Resignation without notice – what can the employer do?

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Resignation is a common phenomenon at the workplace. Employees leave work for various reasons. The right of an employee to terminate a contract of employment on notice is recognised at common law. It is also recognised by statute, that is, section 12(4) of the Labour Act (Chapter 28:01) which provides for time periods that apply when a contract of employment is terminated on notice. But what is resignation? This is not defined in the Labour Act.

The Zimbabwe Supreme Court in **Madondo vs. Conquip Zimbabwe (Pvt) Ltd SC 25/16** endorsed the position that resignation is a voluntary, deliberate and unilateral act by the employee in terms of which he or she brings the contract of employment to an end without the consent of the employer, with or without notice. Termination of employment is not necessarily on the date on which the notice is given but on expiration of the notice period, if any. If no notice is given, termination is on the date the resignation is communicated. A number of issues arise in connection with resignation. However, this contribution is primarily concerned with a situation where an employee resigns without giving the required notice.

Statements like, "I resign with immediate effect" are commonplace. The employee just packs his briefcase and leaves his job disrupting the smooth flow of work leaving the employer scrambling to find a replacement. In most cases it may result in considerable loss of production. This is what riles employers. The frustration is compounded by the fact that the employers cannot stop an employee from resigning without giving notice since resignation is a unilateral act by the employee which requires no acceptance or accord by the employer. Employers feel, and rightly so, that just as they are required by law to give an employee notice, he should do the same.

To address this perennial problem some employers have resorted to withholding or deducting terminal benefits equivalent to the requisite notice period. This is unlawful for two reasons. First, this is not a permissible deduction in terms of section 12A(6) (a) – (f) of the Labour Act.

This provision does not leave the employer in any doubt as to what amounts it can lawfully deduct. The only permissible deductions are as follows:

(a) where an employee is absent from work on days other than industrial holidays or days of leave to which he is entitled;
(b) amounts which an employer is compelled by law or legal process to pay on behalf of an employee;
(c) where an employee has received an advance of remuneration due;

(d) by written stop-order for contributions to insurance policies, pension funds, medical aid societies, building societies, burial societies and registered trade unions;
(e) by written consent of an employee, for repayment of money lent by the employer on terms that have been mutually agreed to between the parties;
(f) an amount recovered for payments made in error.

Second, on resignation, an employee is entitled to wages and benefits on termination prescribed in section 13 of the Labour Act. This is mandatory. In terms of section 13(2) of the Labour Act, unreasonably withholding terminal benefits without the Minister's approval is a criminal offence which can expose an employer to criminal prosecution and the attendant inconveniences as well as bad publicity. Withholding terminal benefits outside the law also amounts to self-help which is unlawful and frowned upon.

What then are the legal remedies available to an employer against employees who resign without giving the required notice? Resignation is not unlawfully, even if no notice was given to the employer. It is also not prescribed as an unfair labour practice. The employer's remedies lie at common law. Resignation without notice constitute a breach of contract. Breach of contract has two substitute remedies; specific performance or damages. The employer has to sue for this. It is usually by way of summons. Specific performance means that the employer will seek an order holding the employee to the contract by demanding that he or she gives proper notice and render services for the notice period.

The order which will be sought is for the employee to serve the notice period. One of the cases in which the employer obtained an order for specific performance is the South African case of **Santos Professional Football Club (Pty) Ltd vs. Igesund 2003 (5) SA 73 (C).** Nonetheless, the efficacy of this remedy is limited by the fact that an employment contract is one of a personal nature and an employer may have no joy in retaining a disgruntled employee who does not want to work for him. It is a truism that the employer requires committed employees.

This leaves damages as the more practical remedy. A claim for damages is based on breach of contract owing to the failure by the employee to serve notice. In **A. C Controls (Pvt) Ltd vs. Midzi and Another HH 75/10** the court held that the employer can institute a claim for the damages he may suffer as a result of the employee's resignation without giving him adequate notice. A damages claim is instituted by way of summons where convincing proof of damages suffered with an easily identifiable quantum is made.

The amount of damages is not necessarily equivalent the notice period which the employee should have served. There may be additional pecuniary loss which the employer could have suffered as a result of the employee failing to give and serve the requisite notice. In **National Entitled Workers Union vs. CCMA (2007) ILJ 1223 (LAC) and Labournet Payment Solutions**

(Pty) Ltd vs. Vasloo (2009) ILJ 2437 (LC) the court laid down the principles applicable in claiming and quantifying these type of damages. Lastly, the Labour Court has no jurisdiction to entertain a damages or specific performance claim owing to provisions of section 89(1) of the Labour Act which restricts its powers. Such a claim has to be made in the High Court which has inherent jurisdiction.

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