



## THE LEGAL INSIDER

of Mr. Alain P. Lecours

### LABOUR LAW

#### Employee Suspension: With or Without Remuneration?

*You have recently hired a bus driver, daycare educator, or camp counselor for your business. All goes well, until this employee comes under criminal accusations of sexually molesting a minor, but not while on duty. Considering the degree of these accusations and taking into account your desire to protect the public and your business' image, you decide to suspend this employee preventively, until a judgment is rendered on these criminal allegations. Should you suspend the employee with or without remuneration? The same analysis can be applied to an employee that, working for a security-service business, comes under accusations of breaking and entering outside of his work hours. In such cases, you would be tempted to cease all remuneration to that employee during his suspension. However, beware: an employer's power to suspend can only be exercised in certain circumstances and only following certain conditions, which we shall further analyze as follows.*

For many years, it has been recognized by the Courts that an employer can, in certain circumstances, enforce a suspension against an employee. However, a distinction must be made between **disciplinary suspension** (a punitive measure for a reproachable act made during work) and **administrative suspension** (a preventive measure which can be taken when the interest of the employer's business requires it, even in the absence of an act made by the employee while working).

**Disciplinary suspension** of an employee generally is the step that immediately precedes dismissal, pursuing to the principle of gradation, which must be followed by the employer in matters of disciplinary sanctions before an employee can be dismissed. It is recognized and admitted that an employer has the power to administer such sanctions against an employee, as long as just and reasonable causes justify the sanction. Since a **disciplinary suspension** sanctions an employee's misconduct, it generally is without remuneration.

However, what shall it be in cases where the employee is the target of allegations of misconduct, such as sexual offences committed in the scope of his work? Can the employer suspend that employee without remuneration before the end of his investigation regarding these allegations? The analysis of recent Court decisions indicates that the answer to these questions is no. Indeed, as long as the employer has not finished looking into the allegations hanging over the employee, any measures taken against said employee cannot be deemed disciplinary, as the allegations have not been supported in any substantial way. Any suspension imposed on an employee at such a stage in the process shall be considered a **preventive** and therefore **administrative suspension**, which as a rule does not incur a suspension salary. Thus, an employee who ceases to receive his remuneration following such an **administrative suspension** could claim damages against his employer for that loss of income.

In reference to criminal accusations brought against an employee for actions perpetrated outside of work, could the employer suspend that employee in order to preserve the business' image? The employer can do so if he demonstrates the existence of a just and reasonable cause (for example: protection of reputation) allowing for such an **administrative suspension**. With regards to the nature of this just and reasonable cause, the Courts have developed various criteria, which can guide the employer in his decision to **administratively suspend** an employee:

1. Sufficient link between the reproached act and the type of employment;
2. The nature of the accusations;
3. The existence of reasonable grounds to believe that maintaining, even temporarily, the employment relationship would be prejudicial to the employer or to his reputation;
4. The existence of immediate, important inconveniences that cannot be practically countered by alternate measures (for example: assigning the employee to another post)
5. The necessity of protecting the public.

However, in any case, a **preventive or administrative suspension** cannot entail a loss of remuneration.

Once the employer's investigations are complete or once the competent authorities have rendered their decision, the employer must consider whether the gravity of the employee's actions justify a dismissal without severance pay and without notice. It should be noted that during an **administrative suspension**, the employer is under no obligations to conduct his own investigations regarding the criminal charges brought against his employee for actions outside of work. However, the employer has the obligation to permit his employee to give his own versions of the facts, if he so desires.

The employer's power of **disciplinary suspension** is a power implicitly recognized in labour legislation (*Labour Standard Law, Labour Code*). It is a punitive measure that must follow a reprehensible act perpetrated by the employee within the scope of his work. This prerogative is only one of a multitude of sanctions that can be brought against an employee according to the principle of graduation in disciplinary measures. A **disciplinary suspension** usually is without remuneration. This is logical, as a suspension with remuneration in such a context would not have the disciplinary impact it must have.

In the case of the **administrative suspension**, this preventive measure is not provided by any text of law. Rather, it is founded upon the very nature and finality of the contract of employment, as defined by the *Civil Code of Québec*. According to a recent decision of the Supreme Court of Canada, an **administrative suspension** can be imposed by an employer if he justifies that measure through the existence of a just and sufficient cause that would potentially prejudice his image and reputation or jeopardize the security of the public, under the criteria laid out above. Nevertheless, as an **administrative suspension** is a purely preventive measure, **it should not, as a rule, entail a suspension of the employee's remuneration** as long as the various investigations required have not been completed or as long as the awaited judgments have not been rendered.

## CONCLUSION

In the last years, the employer's right to suspend an employee temporarily and without pay, as a disciplinary measure, has been widely recognized. It is a fundamental principle that is not subject to controversy. Numerous judgments, issued by instances of diverse levels of jurisdiction, have clearly defined the nature and scope of **disciplinary suspension**. As a result, it is a well-defined concept.

On the other hand, the notion of **administrative suspension** is a relatively new arrival on the judicial scene; as a result, it is the subject of few decisions and is little analyzed. A recent judgment from the Supreme Court of Canada instructs us that without a written contract of employment to that effect agreed upon by the employee, the general provisions of labour law forces the employer to continue an employee's salary during an **administrative suspension**. However, the Court seems to leave the door open for administrative suspension without pay when the circumstances justifying such a measure have been provided for in a written contract of employment negotiated and agreed upon by the parties. This, however, does not signify that an employer could include in a contract of employment a general provision allowing for **administrative suspension** without salary in any circumstances. Indeed, the criteria that must be met to justify an **administrative suspension**, as explained further above, apply in all cases. In consequence, it is strongly suggested to retain the counsel of a legal adviser when drafting up and putting into action such a clause.

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