



The Many Faces of Resignation

Can an employer deduct monies from an employee's salary if the employee fails to give proper notice of resignation? Does verbal resignation suffice or should it be in writing? What if an employee resigns to avoid disciplinary action? Can the employer reject the resignation and proceed with the disciplinary action? Can an employer offer resignation as an alternative to disciplinary action?

Both the Labour Relations Act and the Basic Conditions of Employment Act are relevant to these questions. The BCEA (s 37) provides that notice of termination of employment by both the employer and the employee must be in writing and be of certain duration. This suggests that verbal resignation by an employee does not terminate his/her contract of employment. Therefore, if the employee leaves without giving notice, the contract continues until such time as the employer decides to end it. This does not amount to a dismissal in terms of s 186 as the termination is not at the initiative of the employer, but of the employee.

What if the employee resigns without proper notice pending a disciplinary process? Can the employer continue with the process? Yes: the employee's resignation alone does not end the contract and the employer has a choice to either "accept" the resignation, thereby ending the contract (as explained above) or the employer may decide to maintain the contract until the disciplinary process has been finalised. The employee must be invited to attend the hearing, but if he or she does not, the process can continue in his or her absence. If the employee is found guilty of serious misconduct, the employer may at that stage end the contract by dismissing the employee.

The BCEA further provides (s 34) that deductions may not be made from an employee's remuneration except in the very specific circumstances set out in that section. Unless there is a written agreement with the employee to do so, the employer cannot lawfully deduct any monies from the employee for failing to give proper notice. It is advisable for employers to include a provision in new contracts of employment to the effect that employees who fail to give proper notice will forfeit an amount equal to the amount the employee would have earned during the required notice period and that such amount may be deducted from the employee's remuneration. In the absence of such a provision, the employer's only option is to sue the employee civilly for the damages suffered as a result of the employee's failure to give proper notice.

Is it advisable to offer an employee the option of resigning instead of facing disciplinary action? There are three considerations here. The first is an ethical one. An employer can for example allow an employee who faces allegations of dishonesty to resign. This may send a wrong message to future employers about the circumstances of the employee's departure. The problem is diminished if the offer of resignation is not the consequence of the employee's misconduct, but due to his or her poor performance, ill health or incompatibility.

The second problem is a twofold legal problem. If one employee is allowed to leave so easily it can create a problem in terms of consistency when future incidents of dishonesty arise. It may be difficult, if not impossible, for an employer to convince an arbitrator that it was justified to let one person get off scot-free while another was subjected to a "zero tolerance" approach.

The other legal difficulty is that an employee who feels compelled to resign might allege that she or he was constructively dismissed. Provided the employer otherwise has a basis for dismissing the employee (e.g. serious misconduct or continued poor performance) it will be difficult for the employee to prove that she or he had no option but to resign or that the employer acted unlawfully or unfairly in suggesting resignation. These are essential ingredients for a successful constructive dismissal claim. Subject to what has been said above about the possible ethical and consistency problems, this suggests that an employer is not necessarily bound to follow the disciplinary route in dealing with, e.g. serious misconduct. It does not, however, give employers free reign to push employees into resigning as an easy way out.

As a point of departure, an offer for an employee to resign should not be made unless there is compelling evidence of serious misconduct or there exists another possible ground for dismissal, e.g. incapacity. The employer should not offer the employee the option of resignation where there is doubt about whether the employee's choice would be truly voluntary.

For the employee resignation is also not a course that should be followed without careful consideration. It not only means that unemployment benefits are forfeited, but prevents the employee from claiming that an unfair dismissal took place.

~ *Source:* Prof. Barney Jordaan of www.labourwise.co.za

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