SEENA
LEGAL CONSULT (PTY)LTD
ASSISTING THE BUSINESS OWNER

Volume 2 – May 2016

CORPORATE NEWSLETTER

IN THIS ISSUE

NEW MINIMUM WAGE FOR DOMESTIC WORKERS

Employers of domestic workers should take note of the new minimum wage for domestic workers that took effect on 1 April 2016. In terms of the minimum wage agreement, as gazetted on 24 December 2014, an increase of 5% plus a percentage increase equal to the increase in the consumer price index takes effect 1 April 2016. This means that the minimum wage has increased to N$ 1 353 per month or N$ 62, 45 per day.

MESSAGE FROM THE MD

The public holidays during March and May 2016 will negatively affect business for a period of three months. With our economy already under severe pressure, we as business people can hardly afford it.

Here at **Seena Labour** we experience an increase in personnel issues in the workplace because of the public holidays. It is important to enforce discipline during this period. **Seena Labour** will assist you to be fair and consistent.

Seena BEE has lodged it's commentary on the NEEEF bill on the 29th April 2016 with the office of the Prime Minister. It is a fact that the NEEEF will become legislation in due course. Are you as a business owner ready to face this challenge?

Seena Training is very active and our training sessions are attended by many of our clients and their employees. Initiator training is very popular. This course will assist the employees or managers in your business who are responsible for investigating misconduct and initiating disciplinary action.

Although your business doesn't employ 25 or more employees, **Seena Employment Equity** can assist you to obtain an exemption in terms of the Affirmative Action Act.

MESSAGE FROM THE MD

Die vakansiedae gedurende Maart en Mei 2016 veroorsaak dat besigheid vir 'n tydperk van 3 maande negatief beïnvloed word.In 'n ekonomie wat reeds onder druk is, kan ons as besigheidsmense dit beswaarlik bekostig.

Ons hier by **Seena Labour** kan duidelik sien hoe die vakansiedae ook 'n invloed op ons kliënte se personeelbedrywighede het. **Seena Labour** kan u hiermee bystaan. Onthou dissipline moet juis in hierdie tyd streng en konsekwent toegepas word.

Op 29 April 2016 het **Seena BEE** ons weldeurdagte kommentaar op die NEEEF konsepwet aan die kantoor van die Eerste Minister gelewer. Die implementering van NEEEF as 'n volwaardige Wet, is 'n realiteit. Is u besigheid gereed om hierdie uitdagings die hoof te bied?

Seena Training se opleiding word aktief deur ons kliënte en hul werknemers bygewoon. Die Initiator Training is veral gewild. Hierdie kursus help die personeel in u besigheid wat met dissipline gemoeid is, om oortredings te ondersoek en dissiplinêre aksie te inisieër.

Al het u besigheid nie 25 of meer werknemers nie, kan **Seena Employment Equity** u behulsaam wees om 'n vrystelling te bekom in terme van die Affirmative Action Wet.

Groetnis,

JJ Barnhuizen
MANAGING DIRECTOR

Contact Us

Windhoek Office
Tel: (061) 309 260
Fax: (061) 309 266
Email: windhoek@seenalegal.com

Swakopmund Office
Tel: (064) 416 100
Fax: (064) 461 000
Email: swakop@seenalegal.com

Keetmanshoop Office
Tel: (063) 225 931
Fax: (063) 225 932
Email: keetmans@seenalegal.com

Tsumeb Office
Tel: (067) 222 900
Fax: (067) 222 500
Email: tsumeb@seenalegal.com

DODGY SETTLEMENTS AND POOR WORK PERFORMANCE

Just as an employment relationship is formed by the mutual consent of the two contracting parties, so it can be terminated by mutual agreement. Although the above statement seems fairly uncomplicated, applied in practice it is not always as straightforward. The issue received much attention in the recent Labour Court judgement, as handed down by Judge Euitele, in the matter between TOW IN SPECIALIST CC [1] and one Christoph Urinavi.

The underlying facts of the case can briefly be summarised as follows:

Mr. Chris Urinavi (the Employee) was employed by Tow-In Specialist (the Employer), as a breakdown driver. His employment commenced in 2008 and it appears that the employment relationship was without noteworthy complications until at least 2011. On the 29th of November 2011 trouble started when Mr. Urinavi received the first letter from his employer stating that his performance was not satisfactory. He was given 3 months to improve or face possible dismissal. The letter was followed by 5 meetings, held between the 28th of June and the 2nd of October 2012. In these meetings the Employer sought to address the employee's alleged continued poor work performance with the assistance of an HR-Consultant.

On the 3rd of September 2013 the Employer's HR- Consultant addressed a second letter to the Employee. In the letter the Employee's continued lack of performance was among the issues raised. He was granted one last opportunity and given 2 months within which to improve his performance. The letter concluded with a declaration which the employee signed. It read as follows:

> *"Chris Unrinavi declares that he will endeavour to the best to tow a maximum of 20 cars a month, from this date [i.e. 03 September 2013] of the hearing and that no additional opportunities will be granted again after the enquiry. Should I recover for a certain period of time and collapse again in less than 12 months the agreement will also apply.*
>
> *I Chris Urinavi declare I uderstand and agree to the above content above and acknowledge the receipt of his letter/agreement terms signed on the 03rd of September 2013" [sic]*

On the 4th of December 2013 the Employer's HR-Consultant held another poor work performance meeting. During this meeting the Employee was informed that he failed to reach his target of 20 cars per month and was given another final opportunity to improve on his performance. Shortly after the meeting the tow truck experienced mechanical difficulty and the Employee was informed to park it at the Employer's premises and leave. On the 16th of January 2014 the employee met with the Employer's HR-Consultant. It was during this meeting that the Employee was given a copy of the agreement quoted here-below. He was given the opportunity to consider the content of the agreement and advised to take it to the Ministry of Labour in order to get their opinion on the matter, should he wish to do so. The Employee returned the following day and the agreement was signed, effectively terminating the employment agreement between the parties on 17 January 2014. The signed agreement as directly quoted from the court case, reads as follows:

RE: TERMINATION FOR POOR WORK PERFORMANCE

With reference to our informal hearing held today at 16 January 2014 at 15:22. The employer has decided to terminate your employment contract due to Poor Work Peformance which has being discussed and held with you over a period of 24 months.

This service is voluntary terminated by mutual agreement. It is accepted that neither the employee nor anybody on his behalf will have any claim against the employer arising out of his or her termination.

You will receive 1 months' salary for January 2014.

a) Normal deductions will still be applicable e.g. SSC, PAYE
b) You will receive a certifcate of service;
c) You will aslo be compensated for your accumulated leave of 30 days which amounts to N$ 2 076,90

Neither you nor anybody on your behalf will pursue any alleation of any alleged unfair dismissal or unfair labour practice.

I ..... acknowledge the receipt of the letter and agee the above information and accept the 1 month' salary, and will not allege any allegations against the employer to any unfair dismissal. I conclude that Tow In Specilaist will not make use of my services as from 1 February 2014. Your last working day wil be on the 31st day of January 2014. It will be expected of you to be at work on time until the said last day.

.....
C URINAVI

During the ensuing Arbitration the Employer lost the case and was ordered to pay, along with other payments that are not relevant to this discussion, an amount equal to 11 month's salary for dismissing Mr. Urinavi in a procedurally and substantively unfair manner. The Employer chose to take the entire award on appeal to the Labour Court.

In the Labour Court one of the main bones of contention was whether or not the above agreement constitutes a dismissal or a voluntary parting of ways by means of a mutual agreement. Determining this aspect is of significant importance because of the provisions of section 33(4) of the Labour Act. It reads as follows:

> *In any proceedings concerning a dismissal –*
>
> *a) if the employee establishes the existence of the dismissal;*
> *b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.*

The effect of the above section has been highlighted in the case of *Benz Building Suppliers v Stephanus and Others*[2] and was explained by Judge Parker a follows:

> *"Section 33(4)(a) of the Labour Act casts a critical onus on the employee to establish the existence of the dismissal. It is only when the employee has established the existence of his or her dismissal that s 33(4)(b) comes into play, that is, the presumption that after the dismissal has been established it is presumed that the dismissal is unfair unless the employer proves that he or she had a valid and fair reason to dismiss and that he or she folllowed a fair prdcedure in dismissing the employee..." [sic]*

It is important to establish the nature of the termination notice for the following reasons:

If held to be a termination by mutual agreement, then there is no dismissal and the Employee cannot claim to have been unfairly dismissed. If, however, it is held to be a dismissal by the Employer, the Employer will be presumed to have dismissed the Employee unfairly and will have to prove the contrary.

In considering the nature of the termination notice Judge Euitele soughed to define the term 'dismissal' and did so in paragraph 21 of his judgement with reference to the matter of *Ouwehand v Hout Bay Fishing Industries*[3]:

> *"It is accordingly incumbent upon an employee to establish on a balance of probabilites, where that employee claims to have been dismissed in terms of section 186(1)(a), some overt act by the employer that is the proximate cause of the termination of employment. A dismissal in this sense should be distinguished from a voluntary resignation (where the contract is terminated at the initiative of the employee) and the termination of a contract by mutual and voluntary agreement between the parties...."*

In distinguishing between a dismissal and a termination by mutual agreement the learned judge quotes from the matter of *Newton v Glyn Marais Inc* [2009] 1 BALR 48 (CCMA)

> *"Just as the consensus of the parties brings the employment contract into existence, so too consensus may end a contract or may alter its basic terms. For a contract to be terminated by mutal agreement, the agreement of both parties must be genuine. Once there is genuine agreement, neither party can unilaterally change his or her mind; the employment contract ends and along with it the employment relationship. If the employment relationship is terminated by mutual agreement , the termination does not constitue a dismissal for purposes of the common law ....." [sic]*

To summarize:

DISMISSAL	TERMINATION BY MUTUAL AGREEMENT
Requires some overt act by the Employer that is the 'proximate' cause of the termination of employment. In most cases this will entail the Employer informing the Employee that the contract has come to an end.	Requires a genuine agreement by the parties. In most cases this will be reduced to writing in the form of a settlement agreement.

Before stating the reasons for his decision Judge Ueitele again quotes form the *Ouwehand* case:

> "*Where it is alleged that a contract of employment has terminated by consensus between the parties, the court shall be cautious to ensure that the employer party does not seize upon words or actions that afford them meanings that were not intended. What is required is a consideration of all the factual circumstances and a determination of whether it can truly be said that the employee left the employ of his or her employer on his or her own accord and volition"*

Applied to the content of the termination notice in the TOW IN case the problems are not hard to identify. In the words of the learned judge:

> *"The letter contains contradictory information, in that on the one had it conveys the employer's decision to terminate the employment relationship and on the other hand the information portrays the termination to be by mutual agreement thus leaving doubt as to what the respondent is agreeing to."*

The judge continues to rule that the termination constitutes a dismissal. As such the burden of proof now lies with the Employer to prove that the dismissal was indeed fair. Seeing as the Employee's services were purportedly terminated because of poor work performance, the Employer will have to satisfy the court that a valid and fair reason exists and that a fair procedure was followed in doing so. As we at Seena are regularly approached by clients with queries related to the topic of poor work performance, I will discuss the judge's approach here-below. I would however like to pause at this juncture to emphasize the lesson to be taken from the court's judgement to this point:

Simply because a document reads: "full and final settlement" does not mean that it is in fact a full and final settlement. The test is whether or not the agreement constitutes a "genuine" agreement between the parties. For this reason employers should ensure that all dismissals are preceded by a fair procedure and based on fair underlying reasons. Simply having an employee sign a document entitled "full & final settlement" will not necessarily indemnify you from liability if it is not reflective of the true nature of the underlying agreement.

ON THE ISSUE OF POOR WORK PERFORMANCE:

The judge confirms the right of an employer to set the standards for their business in order to maximize profit. However, when seeking to terminate the services of an underperforming employee, as with a dismissal for misconduct, the dismissal must still be fair and in accordance with a fair procedure. The judge identifies two important principles which impact on the assessment of performance. I quote:

> "*First, as indicated above, an employer is entitled to set his own standards as to the performance requried of his or her employees and the court will only interfere where such standards are inappropriate. Secondly, it s for the employer to determine whether or not the required standard has been met, and the court will interfere only if the performance assessement made by the employer is unreasonable."*

So simply put:

i. Is there a standard;
ii. Is the standard appropriate
iii. Did the employee fail to meet the standard; and
iv. Was he/she fairly assessed

On the point of assessment the judge quotes from the decision in *Gostelow v Datakor Hodlings (Pty) Ltd t/a Corporate Copilith* [1993] 14 ILJ (IC):

> *"A value judgement regarding unacceptable performance must be* ***objective and reasonable to be valid****. It would, where there is no assessment be neither.* ***The assessment would be incomplete if no attempt was made to establish he reason for the employee's shortcoming and, save where the incompetence is irremediable, an attempt was made to assist the employee to overcome his shortcomings by advice and guidance****"*
>
> *(my underlining and emphasis added).*

Applied to the merits of the TOW-IN case the judge ruled that there was no evidence of any attempts made by TOW-In to assist the employee to overcome his shortcomings. Aside from failing to take remedial action, TOW In could also not provide any evidence that a fair procedure had been followed.

In Conclusion:

When addressing the underperforming Employee, Employers should ensure that the Employee is left with no uncertainty as to the standard of performance required of him/her. When first addressing the matter with the underperformer make sure that the meeting is minuted and subsequently signed off, as the burden of proof will ultimately lie with the Employer. Performance standards should be reasonable and assessments should be fair. Lastly employers should make reasonable efforts to assist the employee in overcoming his/her shortcomings prior to resorting to a dismissal. Failure to do so may prove to be a costly mistake.

By Nicky Smit,
National Manager
Seena Legal Consult (Pty) Ltd

Case Reference:

1. Tow in Specialist CC v Urinavi (LCA 55-2014) [201] NALCMD 3 (20 January 2016)
2. Benz Building Suppliers v Stephanus and Others 2014 (1) NR 283 (LC)
3. Ouwehand v Hout Bay Fishing Industries [2004] 8 BLLR 815 (LC)

DIE AARD VAN DROS AS 'n VORM VAN KONTRAKBREUK EN WANGEDRAG, EN RIGLYNE VIR DIE HANTERING DAARVAN

Dros is 'n vorm van kontrakbreuk maar konstitueer ook wangedrag. Dros kry sy bestaan vanuit die prinsipiële verpligting op die werknemer ingevolge die diensooreenkoms of diensverhouding waarvolgens die werknemer sy persoonlike dienste tot beskikking van die werkgewer moet stel. Die aanbied van dienste is terloops die voorvereiste van die reg van die werknemer ten einde vergoeding van die werkgewer te eis.

Dros kan gedefineer word as die eensydige weiering of versuim van 'n individuele werknemer om vir 'n onredelike lang tydperk, sonder toestemming, goeie rede, of kennisgewing van die werk af weg te bly, of om sy dienste aan te bied, met die opset of bedoeling om die diensverhouding met die werkgewer permanent te verbreek.

Die elemente van dros:

1. **Weier/versuim om sonder toestemming, goeie rede of kennisgewing;**
2. **vir diens aan te meld / dienste aan te bied;**
3. **vir 'n onredelike lang tydperk;**
4. **met die opset om nie terug te keer werk toe nie / diensverhouding permanent te verbreek.**

Die eerste twee elemente is normaalweg nie problematies nie. Wat wel problematies is, is die kwessie met betrekking tot die tydperk en die onus op die werkgewer om die opset van die "vermiste" werker te bewys. Die opset is 'n psigiese element wat in 99 % van die gevalle afgelei moet word van gedrag en die feite van die geval, gebasseer op omstandigheidsgetuienis.

Wat 'n onredelike lang tydperk betref, sal ook afhang van die feite van elke spesifieke geval.

Uit gesag blyk dit dat 'n tydperk van minstens 5 dae (werksdae) genoegsaam mag wees om bepaalde afleidings te begin maak. Die kruks van dros lê opgesluit in die verbreking van 'n essensiële bepaling van die diensooreenkoms (skriftelik of by implikasie). (*Strachan v Prinsloo* 1925 TPD 709).

Die hedendaagse gesag is net so konflikterend soos dié in die gemene reg gedurende die twintiger- en dertigerjare. Die howe het by sy ondersoek na die verbreking van die essensiële element van aanwesigheid by die werkplek deur afwesigheid, geneig om te fokus op die volgende:

1. die aard van die werk;
2. die invloed van die afwesigheid op die werkgewer se besigheid (die ontwrigting wat dit in die normale verloop van die besigheid veroorsaak);
3. die tydperk van diens;
4. rede vir afwesigheid;
5. die duur van die afwesigheid;
6. die bepalings van die werkgewer se dissiplinêre kode.

Ten spyte van die feit dat dros 'n vorm van kontrakbreuk / repudiasie is, blyk dit dat dros en afwesigheid eerder wangedrag is in terme van die Arbeidswet en as sulks hanteer moet word.

Dit impliseer derhalwe dat 'n billike proses gevolg moet word indien die werkgewer die afwesige werknemer se dienste wil beëindig.

Die verskil tussen dros en repudiasie is geleë in die feit dat by repudiasie dit objektief onmoontlik moet wees vir die werknemer om diens te lewer, waar by dros daar 'n vorm van opset moet wees, maar nie noodwendig 'n objektiewe onmoontlikheid nie. Die objektiewe onmoontlikheid is juis 'n geldige verweer in die geval van dros.

Die nuutste gesag bevestig die feit dat dros of afwesigheid, wangedrag uitmaak. Buiten die gewone prosedurele vereistes wat die howe vereis met betrekking tot dissiplinêre verhore, het die howe bykomende "voor verhoor" vereistes neergelê waaraan die werkgewer moet voldoen alvorens hy dienste kan beëindig.

In *PSA obo Wenn and Department of Agriculture* (2004) 13 GP55BC 8.17.3) en *Mabesele and Vanderbijl Hydraulics and Engineering CC* (2004) 13 MEIBC 8.17.1) is beslis dat die werkgewer alle middele tot sy beskikking moet uitoefen om die werknemer te kontak, en hom in kennis te stel om werk te hervat.

Die gemeenregtelike ondersoek na die verbreking van die ooreenkoms en die faktore wat oorweeg moet word soos hierbo vermeld, is dié wat dan in Arbeidsregtelike sin oorweeg moet word ten einde die ontslag substantief te regverdig. Weereens sal die feite van elke geval bepalend wees of ontslag geregverdig is.

In die lig van die houding van die howe sal dit derhalwe in die toekoms geen grondige verweer wees, waar die werkgewer in geval van dros of lang tydperke van afwesigheid, beweer dat die werknemer die diensooreenkoms repudieer het / homself ontslaan het, of dat die beëindiging van diens van 'n drostende werknemer nie neerkom op 'n ontslag soos bedoel in die Arbeidswet nie.

Die volgende riglyne word voorgestel en moet deur werkgewers gevolg word:

1. Die werkgewer moet eerstens verseker dat die korrekte pos- en fisiese adresbesonderhede van werknemers op lêer is;
2. Die werkgewer moet d.m.v die diensooreenkoms of 'n beleid / instruksies in die werkplek (en verseker dat werknemers behoorlik daarvan bewus is) die verpligting plaas op die werknemer om die werkgewer binne 'n redelike tyd, nadat sy adresbesonderhede verander het, daarvan in kennis te stel;
3. Indien 'n werknemer vir 'n tydperk van 5 (vyf) agtereenvolgende werksdae afwesig is, sonder verlof of kennisgewing moet die werkgewer:
   - 3.1 'n ondersoek loods na die omstandighede van die werknemer se afwesigheid en waar hy / sy, hom / haar mag bevind;
   - 3.2 alle moontlike middele aanwend of stappe volg om met die betrokke werknemer kontak te maak;
   - 3.3 indien hy die werknemer nie opspoor nie, moet hy die werknemer per geregistreerde pos by sy laasbekende adres skriftelik aanmaan om terug te keer werk toe. Hy moet hom dan ook gelas om 'n dissiplinêre verhoor by te woon.

Indien die werknemer nie op die posstuk reageer nie en nie na die werksplek terugkeer en / of nie vir die verhoor opdaag nie, moet die werknemer se dienste nie beëindig word nie. Laasgenoemde moet as "status onaktief / afwesigheid" getipeer word en sy leêr moet bewaar word. Enige instansie ten opsigte waarvan die werkgewer en die werknemer finansiële bydraes moet maak (soos Social Security) moet van die situasie in kennis gestel word.

Indien die kennisgewing van die dissiplinêre verhoor persoonlik op die werknemer beteken is, mag die verhoor voortgaan in die werknemer se afwesigheid indien geen verduideliking of kennisgewing om sy afwesigheid te verklaar, deur die werknemer aangebied is nie. Die werkgewer moet egter by magte wees om voldoende bewys van persoonlike betekening te lewer.

Indien die werknemer op enige later stadium opdaag, moet sy afwesigheid ondersoek word en dan kan 'n "normale" verhoor t.o.v die afwesigheid gehou word.

Bydrae gelewer deur SEESA.

SEENA | LABOUR

SEENA | BEE