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GENERAL

SHORT NOTICE

– WHAT'S AN EMPLOYER TO DO? –

A new and disturbing trend is arising in the workplace: employees resign from their positions without affording the employer the proper notice period; or they disappear midway through their notice period. Often this leaves an employer high and dry, with important work to be done and no-one to do it.

Employers take note: there exist no grounds in a free and humane society whereby anyone can be forced to physically perform work against their will. This much is accepted. However, this does not mean that such an employer need be without recourse...

The Basic Conditions of Employment Act (BCEA) at section 37(1) prescribes minimum notice periods (determined by the employee's length of service) and the parties are required to give each other: (a) one week notice during the first six months; (b) two weeks' notice thereafter; and (c) four weeks' notice after a year of service. A contract of employment can vary (increase) these notice periods, as long as they bind the parties equally.

The Labour Appeal Court in *National Entitled Workers Union v Commission for Conciliation, Mediation & Arbitration & Others (2007) 28 ILJ 1223 (LAC)* considered the question as to what recourse an employer might have in the event of short notice.

One of the employees of the union (*NEWU*) had failed to give notice and the union claimed that this was an

Unfair Labour Practice perpetrated against them. The court did not agree. The court made it clear that there was no mechanism or recourse built into any labour legislation which protects an employer against an employee who does not honour their contractual notice period.

The significant word here being "contractual". Whether or not the labour legislation allows short notice, an employee who bound themselves contractually to providing a certain period of notice (and then reneges) is in breach of contract and may be sued for damages under common law – as confirmed in the *NEWU*-case.

However, this does not mean that an employer can throw punitive clauses into their contracts of employment willy-nilly. A contract which runs counter to the aims of labour legislation will most often be found unenforceable. Creative drafting is required.

In years past, employers attempted to recoup their losses by deducting the value of the notice period from the vanished employee's final remuneration. This was often frustrated by the employee having no leave due and having disappeared immediately following pay day. In any event, as per the *NEWU*-case, this was not an accepted practice.

At least, not if it was not contractually provided for in the employment agreement. At section 34, the BCEA allows for deductions to be made via agreement and a clause is required stating that the employee agrees to the deduction from their final remuneration in the event of short notice.

Of course, if the employee is not due any final remuneration, the employer will still need to institute a civil case for breach of contract in order to recoup these damages.

To reiterate, employers are advised against withholding final remuneration in lieu of notice, unless their contracts of employment have been specifically crafted to allow this.

Contact Invictus (or your normal service provider) to ensure that your contracts are up to date.

INDUSTRIAL RELATIONS

VICARIOUS LIABILITY

–EMPLOYERS ON THE HOOK–

While most employers are, at least notionally, aware that the actions of their employees can be attributed back to them, many do not explore the reasons or limits of this idea. Its source is the legal doctrine of Vicarious Liability, which gives form to the Latin maxim: "*qui facit per alium facit per se*" interpreted as "he who acts through another, does the act himself". In law, it is describes as the "strict liability of one, for the delict of another". Loosely, a "delict" is an action or omission, either wilful or negligent, which causes damage. It does not necessarily fall under either contractual- or criminal liability (although it may, depending on the circumstances).

In short, the employer is held civilly liable for damages caused by its employee and may be successfully sued by the one who suffers such damage. The range of damage covered by this doctrine is unlimited and may include matters as simple as a fender-bender; as complex as sexual harassment; or as serious as the death of another. As per the Law of Delict, any "*act of a person that is a negligent-, wrongful-, intentionally unlawful act / omission or otherwise culpable, causing harm to another*".

Nevertheless, Vicarious Liability is regulated not by legislation but through Common Law, which operates irrespective of any pre-existing contact, contract or agreement with the one suffering harm. However, there is still a question as to whether the aggrieved party may follow the chain of liability up to the employer or whether it will be limited in claiming damage from the employee only. Assuming that it has been proven that the employee in question has caused damage, it does not necessarily follow that employer can be held accountable. For the employer to be held liable, the action by the employee must have been committed during the course and/or in the capacity of their employment.

Specifically, there are three requirements: i) there needs to be an employment agreement (as defined in

labour law) between employer and employee; ii) the employee, in causing the damage, must have acted within the scope of his/her employment and iii) the employee must be the actual perpetrator of the delict.

Each case is still judged upon its own merits. One of the earliest was *Feldman (Pty) Ltd v Mall 1945 AD 733* where the court stated that a Master employing a Servant brings about many forms of risk of harm to others, if proven that the Servant was negligent, inefficient or untrustworthy. If the Servant, in completing his Master's instructions (or activities incidental thereto) in a negligent or improper manner were to cause harm to another, the Master is deemed culpable for the harm [741].

Similarly, in *Bezuidenhout NO v Eskom 2003 24 ILJ 1084 (SCA)*, Eskom forbid its employee from transporting any unauthorised passengers in the company vehicle. The court held that, due to this instruction, it could not be said that the employee, in so transporting unauthorised passenger, was acting "within the course and scope of his employment". Consequently the employer cannot be held vicariously liable.

This illustrates that there must be a nexus (close causal link) between the employee's conduct and what the employer authorises the employee to perform. *(Smith & Van der Nest 2004 TSAR 520 536)*. This is not to say that an employer will escape liability merely on the basis that the employee's conduct was fraudulent, unauthorised or undertaken for the employee's own interest *(Minister of Fiancé v Gore 2007 1 SA 111 (SCA))*.

It becomes clear that an employer can protect itself from vicarious liability (at least, to a certain extent) by clearly defining the employee's scope of authority and forbidding those acts which it foresees might cause harm to itself or others. While the BCEA (at section 34) allows the employer some financial recourse against such an offending employee, this is often cold comfort and mostly entirely insufficient. Employers are advised to maintain thorough company policies and procedures in order to limit its liability.

In this regard, contact Invictus or your normal service provider

HUMAN RESOURCES

CASUAL HARASSMENT

– FORMAL SANCTION –

It happens to everyone occasionally: the temptation to respond to a stupid question with anger; to let the person sending you an email on a Friday afternoon know exactly how far they can stick their request up their weekend.

For the most part, we manage to take a deep breath and not respond in the moment. We do the smart thing and give ourselves a cooling-off period. But sometimes our anger and frustration boil over unto our return email. And then Monday dawns, along with a harassment grievance and an invitation to a disciplinary inquiry. But this might be the least of your worries.

In our haste to link harassment to discrimination under the Employment Equity Act (55 of 98), we sometimes overlook what is right in front of us: The Protection from Harassment Act, number 17 of 2011 (the "Act") defines harassment as repetitive conduct which, over time, comes to constitute harassment.

However, in *Mnyandu v Padayachi [2016] 4 All SA 110 (KZP)* the learned judge stated that: "[a]lternatively the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences [...]".

Such conduct would include (as per the Act's definitions) any conduct which a perpetrator knows, or ought to know, will cause harm (meaning mental-, psychological- or economic harm) or inspires the reasonable belief on the part of the victim that harm will be caused to the victim or any member of his/her family.

This can include (but is not limited to) unreasonably following-, watching- or pursuing a person; unreasonable verbal-, electronic- or other communication; unreasonable sending of letters, faxes, telegrams, packages, text messages or emails to a person; as well as sexual

harassment or bullying.

Such a victim is entitled under the Act and in the course of a relatively informal and inexpensive process, to obtain a Protection Order and to have such order enforced against the perpetrator. It is similar to the Protection Orders available to victims of domestic violence but does not require the existence of a "domestic relationship" between the parties.

In our above example a single ill-conceived, Friday afternoon email can set one on a course whereby a Protection Order is granted, binding the employer to keep the parties apart. This can wreak havoc with the smooth running of the employer's day-to-day operations.

Employers are advised to caution their employees, through policy and workshops, against abusive conduct and to attempt, as far as possible, to foster a culture of mutual respect and workplace harmony.

LEGAL

SABOTAGE!

– THE GREMLIN ON THE WING –

Sabotage in the workplace is seldom discussed but has far reaching and serious implications. It refers to an employee (or group of employees, acting jointly) who cause some form of harm to the company (or to other employees) by deliberately (and often covertly) acting in a destructive, obstructive or disruptive manner. The harm could be directed at the company directly or indirectly (at assets or operations the company may have an interest in).

Sabotage can take many forms and can include spreading rumours with the intention of causing harm to the company or fellow employees; disclosing confidential information to competitors; negatively altering company information or documents; or deliberately under-performing at work. Sometimes one employee will sabotage another employee in an attempt to gain a career

advantage by making the competition look incompetent. This often undermines the company's aims.

It becomes apparent that sabotage can have serious consequences, both reputational and financial. It is critical that employers act as soon as possible to identify and prevent sabotage before it occurs. This is often easier said than done, as sabotage is mostly a covert enterprise. For this reason it is important for the employer to make employees aware of the serious nature of sabotage and include in their disciplinary codes that it is an offence that warrants appropriate disciplinary action, including dismissal.

In the case of *Chauke & Others v Lee Service Centre CC t/a Leeson Motors (1998) 19 ILJ 1441 (LAC)*, the Labour Appeal Court held that an employer who continuously suffered as a result of sabotage committed by various employees, who were never specifically identified, was entitled to dismiss *all* employees by virtue of the fact that all the employees were either directly involved in the sabotage or failing to aid the employer from uncovering the saboteurs. Sabotage by employees often goes hand in hand with derivative- or group misconduct where, it is impossible to determine exactly who is committing the sabotage. Many courts have found it appropriate to dismiss in cases of group misconduct where a specific perpetrator cannot be identified.

In the case of *SACTWU obo Ramafoko v Bader SA (Pty) Ltd- (GAPT9945-06)*, the employee was dismissed for sabotage in that he deliberately manipulated tests in order to make it seem as if the company had many health risks associated with its operation. His dismissal was found to be fair.

It is also not uncommon to see sabotage as an act of revenge, following an employee's dismissal. In a recent case, a branch manager of Media24 was dismissed. In revenge, he sabotaged the company by intercepting, removing and destroying magazines, newspapers and pamphlets the company intended to distribute on behalf of its customers. The High Court granted an interdict against the ex-employee, prohibiting this behaviour, in order to protect the interests of the company.

The act of sabotage will generally also breach the trust relationship and duty of care between the employee and employer. Central to the employment relationship is trust and confidence in one another. Conduct inconsistent with this warrants dismissal of an employee. An employer should take care (through deed and policy) to foster a company culture of co-operation and mutual benefit.