

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 (i.e. 1 week during the first 6 months of employment, and so on). What if the employee resigns without proper notice when a disciplinary process is pending, can the employer continue with the process? The answer is yes: the employee's resignation alone does not end the contract – the contract continues until the date on which it would have ended if proper notice had been given (the 'usual termination date'), or until the date on which the employer elects to end the contract, if that happens sooner. The choice whether to allow the contract to 'run out' or to terminate it earlier by way of a disciplinary process belongs to the employer. Of course, if the employee is no longer available for work, he/she is not entitled to claim salary from the date of their desertion, which is what resignation without notice essentially amounts to. If the employer elects to keep the contract alive and to hold a hearing, the employee should be invited to attend the hearing, but if s/he does not, the process can continue in his/her absence. If the employee is found guilty of serious misconduct, the employer may at that point 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, without a written agreement to that effect, 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. In the absence of such a clause, the employer's only option is to try to obtain the employee's consent to a deduction, or else sue the employee civilly for the damages suffered as a result of the employee's failure to give proper notice. The expense involved in doing so probably won't make it the employer's while.

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. Say, for example, that an employer allows 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. There is less of a problem if the offer of resignation stems not from the employee's misconduct, but his or her poor performance, ill health or incompatibility. The second problem is a two-part legal one: letting one employee go as easily as this 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 there was any justification in letting 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 s/he has been constructively dismissed. However, 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 s/he had no option to resign or that the employer acted unlawfully or unfairly in suggesting resignation (these being essential ingredients for a successful constructive dismissal claim).

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 – as a rule of thumb; one should ask if all things considered, the employee ultimately benefits from the resignation.

For the employee, too, resignation is 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 had taken place, save for the exceptional instance of constructive dismissal.

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