NEWSLETTER

The Official Newsletter of SEENA Legal Consult.

IN THIS EDITION:

Voorwoord

Hoe lekker is dit nie om sonder ’n masker rond te beweeg nie. Oral sien ’n mens ook tekens dat die wiele van die ekonomie vinniger begin draai.

Here at SEENA it is business as usual. The Covid pandemic has changed the view of many employers and employees alike, especially where office attendance and meetings are concerned. There is also a big number of employees who are looking for something different. If your business has suffered many resignations post-Covid, you are not alone. This mass exodus is a world-wide phenomenon, being referred to as “the great resignation”.

In hierdie uitgawe het ons relevante artikels, gegewe verskeie oproepe en versoeke wat ons in die afgelope tyd daaroor ontvang het.

Ek herinner u graag aan SEENA Payroll en boekhou dienste deur ons sustersmaatskappy, Odula Bookkeeping and Office Solutions. Vir ’n kopieerderkontrak met gunstige voordele, kontak gerus vir Kassie Lofty-Eaton by 064 416 100.

SEENA groete,

Koos Barkhuizen

UNION ACCESS TO THE PREMISES OF THE EMPLOYER

By Nicky Smit

As Employees are free to organize and join a labour union of their choice, it goes without saying that Unions are permitted access to the workplace for purposes of recruiting members and in order to conduct their normal affairs.

Union access is however, not unrestricted, will normally fall outside of ordinary working hours and needs to be arranged with an Employer beforehand. There is a distinction to be drawn between Unions that enjoy majority representation amongst workforce and those that merely have minor membership, with the former enjoying greater rights to access under our law. Before delving into the subject of Union access, it is important to point out that the right to access of an Employer's premises are limited to Unions that are registered with the Ministry of Labour and that are in compliance with the various prescriptive provisions of the Act. Similar rights of access are not extended to political parties and activists. Union Officials are required to carry identification and Employer's may insist on proof in order to verify the identity of any individual purporting to represent a registered trade union, prior to granting or refusing access.

Unions that only enjoy minority membership are still entitled to reasonable access to an Employer's premises for the purposes of recruiting members and holding meetings with their members. For as long as the Union remains representative of the minority only, such access shall however, always be outside of normal working hours.

Once a registered trade union acquires majority representation, the Union may bring an application to be recognised by the Employer as an exclusive bargaining agent. Provided the Union acts within the scope of their constitution and the majority membership has been verified, Employers generally have no option but to grant the union exclusive bargaining status. Once so recognised, the Union is elevated in status and may then periodically arrange meetings with an Employer inside of normal working hours for the purposes of recruiting members and in order to perform any functions agreed to under a collective agreement with the Employer. General meetings with members are however, still held outside of normal working hours.

When it comes to Union access the emphasis is on reasonable access. Employers may therefore impose conditions on any meeting that is reasonable, including:

I. Insisting on fair warning/advanced notice;
II. Giving priority to operational requirements;
III. Attaching conditions to the Union's right of access, including insistence on adherence to safety and security protocol;
IV. Setting of reasonable time limits to the duration of any meeting agreed to; and
V. Revoking a union official or office bearer's right to access, in the event that the meeting agreed to exceed the spirit and purpose for which it was granted, or where the Union fails to adhere to any reasonable, prescriptive condition that was set in advance.

Although required to grant access and to provide a venue for meetings agreed to, the meeting remains that of the Union. Unless the Employer's participation is required in the meeting, it is up to the Union to communicate and inform their members of any scheduled meeting and to arrange for their attendance.
By: Nicky Smit

GROSS INSUBORDINATION

By Christien Boshoff

What happens when an employee refuses to comply with instructions given to them by their supervisor, manager or employer. Say for instance the employee is instructed, in line with his job description, to remove scrap from the workshop floor. He verbally refuses to comply and tells his supervisor to do it himself. Typically, such refusal may constitute insubordination. Depending on the circumstances surrounding the refusal, the conduct may even constitute gross insubordination. In this article we discuss the definition of insubordination, gross insubordination and how to deal with this form of misconduct at work.

In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* (1989) 10 ILJ 311 (IC) the Court defined insubordination as "a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer's authority. Whereas in some cases defiance of an instruction may indicate a challenge to

the authority of the employer, this is not so in every case."

Insubordination may therefor manifest itself in two scenarios:

1. Where the employee wilfully and seriously refuses an instruction from his employer or authorised delegate; or
2. Where the disrespectful conduct poses a deliberate (wilful) and serious challenge to, or defiance of the employer's authority, even where there is no indication of the giving of an instruction or defiance of an instruction.

Insubordination in itself does not necessarily justify dismissal as a first offence. Depending on the disciplinary code in the workplace, a Final written warning may be given. In order to justify dismissal, the conduct of which the employee made himself guilty, must be of an aggravated (gross) or serious form.

So when can the conduct of the employee be said to be gross? Insubordination will be regarded as gross when it is serious, deliberate and persistent.[1]

The initiator in a disciplinary hearing would need to prove:

- that the employee was given an instruction by a person with the authority to do so;
- that the instruction was given in accordance with the employee's job description;
- that the employee refused the instruction; or
- that the refusal challenged the instruction giver's authority; and
- that the refusal was deliberate, persistent and serious.

An employee may be dismissed for a first offence for gross insubordination. In *SAMWU obo Felicia v CCMA and Others* (JR 2195/14) (2016) ZALCJHB 338, the Court enunciated the principles that govern insubordination. It held that the employee's defiance must be 'gross' to justify dismissal. It held further that the insubordination must be serious, persistent and deliberate, and that the employer must adduce proof that the employee was guilty of defying an instruction. The courts' view was that, for an employee's conduct to constitute gross insubordination, evidence is required to demonstrate a persistent and wilful refusal to comply with an instruction, which constitutes gross insubordination.

[1] *CWIU & Another v AECI Paints Natal (Pty) Ltd* (1988) 9 ILJ 1046 (IC).

In *Africa Personnel Services (Pty) Ltd v Shipunda & Others* 2012 (2) NR 718 (LC) the court is referred to the recent work of Parker, J Labour Law in Namibia where the following is stated:

"*An employee's obedience to the lawful instructions of his employer is a touch stone of the employer-and-employees relationship. The employee must carry out a lawful order that is within the scope of the express or implied terms of his contract of employment. Failure to do so is insubordination, i.e. the lawful disobedience of the lawful and reasonable commands of the employer*."

And further

"*Insubordination will justify dismissal especially if it is unlawful or repeated…*"

MINIMUM WAGE FOR AGRICULTURAL WORKERS TO BE ADJUSTED

Following an agreement signed in November 2021, the current minimum wage of 2017 was set to be increased from 1 January 2022.

Parties to the agreement were the Agricultural Employers Association, the Namibia National Farmers' Union, the Namibia Emerging Commercial Farmers' Union and the Namibia Farm Workers' Union.

In December 2021, a Publication of request for, and invitation for objections to, extension of collective agreement for minimum wage in the agricultural sector was published in the Government Gazette, inviting any person who wishes to object to the extension of the agreement within 30 days from the date of publication of this notice, to do so.

The purpose of this collective agreement for a minimum wage is:

- To improve the living standard of agricultural employees
- To reduce poverty
- To maintain social peace
- To ensure income levels above the breadline; and
- To curb and prevent exploitation of agricultural employees.

The agreed minimum is applicable to the entry level agricultural employees in the whole of Namibia, including agricultural contract employees. Domestic workers on farms, game and hunting farms, and lodges are also covered by the agreement.

The minimum cash wage for the entry level agricultural employees is set to be N$ 5.40 per hour. Additionally Employers are reminded that they have the option of providing one of the following ration components:

a) permission to keep such livestock and cultivate land in order for the employee to provide for the reasonable needs of himself or herself and of his or her dependants; or
b) food or rations which value should not exceed the equivalent of 35% of the employee's basic wage; or
c) an additional allowance of at least N$ 600.00 per month.

If the employee is required to live in or on the place of his or her employment, the employer must also provide the employee with housing, including sanitary and water facilities, as may comply with the reasonable requirements of such employees and, in the case of an employee who is required to live or reside on agricultural land, that of his or her dependants. In addition, electricity is to be provided to such employee where available.

It is to be noted that this agreement has not formally been promulgated in the Government Gazette. Once it is, we will keep our members informed. You can also click here to be directed to our website in order to download any other Collective Agreements that may be applicable to your industry or read some of our previous Newsletters that you may have missed.

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

Otjiwarongo Office
Tel: (067) 304 915
Fax: (067) 304 809
Email: otjiwarongo@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