

Instant Resignations a Problem For Employers



The employment of an employee can be terminated by the death of the employee, by his/her retirement, by dismissal, by mutual agreement or at the instance of the employee.

Normally, if the employee terminates the employment he/she does so by retiring or resigning and giving advance notice in writing. The amount of notice that the employee is supposed to give depends on a number of factors. Firstly, if there is no contract between the employee and employer providing for a notice period then the notice period as provided for by labour legislation must be applied. For example, the Basic Conditions of Employment Act (BCEA) provides that employers and employees covered by the BCEA must give, in writing:

One week's notice if the employee has up to six months' service

Two weeks' notice if the employee has between six months' and 12 months service

Four weeks' notice if the employee has 12 months' service or more.

Secondly, an employment contract can provide for periods of notice longer than those prescribed by legislation as long as the employee is not required to give more notice than the employer is required to give.

Sometimes the employee just leaves without giving notice or works only a portion of the notice. This can cause operational problems for the employer who then does not have sufficient opportunity to make alternative arrangements to get the work done.

In some cases where the employee fails to work the required notice the employer is only too pleased to accept this. But, if the employer fails to object to the absence or shortness of the notice period being

worked the employer is required to pay the employee out in lieu of the unworked portion of the notice!

A bigger problem arises for the employer where the employee fails to work-in his/her notice in a situation where the employer needs the employee's services for the full notice period. This need could exist because:

The employer needs the employee to complete a handover of his duties;

There is a lot of work that still needs to be done ;

Certain tasks can only be done by the employee;

It will take time to find a suitable replacement;

Clients need to be given advance warning of the employee's departure due to a special working relationship between the employee and the client.

What can employers do if employees leave without working the required notice? Firstly, the employer can apply to court to issue an urgent order of specific performance. This is an order requiring the employee to work-in the required notice. Secondly, the employer could apply to court for damages caused by the employee's failure to work the notice. However, should the employer sue for damages, it would have to be able to quantify and prove specific losses attached to the employee's breach of the notice agreement. For example, if the employer could show that it lost an order worth one million rand due to the employee's premature departure the damages claimed from the employee would be one million rand. In the case of SAMRO Ltd vs Mphatsoe (2009, CLL Vol. 18 No. 9 page 82) the employee failed to work the notice that the employer believed he was contractually required to work. The employer therefore sued Mphatsoe for damages equivalent to the earnings that employee would have been paid for the period of the unworked notice. The Court decided that this basis for arriving at the damages amount was legally incorrect. It said that a suit for damages can only be satisfied by the amount of loss actually suffered by the plaintiff. However, as the employer was unable to show that it had suffered any specific loss, the Court was unable to award any damages. The Court commented that, if the employee breaches the notice agreement the actual damages caused could be zero or could be a lot more than the amount of the employee's earnings.

The Court also decided that a clause in the agreement providing for a 'calendar month's notice' will not always mean that notice must be given on the first of the month to the end of the month. The intention of the parties as to the notice period was more important in this regard.

The outcome of this case makes it clear that:

It is difficult for employers to force employees to work-in their agreed or statutory notice

Should the employer claim damages it must clearly identify and quantify the losses actually suffered

Where the employer wants notice to be given on the first day of the month the employment contract should specifically provide for this instead of merely requiring a calendar month's notice.

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