

Payment of notice pay by employees upon short resignation.

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The issue of employees leaving the employ of an employer whilst owing debt to the employer, or just simply resigning with no notice or short notice, is not a new one and employers still grapple with the question as to what can be deducted from the employee's salary and how much, if any. Or alternatively whether leave pay, or notice pay can be withheld or not.

In the matter of *Francise v Bushlapa Offroad Caravans (Pty) Ltd*, the employee resigned without giving the contractually required four weeks' notice to the employer. The Employer then proceeded to deduct the notice pay from his final salary. The employee referred a section 73A dispute to the CCMA on the basis that the deduction was one as contemplated in section 34 of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) and claimed the return of the deducted amount.

The facts of the case: The employer, on the other hand, alleged that the deduction was made in terms of a bargaining council agreement and an agreement with the employee, covering the employment of the employee and furthermore, that nothing was owing to him because he had not worked for the period in question.

The employer alleged that it was competent to deduct the money, contra to section 34 of the BCEA, on the basis that the agreement with the employee overrides section 34's stipulations, as it had an agreement with the employee allowing the employer to deduct an amount equal to the salary for the notice period (from the employee's last salary), in the event that the employee failed to provide the required four weeks' notice of resignation. The MIBC Bargaining council main agreement, provided that certain amounts could be deducted from the salaries of employees who are absent without leave, however the employer interpreted the main agreement incorrectly when it argued that the clause applies to notice pay in circumstances of short notice.

Section 34 of the BCEA determines that an employer may not make deductions from salary unless the employee agrees in writing with relation to a debt, or in terms of a court order, the law or arbitration award. In the event of loss or damage, the stipulations of section 34 (2) apply, requiring a procedure to be followed, the loss or damage to be the fault of the employee and the total deductions do not exceed one quarter of the remuneration in money.

The Commissioner held that he was bound by three Labour Court judgments which confirmed that the deduction of notice pay, from the final salary of employees who had not served the required period are prohibited by section 34 of the BCEA and the employer was ordered to repay the applicant the R16 200 which had been deducted from his final pay cheque.

In accordance with section 73(A) of the BCEA a commission must determine whether an employee can claim any amount payable due in terms of the BCEA, the Minimum Wage Act, a contract of employment or a collective agreement. Section 5 of the BCEA also supersedes any agreement entered into, as the BCEA or anything done under it, takes precedence over any agreement entered into by parties. What the employer effectively tried to do is to deduct notice pay from salary already worked for, as the employee already were not paid when he resigned, due to the "no work no pay" principle.

The commissioner also considered the judgement of *Padayachee v Interpak Books (Pty) Ltd* At para [36] the court noted that "The wording of section 34(2) establishes that an employer is entitled to make a deduction from remuneration for damage or loss caused by the employee, but must use the process stipulated in sections 34(1) and 34(2) of the BCEA". In this case the employer did not, and rightly so, it had to refund the employee.

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