

# Workplace Banishment and Human Rights Implications



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## Abstract

Franz Kafka's *The Trial* opens with the sentence: 'Somebody must have made a false accusation against Josef K., for he was arrested one morning without having done anything wrong' [1]. Two strangers entered K.'s room unexpectedly and told him: "'You are not allowed to go from here. You are after all under arrest.' 'So it would seem,' said K. 'And for what reason?' he then asked. 'It's not our job to tell you that. Go into your room and wait. The proceedings have now started and you will learn everything in good time.'" [2] When Kafka's protagonist demanded to see their superior in order to understand what was happening, he was told by one of them, a warder called Willem, that "...[A]nd now I advise you;, he added, 'to go into your room, keep calm, and wait to see what will be decreed about you'" [3].

**Keywords:** Human Rights; Europe's historical past; Discrimination and harassment; Employment; Workplace suspension

## Introduction

Such surreal experiences and abuse of human rights are traditionally associated with totalitarian and authoritarian structures which have been seemingly relegated to Europe's historical past. Yet, in the second decade of the 21<sup>st</sup> century, we witnessed the clear undermining of liberal democracy and the rule of law covertly or overtly, [4] the worshiping of the 'strongman' qua leader and the generalized prevalence of the neoliberal logic of treating employees as disposable tools - and not as persons entitled to enjoy fair and just working conditions and the protection of all other fundamental rights [5].

Kafkaesque workplace suspensions became widespread. There has been an increasing trend of suspending employees

during disciplinary proceedings almost as a matter of course as well as of orchestrating disciplinary proceedings without reasonable grounds in order to suspend employees and bully them out of their job in the UK and elsewhere [6]. Both trends have been noticeable in the private and public sectors, such as, health, social care, police, education, higher education and so on. Whistleblowers and complainants of discrimination and harassment tend to be penalized with suspensions as a disciplinary sanction prior to a formal disciplinary process following allegations of misconduct for which there is no prima facie evidence. The Daily Telegraph in the UK exposed the mistreatment of whistleblowers of patient safety concerns: 'they are hounded and bullied out of jobs' with their financial and professional futures ruined by bureaucrats [7].

1. Penguin Books (transl. by Idris Parry), Milton Keynes, 1994 [1925], p. 1.
2. Ibid, at p. 2.
3. Ibid at p. 6.
4. Graber MA, Levison S, Tushnet M (eds.) (2018) *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018).
5. See inter alia The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III); the International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; the International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; the European Convention on Human Rights (opened for signature on 4 November, entered into force on 3 September 1953) available at <https://www.coe.int>, and the EU Charter on Fundamental Rights which was proclaimed in Nice in 2000 and became legally binding when the Lisbon Treaty entered into force on 1 December 2009; it is available at <https://fra.europa.eu>. On the right to just and favorable or fair working conditions, see Article 23 of the Universal Declaration on Human Rights, Article 7 of the 1976 Covenant on Economic, Social and Cultural Rights and Article 31 of the EU Charter of Fundamental Rights.
6. Kostakopoulou D, Mahmoudi M (2024) 'Academic Bullying and Human Rights: Is It Time to Take Them Seriously?' 25 Human Rights Review p. 25-46.
7. Eastham J, Rayner G (2024) 'NHS bosses destroy careers of whistleblowers who stand up to protect patients' lives', The Telegraph, 15 May 2024 at <https://www.telegraph.co.uk/news/2024/05/15/nhs-bosses-destroy-careers-whistleblowers-avoidable-deaths/>; K. Ahmed and C. Tominey, 'Why are whistleblowers hounded out of the NHS?', The Daily Telegraph, 16 May 2024 at <https://www.telegraph.co.uk/news/2024/05/16/daily-t-podcast-nhs-whistleblowers/>.

Suspensions are thus part of forced workplace exit tactics. Since an unfair suspension amounts to a breach of the implied term of trust and confidence between the employer and the employee, the targeted employee is bound to resign and, then, claim that they have been constructively dismissed [8]. But the exercise of this right is not easy in practice. Fear about an uncertain employment future and deep sadness about their imposed misfortune and the destruction of their career immobilize employees and lead them to sign non-disclosure agreements containing a few months' salary as compensation.

Innocent employees become traumatized by spurious allegations and managerial malignity. They suffer health problems, anxiety, long-term psychological injuries and can become suicidal as a result of their unfair treatment [9]. In the management's game of banishment from the workplace and forced exit, there is little regard for the truth. After all, leaders engaging in arbitrary exercises of power like to conceal the real reasons for their actions and do not care about due process and natural justice. Individuals are treated as mere objects of power and the injuries inflicted on one's professional reputation, career, health and personal and family lives are deemed to be irrelevant considerations by authoritarian managers. For narcissist managers, there might be a personal gain too, namely, the pleasure they derive from the pain of the injured employee.

There are also cases of excessively long suspensions of two, three-, four-, six-, nine and even twelve-months' duration designed to inflict maximum damage on an employee [10]. In such cases, sycophancy is fused with organizational violence, that is, an organizational plan to cause the physical and psychological liquidation of the employee. The perpetrators more often than not tend to remain unaccountable for an employee who has been disoriented by a sudden suspension and is fearful of losing their job is unlikely to have the presence of mind and the willingness to bring an employment tribunal claim within the statutory time limit of three months. They eagerly await the end of the suspension in order to return to work.

Employers and their human resources departments know the requirements for a lawful suspension: namely, the existence of a real and serious misconduct for which there is prima facie evidence

posing a potential threat to the business or other employees; it is impossible to investigate the allegation if an employee remains at work because they may destroy evidence or attempt to influence witnesses; and the employee cannot be transferred to another area of the business whilst the investigation is carried out [11]. They also know that the suspension should be brief, should be kept under regular review, the disciplinary investigation/ procedure should be concluded as soon as possible. The employee should also be given clear information regarding their suspension and its duration as well as regarding about their rights and obligations during the period of suspension.

If the suspension continues, reasons must be provided to the employee who should have a right to appeal against the continued suspension. Any presumption of guilt is to be avoided not only because it can prejudice the disciplinary process, but it can also cause distress and harm on the employee's reputation and career. In the United Kingdom, the ACAS guidelines on workplace suspension stipulate that 'there may be instances where suspension with pay is necessary while investigations are carried out' [12]. For example where relationships have broken down, in gross misconduct cases or where there are risks to an employee's or company's property or responsibilities to other parties [13]. Exceptionally you may wish to consider suspension with pay where you have reasonable grounds for concern that evidence has been tampered with, destroyed or witness pressurized before the meeting [14]. Suspension with pay should only be imposed after careful consideration and should be reviewed to ensure it is not unnecessarily protracted. It should be made clear that suspension is not an assumption of guilt and is not considered a disciplinary action' [15]. Therefore, if possible, the suspension should be kept confidential and, in all cases, the employee should be given an opportunity to be heard before the suspension decision [16].

The latter is constituent of the legality of any workplace suspension because it flows directly from the principle of natural justice: negative decisions affecting an individual's rights require an advance notice and an opportunity to be challenged. But when the suspension is not founded on real misconduct and is, instead, a fraudulent stratagem and bullying act and/or a reprisal for whistleblowing, employers will bypass the legal requirements of

8. Burgher B (2020) *Constructive Dismissal: Practice Pointers and Principles* (Somerset, UK: Law Brief Publishing, 2020).
9. Kivimaki M, Vistanen M, Vartia M, Elovainio M, Vahtera J, et al. (2003) 'Workplace bullying and the risk of cardiovascular disease and depression', 60(10) *Occupational and environmental medicine*, 779-783; T. Field, *Bully in Sight* (Wantage, England: Success Unlimited, 2009 [1996]); S. Hinduja and J. W. Patchin, (2010) 'Bullying, Cyberbullying and Suicide', 14 *Arch. Suicide Res.*, 206-211.
10. Kostakopoulou D, Mahmoudi M (2023) 'Human Rights and Academic Harassment: Policy v Action', 10(3) *Austin Journal of Public Health and Epidemiology*, 1-3 (Communication);
11. ACAS Guide, Suspension during a work investigation available at <https://www.acas.org.uk/suspension-during-an-investigation>, 12 June 2023.
12. ACAS Guide on Discipline and Grievances at Work, July 2020, at 17.
13. *Ibid*, at 17-18.
14. *Ibid*, at 17.
15. *Ibid*, p. 18.
16. See the Irish Supreme Court's decision in *O'Sullivan v HSE* [2023] IESC 11; see also the English Supreme Court's decision in *Braganza v BP Shipping* [2015] UKSC 17.

a prior meeting with the employee, a prior investigation of the allegations to establish facts, the need to consider alternatives to suspension and the use of suspension as a last resort. They will not even provide the suspended employee with sufficient particulars and supporting evidence of their alleged misconduct because they have none since the allegations are fabricated.

Reminiscent of Kafka's account, the absence of any information on material facts and prime facie evidence at the time of the suspension is intended to destabilize the employee and to sow confusion. The employee must know the nature of the allegations made against them and be provided with any written copies of evidence and relevant witness statements in order to make sense of what is done to them and to decide what they may do in return. It is foreseeable that a psychiatric injury can result if an individual is unaware of the detailed allegations and the supporting evidence while (s)he is suspended. The denial of due process and natural justice which includes the principle that individuals have a right to know a decision and to be heard before their rights can be affected engage the fundamental rights of human dignity and the personality rights stemming from Article 8 ECHR and Articles 1 and 7 EUCFR. Organizations practicing 'fake' suspensions and ostracism of their staff also breach their duty of care flowing from health and safety regulations and equality and whistleblowing laws which prohibit victimization and bullying and vexatious allegations made in bad faith, and the principles of proportionality and reasonableness.

Punitive suspensions regardless of the employee's innocence thus constitute a perversion of the law and human rights abuse. Unnecessarily protracted suspensions aiming at procuring or inducing a breach of contract and thus a claim for constructive dismissal on the part of the employee are unlawful. They indicate a wilful intention to cause harm and have a detrimental impact on the health and well-being of employees. For public authorities qua employers this is significant not only because they are obligated to protect and to mainstream human rights, but also because they have a duty to act lawfully, fairly and justly in the wider public interest in all their activities. In addition, a public institution also must comply with its public sector equality duties. It must

ensure that the principle of equality of treatment is respected and must pro-actively take measures to eliminate discrimination, bullying, harassment and victimization from the workplace [17]. A reluctance to take into consideration human rights and, in particular, non-discrimination and the protection of the inviolable right to human dignity should not be tolerated in a civilized society in the 21<sup>st</sup> century.

The 2011 United Nations Guiding Principles on Business and Human Rights stipulate states' duty to protect human rights, businesses' responsibility to respect human rights and victims' right to access an effective remedy when their human rights are breached [8]. Critics might observe, here, that there is no agreed definition of the term 'abuse'. However, the UN draft of internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises defines human rights abuse as 'any direct or indirect harm in the context of business activities, through acts or omissions against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment' [19].

### Conclusion

This definition should be at heart of human rights compliant workplace behaviors. Public Organizations must uphold the law and protect all the rights employees are entitled to. These range from the rights to health and fair and just working conditions, to non-discrimination, freedom of expression, respect for private and family life, the right to protection of personal data and equal human dignity. Governments can play a crucial role in this area by imposing statutory bans on protracted suspensions. By imposing a maximum limit of 7 or 10 days, unless a police investigation is pending, governments can effectively prevent the misuse of workplace suspension and deceptive schemes of employee exit, protect fundamental rights and contribute to a healthier work environment.

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17. S. 149 of Equality Act 2010 (UK); see also <https://www.gov.uk/government/publications/public-ector-equality-duty>.
  18. Available at [https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).
  19. Article 1, Definitions, Third Revised Draft 17.08.2021, available at <https://www.ohchr.org/sites/default/files/LB13rdDRAFT.pdf>.



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