable reasons for suspending employees. In punitive suspension, the employee's guilty status has to be proved by an employer for the sanction to be valid.²⁴² In administrative suspension, first an employer has to have a justifiable reason that the employee has engaged in serious misconduct to form a *prima facie* case. Secondly, there must be some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some relevant factor that would place the investigation or the interest of the affected parties in jeopardy.²⁴³

3.3.1 Payment during suspension

On the issue of payment during suspension, part IV of the Act provides for the protection of wages. It prohibits unilateral deductions from an employee's salary by an employer.²⁴⁴ Being a fundamental term of the contract of service and a protected right, an employer can only withhold the entire of an employee's salary either with the consent of the employee or where the law permits it. During administrative suspensions, employees are entitled to full salary unless the withholding of salary is sanctioned by a statute or internal disciplinary rules.²⁴⁵ The non-deduction of salaries is based on the fact that since the guilty status of the suspended employee has not yet been established, it would be an admission of guilt if such happens. Courts have made it clear that the act of sending employees on administrative suspension without pay offends the principle of fair labour practice.²⁴⁶ Some courts have held that to serve as a middle ground for both parties in the employment relationship, a portion of the pay should be withheld even as the other is released.²⁴⁷ This is to ensure that the contract remains alive during the disciplinary process.

²⁴⁰ Section 43, Employment Act No. 11 of 2007.

²⁴¹ Section 45, Employment Act No. 11 of 2007.

²⁴² Maureen Cherono Nyigei v Chief Justice and President of the Supreme Court of Kenya & another [2021] eKLR.

²⁴³ Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others [2014] eKLR

²⁴⁴ Section 19, Employment Act No. 11 of 2007.

²⁴⁵ Francis Okumu Oketho v Buzeki Enterprises Limited [2019] eKLR.

²⁴⁶ Martin Situma Bakuli v African Express Airways [2021] eKLR.

²⁴⁷ Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR:
Grace Gacheri Muriithu v Kenya Literature Bureau [2012] eKLR.

As regards protracted suspensions, which is the cornerstone of this thesis, courts have held that administrative suspensions ought to be held within reasonable timeframes; however, the reasonableness of such becomes relative as no guide has been provided neither by the Act nor the Labour Relations Act. In the matter of *Samson Ole Kisirkoi v Maasai Mara University & 3 others*, the court held that it is an employer's duty to ensure that the disciplinary process against an employee is held within a reasonable period and where found culpable a sanction to issue and where none, the employee to be recalled back to work and paid his dues.²⁴⁸ Protracted suspensions have been held to occasion indefinite suspensions and constructive dismissal.²⁴⁹ Furthermore, indefinite suspensions have been held to be illegal however there is no unanimously agreed time frame that is regarded to be reasonable.²⁵⁰ This begs the question of what ought to be the reasonable time frame to conduct disciplinary investigations that require the employee to be absent from the workplace.

3.5 The Anti-Corruption and Economic Crimes Act and Suspension

The Anti-corruption and Economic Crimes Act has been extended to address the situation of employees facing charges related to corruption and economic crimes.²⁵¹ However, the application of this Act is restricted to public and state officers. In cases where public officers are charged with corruption or economic crimes, they shall be subject to suspension with half pay. The suspension will continue until the resolution of the case provided that the case shall be determined within twenty-four months.²⁵² However, despite being on half pay, the employee is still entitled to receive the full amount of any allowances payable to him in their contract.²⁵³ The suspension ceases once the proceedings against the officer are discontinued or upon acquittal and the officer becomes reinstated with full pay.²⁵⁴ The Act provides for suspension without pay as a penalty where an officer is convicted of corruption or economic crime pending appeals.²⁵⁵ The suspension ceases once the conviction becomes overturned on appeal. When the conviction is overturned, the

²⁴⁸ *Samson Ole Kisirkoi v Maasai Mara University & 3 others* [2018] eKLR.

²⁴⁹ *Joseph Ndung'u v Mastermind Tobacco (K) Limited* (2014) eKLR.

²⁵⁰ *Kenyatta University & another v Fred Obare* [2017] eKLR.

²⁵¹ Section 62, Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).

²⁵² Section 62(1), Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).

²⁵³ Section 62(2), Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).

²⁵⁴ Section 62(3), Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).

²⁵⁵ Section 63(1), Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).

employee retains their position, and the suspension is done away with. However, where the time of making appeals has lapsed or the conviction has been upheld, the dismissal of the officer ensues.²⁵⁶

3.6 The Public Service Commission Act and Suspension

The Act provides for the interdiction of a public officer where proceedings that may lead to the officer's dismissal are being taken or are about to be taken.²⁵⁷ The interdicted officer is entitled to receive half basic salary and full house allowance, but other benefits are withheld.²⁵⁸ Upon the termination of disciplinary or criminal proceedings instituted against an officer on interdiction and he or she is not otherwise dismissed or punished, the officer is restored to his position.²⁵⁹ Suspension is effected when a public officer has been charged with a serious criminal offense pending the outcome of the case.²⁶⁰ It also occurs where an officer against whom proceedings for dismissal have been taken and as a result, it is determined that the officer ought to be dismissed.²⁶¹

An officer on suspension is entitled to half basic salary and full house allowance but all other benefits are withheld.²⁶² Upon the termination of proceedings against a suspended officer who has not been dismissed or punished, the withheld emoluments, allowances, or other benefits are restored to the officer.²⁶³ Where at the end of the proceedings the officer is found culpable and a penalty imposed, the salary and benefits withheld are not restored to the officer.²⁶⁴ This is considered a fair act since its performance is after the determination of the guilty status of the employee thus in line with the presumption of innocence till found guilty. Furthermore, the Act provides that it is the right of the suspended officer to be updated on the progress of the proceedings against them.²⁶⁵ Essentially this keeps the employee abreast with the matters surrounding their case other than being left in limbo without any communication. The public officer who has been

²⁵⁶ Section 63(3), Anti-Corruption and Economic Crimes Act (Act No 3 of 2003).

²⁵⁷ Section 70, Public Service Commission Act (Act No 10 of 2017).

²⁵⁸ Section 70(2), Public Service Commission Act (Act No 10 of 2017).

²⁵⁹ Section 70(3), Public Service Commission Act (Act No 10 of 2017).

²⁶⁰ Section 71(1), Public Service Commission Act (Act No 10 of 2017).

²⁶¹ Section 71(2), Public Service Commission Act (Act No 10 of 2017).

²⁶² Section 71(3), Public Service Commission Act (Act No 10 of 2017).

²⁶³ Section 71(4), Public Service Commission Act (Act No 10 of 2017).

²⁶⁴ Section 71(5), Public Service Commission Act (Act No 10 of 2017).

²⁶⁵ Section 72, Public Service Commission Act (Act No 10 of 2017).

suspended or interdicted may in writing request the authorized officer to communicate the progress and action taken towards the conclusion of the disciplinary case. The authorised officer is in turn required to make a response within thirty days upon receipt of the officer's request.²⁶⁶ The suspended officer may make an application to the Commission for the lifting of the interdiction or suspension upon failure to make a response by the authorised officer or dissatisfaction with the response.²⁶⁷

The statute is remarkable for its proactive approach to providing precise and comprehensive processes for enforcing employee interdictions in the public sector. However, there is a significant vacuum because the statute does not specify how long such suspensions will last. This omission reduces the act's comprehensiveness, restricting its use as an authoritative reference for defining the duration and limits of administrative suspensions.

3.7 Conclusion



In conclusion, this chapter has provided a comprehensive examination of the legislative framework governing workplace suspensions. The discussion has delved into the constitutional provisions, the Employment Act of 2007, the Labour Relations Act of 2007, as well as specific acts such as the Anti-Corruption and Economic Crimes Act and the Public Service Commission Act. The rights and obligations of both employers and employees during suspension have been explored, considering aspects of procedural and substantive fairness.

It is evident that while the legislative framework in Kenya addresses certain aspects of suspension, there are notable gaps, especially concerning the duration of administrative suspensions. The lack of specific guidelines on reasonable timeframes for disciplinary investigations raises questions about the fairness and legality of protracted suspensions. The next chapter will build upon these insights and focus on a comparative analysis of employment laws in South Africa that offer a time frame for such suspensions. Additionally, the chapter will explore potential reforms or amendments to enhance the effectiveness and fairness of the suspension process in the workplace.

²⁶⁶ Section 72(2), Public Service Commission Act (Act No 10 of 2017).

²⁶⁷ Section 72(3), Public Service Commission Act (Act No 10 of 2017).

Chapter 4: Harmonising suspension timelines in Employment Law: A comparative analysis of Kenyan and South African legislations for the formulation of an equitable framework.

4.1 Introduction

The preceding chapter focused on an in-depth examination of the legislative framework governing employee suspension in Kenya. This chapter shifts the focus to South Africa, aiming to provide a comparative analysis of the legal frameworks surrounding administrative employee suspension in the two countries. While both nations share certain similarities in their legal approaches to employment matters, this chapter seeks to illuminate the specific nuances within South African labor law related to employee suspension. By delving into the legal provisions governing suspension in South Africa, the goal is to draw parallels and distinctions, shedding light on potential areas of convergence and divergence between the two jurisdictions. Of particular interest is the exploration of time-related aspects in administrative suspension, an area where South African labor law may offer insights or pose challenges distinct from the Kenyan context. Through this comparative lens, we endeavor to deepen our understanding of the legal landscape surrounding employee suspension, laying the groundwork for a nuanced analysis in subsequent sections.

4.2 The Constitution of the Republic of South Africa No. 108 of 1996

The Constitution affords protection to each and every individual in South Africa, including the rights of individuals in labour matters. Section 23 of the Constitution provides for everyone's right to fair labour practices.²⁶⁸ Similarly to Article 41 of the Constitution of Kenya, it fails to categorically prescribe as to what fair labour practices are and which ones are unfair.²⁶⁹ In the application of *NEHAWU v University of Cape Town* that concerned the interpretation of section 197 of the LRA. Specifically, the issue in the case was whether according to the terms of section 197, employees are transferred automatically along with the business when it is transferred as a going concern, or if such a transfer requires a prior agreement between the transferring and acquiring employers. Ncgobo J in determining the matter stated that the Constitution impacts on the employment relationship on terms that are fair to both an employer and an employee; often in

²⁶⁸ Section 23 (1), Constitution of the Republic of South Africa No. 108 of 1996.

²⁶⁹ Article 41, Constitution of Kenya 2010.

terms of a balancing or accommodation of competing interest.²⁷⁰ He further emphasized that care must therefore be taken to neutralize the tension between the interests of the workers and the interests of the employers that is inherent in labour relations so as to arrive at the balance required by the concept of fair labour practices.²⁷¹

As regards administrative suspensions, the South African constitutional court has interpreted the provision to constitute both substantive and procedural fairness. Considerations of substantive fairness in the context of the constitution relates to the reason for the suspension whereby the employer must have a justifiable reason such as believing that the employee was involved in a serious misconduct or where the employer has reasons to believe that the employee's presence in the workplace might jeopardise the investigations.²⁷² On procedural grounds of fairness, the right to be heard before precautionary suspension is one that is contended upon in the courts. Constitutional courts have upheld the decision of the Labour courts that the requirement of a hearing before being placed on precautionary suspension is not mandatory especially if it has not been provided in an employer's policies.²⁷³ However, this does not give employers a carte blanche to place their employees on suspension without affording them the opportunity to make presentations. Regard must be given to an employer's policies, regulations governing the sector, or in the employment contract to determine whether the right to make presentations should be accorded to the employee.²⁷⁴ It is considered good practice and in line with the principles of natural justice to afford employees an opportunity to be heard.

4.3 Labour Relations Act No. 66 of 1995

Section 186(2) of the Act defines an unfair labour practice to mean any unfair act or omission that arises between an employer and an employee involving unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.²⁷⁵ From this provision one can deduct that not all suspensions are unfair labour practices. It becomes apparent that an employer's conduct must be fair for it to fall outside the ambit of unfair labour practices. In the

²⁷⁰ NEHAWU v University of Cape Town [2003], The Constitutional Court of South Africa.

²⁷¹ NEHAWU v University of Cape Town [2003], The Constitutional Court of South Africa.

²⁷² Long v South African Breweries (Pty) Ltd and Others [2018], The Constitutional Court of South Africa.

²⁷³ Long v South African Breweries (Pty) Ltd and Others [2018], The Constitutional Court of South Africa.

²⁷⁴ John Mettler v Nelson Mandela Bay Municipality Case no: P 487/2018 (Delivered on 2 July 2019) Unreported.

²⁷⁵ Section 186(2c), Labour Relations Act No. 66 of 1995.

matter of *Sappi Forests v CCMA*, the employer suspended the employee with full pay pending a disciplinary inquiry.²⁷⁶ The employer convened the inquiry on 2nd November 2005 however the employee requested a postponement of the inquiry pending the outcome of the prosecution. The employer acceded to the postponement of the pending prosecution but refused to continue the suspension of the employee on full pay. Pillay J in deciding the matter based on section 186 (2) of the LRA held that the provision ought to be interpreted generously to include all forms of suspension in employment.²⁷⁷ Therefore, the aspect of fair labour practices applies to both suspensions pending investigations and punitive suspensions.

However, it is worth noting that the Act is silent on the right to procedural fairness; on when an employee is to be suspended, the procedure applicable or the length of a suspension.²⁷⁸ Despite this, the South African Labour courts have played a critical role in providing guidance on the interpretation of section 186(2) of the Act and the requirements of procedural and substantive fairness. In the matter of *Mabilo v Mpumalanga Provincial Government*, the applicant before being on precautionary suspension was given a letter and asked to state reasons as to why he should not be suspended within five days.²⁷⁹ Jajbhay J held that the approach taken by the employer was to facilitate a speedy resolution of the dispute thus could not be faulted. Additionally, the court laid down the criteria for a fair suspension to include speedy and effective resolution of the dispute, conclusion of the investigations within a reasonable time, and informing the employee about the process that the employer is initiating without undue delay.²⁸⁰

4.3.1 Substantive fairness.

When considering issues of substantive fairness, an employer ought to have a justifiable reason to believe that an employee is involved in serious misconduct and suspension is necessary. A suspension is held to be justifiable where there is prima facie evidence of a case against an employee. Justified reasons for suspension have been held to include cases where an employer has a reasonable belief that the employee's continued presence at work has the potential to prejudice

²⁷⁶ *Sappi Forests v CCMA* [2009], Labour Court of South Africa.

²⁷⁷ *Sappi Forests v CCMA* [2009], Labour Court of South Africa.

²⁷⁸ *Avril Elizabeth Home for the Mentally Handicapped v CCMA and Others* [2006], Labour Court of South Africa.

²⁷⁹ *Mabilo v Mpumalanga Provincial Government* [1999], Labour Court of South Africa.

²⁸⁰ *Mabilo v Mpumalanga Provincial Government* [1999], Labour Court of South Africa.

the employer's business interests.²⁸¹ In the matter of *Biyase v Sisonke District Municipality and another*, the applicant's suspension was found to be unfair due to failure of the employer to provide a substantive reason that occasioned the suspension.²⁸²

The interpretation by the South African courts regarding precautionary suspensions shares similarities with the emphasis on substantive fairness observed in Kenyan courts, as discussed in the preceding chapter. This parallel underscores the proactive stance taken by courts in both countries to uphold substantive fairness in precautionary suspension.

4.3.2 Right to be heard - The Audi Alteram Partem rule.

The audi alteram partem rule is a part of the rules of natural justice that is recognised in the South African labour law. It stems from the common law duty to accord a person the right to make representations when a decision is made. As an essential component of natural justice, it has received a more generous interpretation to be included in preventative suspensions. In the matter of *Mabilo v Mpumalanga Provincial Government*, the court in determining the application of the audi rule held that the maxim is an expression of the principle of natural justice which is part of the law.²⁸³ The classic formulators of the principle intended that where a statute empowers a public official or body to give a decision that prejudicially affects an individual, the individual has the right to be heard before a decision is made against him unless the statute expressly or by implication indicates the contrary.²⁸⁴

In *Mogothle v Premier of the Northwest Province*, the applicant was suspended pending investigations without being afforded an opportunity to present his case before the suspension.²⁸⁵ Van Nierek J stated that South Africa being a party to the International Labour Convention, its courts have interpreted the right to be heard as what the ILO'S Committee of Experts has termed

²⁸¹ POPCRU obo Sephanda v Provincial Commissioner, Gauteng Province [2012], Labour Court of South Africa.

²⁸² *Biyase v Sisonke District Municipality and another* [2012], Labour Court of South Africa.

'The applicant was only provided with a copy of the complaint without being informed why he was suspended whilst the collective agreement required that an employee could only be suspended if there is reason to believe that his presence at the workplace may jeopardise investigations into the alleged misconduct, endangering the well-being or safety of any person or municipal property, be detrimental to stability in the municipality.'

²⁸³ *Mabilo v Mpumalanga Provincial Government* [1999], Labour Court of South Africa.

²⁸⁴ *Mabilo v Mpumalanga Provincial Government* [1999], Labour Court of South Africa.

²⁸⁵ *Mogothle v Premier of the Northwest Province and another* [2009], Labour Court of South Africa.

as a process and dialogue and reflection between the parties (employer and employee).²⁸⁶ He went on further to state that it did not see any reason why the same conception of procedural fairness should not be applied to a proposed suspension pending an investigation into an alleged misconduct.²⁸⁷ In the matter of *Baloyi v Department of Communications and others*, the applicant was furnished with the notice and reasons of the pending suspension however, he was given insufficient time to prepare his defense; within five hours.²⁸⁸ The court in deciding the matter held that the requirement for giving an employee a reasonable time is critical to the realization of the audi rule in that not only does it give the employee reasonable time to assemble the relevant information but also and more importantly, it entails affording the employee an opportunity to prepare and be able to challenge the allegations upon which the intended suspension is to be based upon.²⁸⁹

From the decisions above, it is apparent that the courts in South Africa are in full support of the view of the right to be heard before a preventative suspension. This position is different from that of the Kenyan courts which do not find it necessary for a hearing to be done in a precautionary suspension. Their reasoning is based on the fact that it would be impractical to require an employer to hear an employee in such a preliminary stage.²⁹⁰ Also, they are of the opinion that the hearing that should be given to the employee should be based on the merits of the case as a cardinal rule and not revisit the decision to suspend or interdict.²⁹¹ Based on the rules of natural justice, employees placed on either precautionary or punitive suspension ought to be given an opportunity to present their case before a decision to suspend them is made. In precautionary suspension, during the hearing, they ought to state how their presence in the workplace would not jeopardise the investigations against them. The Kenyan employment system should adopt the reasoning by the South African courts. Furthermore, as a party to the ILO, it ought to incorporate the requirement on the right of an employee to defend himself before an employer.²⁹²

²⁸⁶ *Mogothle v Premier of the Northwest Province and another* [2009], Labour Court of South Africa.

²⁸⁷ *Mogothle v Premier of the Northwest Province and another* [2009], Labour Court of South Africa.

²⁸⁸ *Baloyi v Department of Communications and others* [2009], Labour Court of South Africa.

²⁸⁹ *Baloyi v Department of Communications and others* [2009], Labour Court of South Africa.

²⁹⁰ *Luka Korir vs Moi Teaching and Referral Hospital* [2022] eKLR.

²⁹¹ *Sava v Kitui Cottages And, Guest House (Cause 1280 of 2017)* [2022] KEELRC 1499 eKLR.

²⁹² Article 7, Termination of Employment Convention, 1982 (No. 158).

4.3.3 Payment during suspension and the Basic Conditions for Employment Act No. 75 of 1977 (BCEA)

This Act was enacted to give effect to the right to fair labour practices envisioned in section 23(1) of the Constitution of South Africa by establishing and making provision for the regulation of basic conditions of employment.²⁹³ Section 34 of the BCEA prohibits deductions from an employee's remuneration unless by agreement or following due process of law.²⁹⁴ This implies that unilateral deductions from employees' wages are prohibited. In the matter of *Tsaperas v Clayville Cold Storage (Pty) Ltd*, the employee was sent on precautionary suspension without pay.²⁹⁵ The CCMA challenged the legality of such suspension and held that suspension without pay pending a disciplinary inquiry is unfair.²⁹⁶ This holding was supported in the matter of *Sappi Forest (Pty) Ltd v CCMA* where Judge Pillay ruled that,

*"The position at common law has always been that an employer who suspends an employee without pay commits a breach of the contract of employment. An employer may suspend an employee without pay if the employee so agrees or legislation or a collective agreement authorises the suspension".*²⁹⁷

Therefore, it is unlawful and unfair to suspend an employee without pay pending a disciplinary enquiry. This also applies to the withholding of an employee's benefits during precautionary suspension as it is only allowed where it is provided by statute or where an employee consents to it. The rationale of this is that it would be unfair to suspend an employee without pay before the disciplinary hearing where the guilt status of the employee is yet to be proved.²⁹⁸ A suspension without pay can only be used as a penalty after the employee is found guilty at a disciplinary enquiry of which it becomes a punitive suspension.²⁹⁹ In the matter of *Chaba v Iselwa Investment*, the employer refused to continue providing benefits to the employee while the employee was on

²⁹³ Preamble, Basic Conditions of Employment Act No. 75 of 1997.

²⁹⁴ Section 34, Basic Conditions of Employment Act No. 75 of 1997.

²⁹⁵ *Tsaperas v Clayville Cold Storage (Pty) Limited* [2002], The Commission for Conciliation Mediation and Arbitration.

²⁹⁶ *Tsaperas v Clayville Cold Storage (Pty) Limited* [2002], The Commission for Conciliation Mediation and Arbitration.

²⁹⁷ *Sappi Forest (Pty) Ltd v CCMA* [2009], Labour Court of South Africa.

²⁹⁸ *SAEWA obo Members and Aberdare Cables* [2007], Metal and Engineering Industries Bargaining Council.

²⁹⁹ *SAEWA obo Members and Aberdare Cables* [2007], Metal and Engineering Industries Bargaining Council.

suspension for two months pending investigation.³⁰⁰ The employer's contention was that it was unnecessary to pay the employee based on the principle of 'no work, no pay.' The Commissioner held that the principle only applied in instances where the absence from work was an initiative of the employee and thus the employer could not rely on that principle to refuse the continued provision of benefits.

Another approach has been used by judges to rule on the mandatory payment of remuneration of employees on preventative suspensions. In line with factors to do with natural justice and employment contracts, judges have employed the use of human rights principles to accommodate this stance. In the case of *Miller and Others v Chairman, Ministers Council*, Howie J emphasised on the financial hardship that the non-payment of salaries inevitably brings to those suspended without pay.³⁰¹ He used this reasoning to rule that suspension without pay together with failure of being accorded an opportunity to be heard as to why the benefits should be withheld, was contrary to the rules of natural justice.

However, in instances where delay to the hearings after investigations are occasioned by an employee, the courts have held that an employer is not obligated to remunerate the employee from the period of postponement till the hearing date. In the matter of *SAEWA obo Members and Aberdare Cables* the employee was suspended on full pay pending disciplinary enquiry however the hearing was postponed at the request of the union for about two weeks.³⁰² The company agreed to the postponement with the proviso that the further period of extension would be unpaid, but the employee claimed that he was entitled to his full pay. The arbitrator noted that employees suspended pending disciplinary action are normally entitled to their full pay. However, application of this principle to situations where suspension is extended at the request of the employee would be unfair to employers thus the employee was not entitled to payment during the additional period of the suspension.³⁰³ In an attempt to balance both the interests of the employee and the employer,

³⁰⁰ Chaba v Iselwa Investment [2004], Commission for Conciliation, Mediation and Arbitration.

³⁰¹ *Miller and Others v Chairman of the Ministers Council House of Representatives and Others* [1991], Labour Court of South Africa.

³⁰² *SAEWA obo Members and Aberdare Cables* [2007], Metal and Engineering Industries Bargaining Council.

³⁰³ *SAEWA obo Members and Aberdare Cables* [2007], Metal and Engineering Industries Bargaining Council.

the arbitrator was cognizant of the fact that at times employees would find reason to delay disciplinary proceedings at the employer's cost which would be unfair to an employer

It is evident that the issue of payment during precautionary suspension is well settled in the South African courts following the backing of the BCEA. Similarly, the Kenyan courts have upheld the same position in relation to payment. Moreover, they have tried to balance both the interests of the employer and employee by coming to a decision that a portion of the pay can be withheld or some of the benefits as the rest is released to ensure that the contract remains alive during the process.³⁰⁴ The bottom-line position is that employees on preventative suspension in both jurisdictions are entitled to being remunerated.

4.3.4 Duration of the Suspension and the Public Service Act No. 103 of 1994.

It is imperative that preventative suspensions are not prolonged for unreasonable time frames. This calls for a speedy resolution of the dispute thus the hearings where applicable ought to be held within reasonable time frames and the investigations done without unreasonable delay. Preventative suspension cannot continue for an indefinite period of time thus suspensions that are prolonged constitute an unfair labour practice especially where a collective agreement or disciplinary code regulates the time frames. In the matter of *Mabilo v Mpumalanga Provincial Government & Others*, the court set out the reasons to justify a quick investigation; '(i) To prevent the unnecessary disruption in the life of the employee. (ii) To minimise the anxiety and concern of the employee. (iii) To limit the possibility that the employee will not be allowed a fair hearing. (iv) To resolve the dispute expeditiously.'³⁰⁵

To underpin the need for speedy resolution of the investigations in precautionary suspensions, the courts are of the opinion that suspension usually prejudices the alleged employee psychologically and in terms of future job prospects.³⁰⁶ Furthermore, he opined that suspension is the equivalent of arrest thus the investigations ought to be completed without undue delay.³⁰⁷ The duration of suspension has been held to be subject to the employer's disciplinary code and procedures,

³⁰⁴ *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR:
Grace Gacheri Muriithu v Kenya Literature Bureau [2012] eKLR.

³⁰⁵ *Mabilo v Mpumalanga Provincial Government & Others* [1998], Labour Court of South Africa.

³⁰⁶ *Burger and SA Post Office Ltd* [2008], Commission for Conciliation, Mediation and Arbitration.

³⁰⁷ *Burger and SA Post Office Ltd* [2008], Commission for Conciliation, Mediation and Arbitration.

collective agreements, statutory regulations, or contracts of employment that regulate the conditions of employment of a suspended employee. Thus, if suspension continues after the lapse of the prescribed period, it may be deemed to be unfair even if the investigation has not been finalized. Furthermore, failure to provide for a definite period within which precautionary suspension can take place makes employees prone to face injustices such as protracted periods of suspension, which should not be the case.

Subject to this, South Africa has the Public Service Disciplinary Code that regulates and gives guidance as regards to preventative suspension.³⁰⁸ At clause 7.2, the Act provides that: a) The employer may suspend an employee on full pay or transfer the employee if the employee is alleged to have committed a serious offence; and the employer believes that the presence of an employee at the workplace might jeopardise any investigation into the alleged misconduct or endanger the well-being or safety of any person or state property. b) A suspension of this kind is a precautionary measure that does not constitute a judgement and must be in full pay. c) If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement.”³⁰⁹ The Act acts as a benchmark which organisations and companies use to formulate their disciplinary policies to provide clarity, consistency, and uniformity in the form of policies formulated.

The sixty-day period provided for precautionary suspension has been argued to be effective as it balances both the interests of the employer and that of the employee. In preventative suspensions, employees are entitled to payment in as much as they do not offer their services to the employer. Thus, to counter the misuse of an employer’s resources, the time frame is effective as it was argued in the case of *Heyneke v Umhlatuze Municipality*.³¹⁰ The effectiveness of the sixty-day period has been undermined by the lack of compliance with the provisions by the different entities which calls for strict implementation measures. In the matter of *Minister of Labour v General Public Service Sectoral Bargaining Council and Others* the Labour Court considered the suspension of

³⁰⁸ Public Service Act 103 of 1994.

³⁰⁹ Clause 7.2, Public Service Act 103 of 1994.

³¹⁰ *Heyneke v Umhlatuze Municipality*, [2010], Labour Court of South Africa.

an employee for a period far in excess of that permitted by the relevant disciplinary code.³¹¹ The court held that the suspension was unfair. The court's finding was based on the disciplinary code that entitled an employee is suspended pending disciplinary action to a hearing, to be convened within 60 days and the presiding officer must then decide whether a postponement should be granted. Similarly, in *Lekabe v Minister of Justice & Constitutional Development*, the Court held that a provision in a disciplinary code that disciplinary hearings must be commenced within 60 days against a suspended employee meant that the suspension became unlawful should the disciplinary proceedings not be commenced within that stipulated period.³¹²

In the matter of *Jonker v Okhahlamba Municipality and others* that concerned suspension of an employee pending investigation where the suspension period exceeded the limit provided in the policies, Pillay J held that the procedures and time limits in the policy are a commitment to deal with discipline expeditiously and they serve as a guide as to how such could be accomplished.³¹³ This ought to be the standard procedure that should be adopted. Therefore, it is incumbent upon the Kenyan courts to determine the appropriate time frame within which preventative suspension can be conducted. The use of the phrase 'reasonable period' when executing judgements against protracted suspensions by Kenyan employment courts should be given a definite and clear meaning to enhance clarity in the procedure. Given their role to balance the competing interests of an employer and an employee, giving direction in this matter will be a proactive step in guiding both public and private entities as they formulate their policies. A possible effect of incorporating this will be the reformation of laws as the definition and procedures for effecting precautionary suspension will be provided in the laws such as the Employment Act 2007 or the Labour Relations Act, 2007. Furthermore, it would make employees aware of their rights and thus able to institute proceedings against their employers whenever their rights are infringed.

4.4 Conclusion

The chapter has highlighted the striking parallels and similarities between South African labor law and that of Kenya, particularly concerning preventative suspensions. The goal was to shoe the

³¹¹ Minister of Labour v General Public Service Sectoral Bargaining Council and Others [2010], Labour Court of Appeal of South Africa.

³¹² Lekabe v Minister of Justice & Constitutional Development [2009], Labour Court of South Africa.

³¹³ Jonker v Okhahlamba Municipality and others [2005], Labour Court of South Africa.

areas of reform that Kenya needs to have especially concerning the issue of payment and time periods of suspension. South Africa stands out for its clear and definite legal provisions that provide guidance to both employers and employees, especially in addressing injustices related to time during preventative suspensions. These provisions offer clarity and certainty in navigating the complexities of employment disputes, ensuring that employees are afforded fair treatment and due process. In contrast, Kenya may benefit from further clarity and specificity in its labor laws to address similar issues and enhance protections for workers facing preventative suspensions.



Chapter 5: Conclusion and Recommendations

5.1 Conclusion

Employment contracts establish a relationship that is characterised by mutual rights and obligations from both employers and employees. The power of employers to discipline their employees stems from common law which unfortunately did not provide for the right to fair labour practices. The principle of fairness as regards employment relationships has been developed by the courts overtime and the same is also enshrined in our Constitution.³¹⁴ It is thus settled that the aspects of fairness should be present in all employment matters.

The previous chapters have highlighted the challenges that both employers and employees face when it comes to suspensions pending a disciplinary inquiry. From the foregoing discussion, it is evident that employers grapple with uncertainty as to when and whether to suspend. Employees on the other hand are not aware of the rights due to them whenever they are to be sent on precautionary suspension. Cognisance should be taken of the implications of the two different types of suspensions, and the steps to be taken whenever implementing either of the two.

Furthermore, the current employment laws fail to define what suspensions are and in what instances they apply. As interpreted by the courts, the Employment Act's provisions on discipline in employment relationships apply to punitive suspensions. However, the courts have faced great difficulty in determining the aspects of both procedural and substantive fairness when it comes to precautionary/ administrative suspensions. The main issues under discussion in the previous chapters were:

5.1.1 Determination of a reasonable time.

Employees sent on administrative suspensions suffer from protracted periods of suspension, no pay during the period of suspension, failure of being notified of the reasons for suspension and not being afforded the chance to be heard as to why they should not be suspended. Also, failure to establish a 'Reasonable period' for suspension grants employers a wide discretionary power which is prone to abuse. This lack of clarity increases the risks of injustices such as punitive suspensions

³¹⁴ Article 41, Constitution of Kenya 2010.

or the misuse of suspension as a means to constructively dismissing employees. These are aspects of substantive and procedural fairness that employers must comply with.

5.1.2 Determination of entitlement to pay.

The courts contribute to the uncertainty as regards the issues of payment of employees during preventative suspension by holding different views on the matter. The Employment Act clearly provides for the circumstances under which deductions can be made from an employee's remuneration, with suspension not being listed among them. This therefore calls for a unified interpretation of the provision by the courts to occasion clarity and certainty to the procedures to be followed. Addressing these issues is crucial to safeguarding the rights and interests of employees and promoting fairness in the workplace.

In conclusion, the findings of the study confirm the hypothesis that current legislation falls short in tackling the widespread unfairness faced by employees during precautionary suspensions. It is evident that significant reforms are necessary to ensure that employees are afforded due process, fairness, and protection of their rights in such circumstances. By addressing these shortcomings and implementing reforms that prioritize equity and transparency, policymakers can strive towards fostering a work environment that upholds the principles of justice and respect for all individuals involved.

5.2 Recommendations

From the discussions above, aspects of procedural and substantive fairness must reflect in our laws as regards preventative suspension, in order to cure the injustices that couple it at the moment. This study comes with a few recommendations that are aimed at formulating the laws present to enhance certainty and clarity in the way preventative suspensions are handled.

5.2.1 Recommendation for Legislative Amendment: Enhancing Procedural Fairness in Employment Suspensions

The first recommendation is an amendment of the Employment Act by the legislature to create provisions for suspensions. The Act should provide a definition of suspension and differentiate between the two categories of suspension: precautionary suspension and punitive suspension. Furthermore, it should provide the instances under which either can be used and the procedural requirements to be followed whenever they are being used in the workplace. Procedural fairness

in preventative suspension includes the audi alteram partem principle that entails the right of an employee to be notified of the suspension and the right to be given an opportunity to defend oneself as to why their presence in the workplace would not jeopardise the investigations against them.

5.2.2 Clear Provisions for Payment During Precautionary Suspension

On the issue of payment, it is considered an aspect of procedural fairness to pay employees while on precautionary suspension. Therefore, the law should have clear provisions that employers ought to remunerate employees for the period they are away; pending investigation since the suspension is on the prerogative of the employer. Furthermore, it should state clearly that where employees occasion a delay in being called back for hearing after investigations, the employers are not entitled to pay employees for the extended period.

5.2.3 Recommendation for Definite Duration of Sixty Days

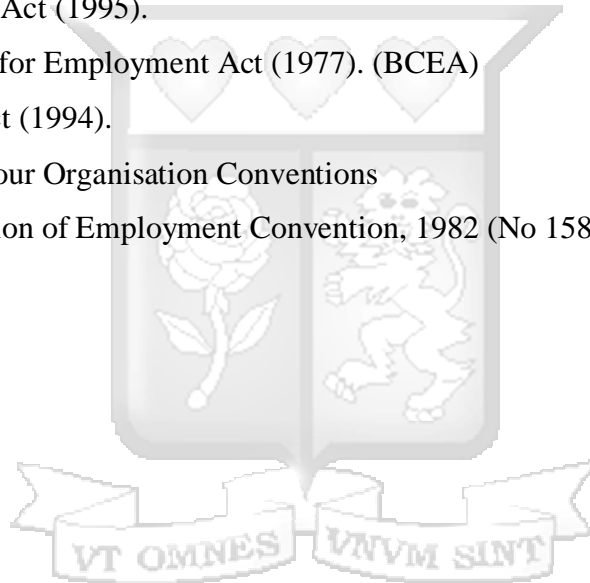
Precautionary suspensions should have a specified duration to mitigate injustices faced by employees due to prolonged suspensions. Relying solely on the notion of reasonableness is insufficient to address these issues. Therefore, it is recommended that the Employment Act stipulate a maximum timeframe of sixty days for preventative suspensions, mirroring the approach adopted by South Africa as discussed in the fourth chapter. This clear timeframe enhances certainty and clarity in the law, serving as a benchmark for organizational policies and promoting consistency across entities. Establishing a definite timeframe not only provides employees with a clearer understanding of their rights but also enables them to seek recourse through legal channels if organizational policies deviate from statutory provisions. This ensures that employees have access to remedies in case of discrepancies between company policies and legal requirements, thus upholding their rights and promoting fairness in the workplace.

In conclusion, implementing these recommendations will enhance certainty, clarity, and fairness in the handling of preventative suspensions, ultimately contributing to a more equitable and just work environment. Furthermore, it will establish a stronger legal framework which is ideal for employee suspensions, thus cure the injustices that employees currently face and provide guidance for the employers to ensure their actions fall within the law.

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