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WINDHOEK

tel: 061-309-260 | fax: 061-309-266
e-mail: windhoek@seesanam.com

SWAKOPMUND

tel: 064-416-100 | fax: 064-461-000
e-mail: swakop@seesanam.com

KEETMANSHOOP

tel: 063-225-931 | fax: 063-225-932
e-mail: keetmanshoop@seesanam.com

TSUMEB

tel: 067-222-900 | fax: 067-222-500
e-mail: tsumeb@seesanam.com

1. MANAGING A “REAL INDEPENDENT CONTRACTORSHIP”

In our previous issue we made the comparison between an employee and an independent contractor. We also undertook to publish guidelines on how to engage independent contractors into your business.

The provisions of the Labour Act and other labour related legislation caters mainly for relationships where the conditions of employment, specifically hours of work and payment of remuneration are not complex.

What happens if your business is of such a nature that the hours of work are beyond your control and remuneration depends on production? Industries like the Road Freight and Marine Fishing find it difficult to manoeuvre their conditions of employment with regard to employees in order to remain within the boundaries of the law and still maintain a financially viable business.

The solution to this is engaging “independent contractors”.

The most prevalent problem employers encounter is, that they engage independent contractors in order to avoid labour legislation, but treat them as you would treat an employee without the benefits provided for in the Labour Act.

When, after the fact, Labour Commissioners need to arbitrate and need to determine the relationship, he/she will find it to be one of an employment nature.

Mistakes employers make, just to name a few:

- No proper “independent contractor” contract is signed by them and the contractor;
- Payment of remuneration is paid like they pay a salary;
 - o on a regular basis;
 - o not on invoice basis;
 - o deductions of tax, ext.
- They exercise too much control over the contractor;
- Disciplining the contractor like an

employee, for poor performance or conduct.

Guidelines to avoid making the same mistakes:

- The object of a contractorship is to deliver a certain specified service and result;
- They are not obliged to render the service personally;
- They should not be treated as employees;
- The contract terminates by completion of the work or breach of contract;
- The determination of the relationship is not necessarily dependent on the contract, but also on the “day to day” conduct of the parties.

If you are involved in a business which does not render it viable to work with employees as such, but on an independent contractorship basis, do as follow:

- Ensure that you sign a contract with the person.
- Engage him/her on a trip to trip basis.
- Set instructions, performance and results clearly.
- Make payments for work completed, only after receiving an invoice from the contractor.
- Don’t make any deduction which relates to an employee. (Tax, social security ext).
- In the event of poor performance or conduct that may constitute misconduct in the employment context, you cancel the contract based on breach of contract, after you required specific performance. You don’t issue warnings and dismiss an independent contractor like you would an employee.
- If possible, let them use their own

- equipment, office and time.
- Don't advance any funds to them to execute their service. If you have to, work on a "deposit" basis.

2. POLYGRAPH TESTING

Employers are generally faced with two different types of situations concerning polygraph testing and their employees. The first situation is where an employee has allegedly committed misconduct and he/she is asked to undergo a polygraph test, which results may be submitted as secondary evidence in a hearing. The second situation occurs when the employee is contractually required and/or the employer's nature of business requires the employee to undergo polygraph tests, without actually having committed misconduct, e.g. on request of a client of a security company or losses that occurred as a result of shrinkage.

Definition: Polygraph test

An instrument that measures predictable changes in a person's body associated with stress or deception such as heart rate, breathing, blood pressure and emotional sweating. It does not record lies.

The underlying theory of the polygraph is that when people lie, they also feel nervous about lying. As a result the heartbeat quickens, blood pressure goes up, breathing rhythms change and perspiration increases. The examiner will ask the subject innocent questions to test his/her responses. If the subject's vital signs change significantly, it is taken as a sign of lying.

You should always keep in mind that in the event of an employee failing a polygraph test during disciplinary action, the result of such testing only will not be sufficient evidence of the fact that he/she committed the offence. The result of polygraph testing is merely circumstantial evidence which can assist in proving guilt. It is that extra edge you may need to prove the offence in conjunction with other evidence.

The accuracy of polygraph tests have been the subject of lively debate over the years. Some say that the accuracy rate is as low as 50 %, but those in favour rate the accuracy at 85 %. The following five guidelines must be adhered to, in order to ensure polygraph evidence is admitted in disciplinary proceedings or otherwise.

Guidelines in using polygraph test results, as evidence in disciplinary procedures and incapacity procedures, are as follows:

1. **Use an expert**
Tests should be conducted by a qualified person using accepted procedures.
2. **Ensure the subject is physically and mentally fit**
Certain ailments may affect the subject's response patterns. These include:
 - Certain heart conditions or respiratory disorders;
 - Intoxication or pain due to injury;
 - Insanity or mental deficiency;
 - Certain drugs such as opium.
3. **Obtain the employee's consent in writing before the test**
The employee must give his/her written consent before the test is administered, because the test may potentially infringe two constitutional rights of the subject:
 - the right to privacy;
 - the rights not to incriminate oneself.
4. **Explain the process to the subject**
The process and reasons for the tests should be fully explained to participating employees to allow them to make an informed decision.
5. **The expert must testify about his findings**
If the results are to be used as evidence, the qualified examiner must give evidence and explain his findings.

Case Law on Polygraph results used in Misconduct dismissals

1. **Metal & Electrical Workers Union of SA on behalf of Mbonambi and S Bruce CC (MEKN) 855-14/5/2005**
An employee was dismissed after being found guilty of stealing money and a cell phone. He was the only one of 11 employees tested by a polygraph examiner, whose answers indicated deception. The Arbitrator affirmed the approach taken by previous tribunals - that the outcome of polygraph tests may be taken into account.

2. **Simani/Coca-Cola fortune (2006) 10 BLLR 1044 CCMA**

The applicant was one of several drivers dismissed after Coca-Cola uncovered a scam in which drivers bribed checkers to allow them to remove company stock, then sold it for their own profit. The applicant denied any involvement in the scheme, and claimed his innocence was proved by the fact that he had passed a polygraph test. The commissioner held that, although Simani may have passed the polygraph test, the fact remained that he was not a credible witness. Other evidence submitted by Coca-Cola indicated that Simani was involved in the scam. The dismissal was held to have been fair.

3. **NUMSA obo Mkhonza & others / Assmong Chrome Machadodorp Works (2005) 9 BLLR 930 (MEIBC)**

After discovering that goods to the value of about R2 m were missing, all the stores' personnel was subjected to a polygraph test. Only the applicant employees failed the test and were subsequently dismissed. They claimed that the employer could not rely solely on the polygraph test results and claimed that the tests had not been properly conducted. The arbitrator held that polygraph tests are inadmissible as evidence only if the examiner is not qualified or did not testify, or if the employees refused to be tested. The examiner had testified, and the employees had agreed to undergo the tests. The Arbitrator held that there was good grounds for the company's suspicion, there had been no forced entry to the premises and the stolen goods could not possibly have been removed through the exit points without the employees' knowledge. Their dismissal was upheld.

What to do if the employee refuses to undergo or fails the test

- An employee refusing to take a polygraph test despite the contract of employment providing for such to be taken. Provided the terms of the contract of employment are unequivocal and that applicable conditions (such

as reasonable notice or a properly qualified examiner) are complied with, such a refusal constitutes insubordination or refusal to obey a lawful instruction. Disciplinary action can be taken against such a refusal and may, particularly if the refusal was continuous, lead to dismissal.

- An employee refuses to take the test in the absence of a contractual obligation. If these are the only facts, without there being a compelling commercial reason for the employer requiring the test, a dismissal due to operational requirements would not be justified.
- An employee refuses to be tested or fails a test in the absence of a contractual duty and the employer suffers substantial shrinkage or theft. The solution is to dismiss the employee concerned for incapacity reasons, being that his refusal or failure renders him unsuitable for employment in a security sensitive environment. It should be remembered that, if such an employer has alternatives available in a non security sensitive environment - such as cleaning or carrying stock - he will be obliged to consider employing the employee in such capacity prior to dismissing him.

3. ENTRAPMENT, EVIDENCE AND ETHICS

Occasionally both Labour Commissioners and the Labour Court are required to address the admissibility of evidence gathered by an employer against an employee during an undercover operation.

This typically takes the form of taped telephone conversations, audit evidence etc, which evolves subsequent to a trap having been laid by the employer.

In *Saccawu obo Libi-Ray Salayadwa (EC 2163)* the commissioner provided a comprehensive analysis of entrapment and the admissibility of evidence obtained during undercover operations. The commissioner also referred to a Labour Court matter in this award - *Cape Town City Council v Samwu*. In this

finding it was held "It seems that, provided the courts are satisfied that the use of entrapment is properly scrutinized and the admissibility of evidence obtained as a result thereof carefully regulated, then courts tend to recognise that there are circumstances in which law enforcement would be impeded if evidence obtained from a trapping situation were excluded".

In *Maswangyani v Mitek Industries (Pty) Ltd (MENT 27690)*, the commissioner held that "In order to prove entrapment, the applicant would have to prove that the respondent initiated the plot with the intention of enticing him to commit an offence".

The Criminal Courts expressly stated that the conduct of the party engaging in an undercover activity must not go beyond providing an opportunity to commit an offence. There should be no action that actually encourages the committing of the offence. When considering the admissibility of the evidence, and the trapper had gone beyond only providing an opportunity, the court shall also weigh up the public interest against the personal interest of the accused.

In the *Maswangyani case*, the commissioner came to the conclusion that while the applicants were not entirely innocent, the detectives' conduct towards them did not comply with the spirit, purpose and objects of the constitution.

In *Sugreen v Standard Bank of SA (2002)* the employer sought to admit into evidence a taped telephone conversation in which the dismissed employee had implicated herself in the receipt of a bribe. The employee objected to the admission of the taped evidence on grounds that it constituted an invasion of her rights and the credibility of the witness who taped the conversation. The telephone conversation was deemed admissible and it was held that the use by employees of the employer's telephone and e-mail are legitimate areas of interest to the employer, where it is suspected that the employee is guilty of misconduct.

From the above it appears as if a similar principle is applied as in cases where an employee's communication is intercepted. The employee's invasion of his/her rights with entrapment should be weighed against the interest of the employer, that the latter wants to protect.

4. PROTECTION OF WHISTLE BLOWERS

It has become trite law that an employee, subjected to occupational detriment by his employer after having made a protected disclosure, may approach a court with jurisdiction for appropriate relief.

In *City of Tshwane Metropolitan Municipality v Engineering Council of South Africa and another 2010 (2) SA 333 (SCA)*, an employee "W" of the Municipality made a protected disclosure to the Engineering Council and the Department of Labour, in which he pointed out that the Municipality was employing unskilled and unqualified electrical system operators.

The position of a system operator was high risk and required highly skilled personnel.

As a result of the disclosure the employee was subjected to a disciplinary hearing and found guilty.

The employee approached the High Court for an order interdicting the employer from imposing any disciplinary sanction on him.

The interdict was granted. An appeal against the High Court order brought by the employer was dismissed with costs by the Supreme Court.

The Judges held that the employee made a protected disclosure and that it was impermissible for the employer to discipline him for doing so and to impose a sanction.

A disclosure is protected if:

- the employee acted in good faith;
- reasonably believed that the information disclosed and the allegations made by him were substantially true;
- was not acting for personal gain; **and**
- the disclosure had previously been made to a person or body and in respect of which no action was taken within a reasonable period after the disclosure or that the impropriety disclosed was of an exceptionally serious nature.

5. QUESTIONS & ANSWERS

Q: *Can I still use temporary employees?*

A: Yes. Temporary employment is also known as fix term employment contract employment. This type of employment refers to the employment of employees for a fixed period - i.e. the employee clearly knows that the employment period has a fixed start and end date or is linked to the completion of a well defined assignment. It is recommended to have a clear agreement with the temporary employee in this regard in order to avoid any disputes. Note that the temporary employees enjoy the same rights under the Labour Act (2007) as full time/permanent employees. Temporary employees therefore need to be registered, inter alia, with the Social Security Commission, have the same leave benefits, etc.

Q: *Can I still use casual employees for 2 days?*

A: No. The Labour Act (2007) does not make any provision for casual employees.

Q: *Why do I need an employment contract for my employees?*

A: Employment contracts govern the employment relationship between an employer and employee. The employment contract stipulates the basic conditions of employment in relation to salary, benefits, working hours, employment terms, etc. and is aimed at avoiding misunderstandings during the employment period. No employment relationship should exist in the absence of an employment contract.

Q: *Can I introduce an employment contract if the employee is already in my service for some time?*

A: Yes. It is never too late to introduce an employment contract. The employer will need to consult with the employees in order to confirm the contents of such contract where after the employment contract will follow. Note also that the parties also need to agree on leave balances etc. at the same time - i.e. new contracts will be introduced for

example from 1st February 2010 and variable items such as leave balances etc. at this time should be included as a opening balance in the contract in order to avoid future disputes regarding queries preceding the introduction of employment contracts. It is important to note that an employment contract is to the benefit of both the employer and employee.

Q: *I have never kept written records of my employee's leave. How can I rectify this?*

A: Consult with your employee and agree on the accrued balance on a specific date. Both parties then agree to these balances with the immediate introduction of relevant leave forms and a system to keep a record of same. Note that the employer is required, by law, to keep leave records and the employer will be disadvantaged when a dispute arise in this regard.

Q: *What will happen if I pay out accrued annual leave during the employment period?*

A: Payment of accrued annual leave at any time except when the employment relationship discontinuous, is illegal even if the employee request or agree thereto. The employer may be held accountable to reinstitute the paid out leave days.

Q: *When do I need to pay Social Security for my employees?*

A: Every employer needs to register his/her employees with the Social Security Commission whether they are permanent or temporary employees. The employer furthermore needs to contribute and deduct from the employee a certain portion of the employee's remuneration and pay it over to the Social Security Commission. It is a statutory obligation for employers to register your employees with the Social Security Commission and to pay the annual fees.

Q: *What is Workmen's Compensation (WCA) and who needs to belong to it?*

A: Workmen's Compensation remunerates employees for injuries incurred on duty. All employers need to be registered

with WCA. WCA will annually calculate a fee payable by every employer, calculated as a percentage of the employer's wage bill for all employees falling within a predetermined salary range. It is a statutory obligation for employers to register their employees with WCA and to pay the annual fees.

Q: *What might be the consequences if I permit a female employee to continue working during her maternity leave period?*

A: Both the Labour Act (2007) and the Social Security Act (2007) prohibit female employees to work during the maternity leave period as defined in the Labour Act (2007). By permitting a female employee to work during her maternity leave period, even if she request to do so, opens the employer up for liability in terms of complications with the pregnancy or childbirth and possible legal action. It may be construed as fraud when maternity leave benefits are claimed from the Social Security Commission while the employee is earning her normal remuneration from the employer.

Q: *What is variable pay?*

A: Variable pay refers to the none guaranteed portion of an employee's remuneration package. Examples of variable pay include commissions, incentives, performance bonuses, etc. Variable pay is also known as "pay for performance" and is globally gaining more popularity as it is a key driver for performance. It is however important that a variable pay package should be both inspirational and fair - thereby ensuring that employees remain motivated.

Q: *What is piece work pay?*

A: Piece work pay refers to payment according to the completion of a task or assignment. It is therefore not linked to hours worked to complete the task or assignment but only to the completion of the task or assignment according to set standards. Piece work pay increases performance but it is important that the rate be fair and that the employee agrees in advance to the principle and required outcomes.