

SEESA LABOUR NAMIBIA

NEWSLETTER 2 / AUGUST 2009

We received positive response to our first newsletter which was published a while ago. With this issue we proceed to fulfil our promise to keep our clients updated on developments in labour law and at SEESA Labour Namibia.

In this issue we will deal with the following:

1. The relationship between SEESA Labour Namibia and the General Employers Association of Namibia (GEAN);
2. Premium increase;
3. Amendments to Collective Agreements;
4. Affirmative Action;
5. How to deal with employees on probation;
6. Say "You're fired" and get away with it.

1. WHAT IS THE RELATIONSHIP BETWEEN SEESA LABOUR NAMIBIA AND GEAN?

The relationship between SEESA Labour Namibia and GEAN created the misconception that SEESA and GEAN operate as one. However, nothing can be further from the truth. We would like to clarify this matter once and for all, and therefore draw your attention to the following:

SEESA Labour Namibia is a labour consultancy firm which assists our clients with various labour-related matters.

GEAN is a duly registered Employers Organisation in terms of the Labour Act. GEAN represents its members at conciliations and arbitrations before the conciliators and arbitrators appointed by the Labour Commissioner.

The legal advisor rendering services to our clients will, for instance, chair a disciplinary hearing on behalf of the client. Should the employee, after being dismissed, refer the dismissal as an alleged unfair dismissal to the Labour Commissioner, an official of an Employers Organisation may represent the employer in the dispute resolution phase and, should the employer be a member of GEAN, it will be a GEAN official.

SEESA and GEAN are totally separated in entity, form and operation. Employers pay their monthly premiums to SEESA for the consultancy services that the legal advisors render to them.

An employer who is a member of GEAN pays a membership fee to GEAN, and on that basis the GEAN officials will render services to the employer during the dispute resolution process.

Employer Organisations must operate totally independent from any other entity or organisation. GEAN is such an independent organisation and is not controlled by SEESA Labour Namibia.

Some of our clients, who are also members of GEAN, were severely affected by the misconception, inter alia, where the Office of the Labour Commissioner prohibited GEAN officials from representing their members at arbitrations, raising the so-called “link” between SEESA and GEAN as the reason. Clients who are also members of GEAN can rest assured that the issue had been addressed by the Executive Committee of GEAN and they do not foresee future problems in this regard.

2. PREMIUM INCREASE

The global economic circumstances have now reached out its tentacles to Namibia. Up to now SEESA Labour Namibia managed to absorb the wave of cost increases without this affecting our clients. Unfortunately an increase in premiums has now become unavoidable.

As from September 2009, an increase of 6% in premiums will be implemented. We trust that clients will understand the necessity of the increase, taking into account our undertaking to maintain our professional services to clients.

3. AMENDMENTS TO COLLECTIVE AGREEMENTS

Clients within the scope of the security, farming and construction industries should take note that the collective agreements regulating these sectors have been amended.

The amendments relate to wages, bonuses, shift determinations and uniform deposits.

3.1 SECURITY OFFICERS

The minimum cash wage for entry-level employees increased from N\$ 2.09 to N\$ 3.80 per hour. This became effective on 1 June 2009. A shift bonus of N\$ 4.00 has now also been introduced and 10,5 hours or more will be deemed a full shift.

An employer may now require a newly-appointed employee to pay a uniform deposit, equal to the cost of a uniform, which should be refunded on the return of the uniform at the time of the employee’s termination of service.

This collective agreement expires on 31 December 2011.

3.2 CONSTRUCTION INDUSTRY

A wage increase of 7%, effective from 1 March 2009 and 6% effective from 1 March 2010, was agreed upon.

The living-out allowance and the service bonus remain unchanged.

Employers active in this industry should take note that in the event of a fair dismissal, the employee is not entitled to his/her service allowance.

3.3 FARM LABOURERS

A wage increase from N\$ 2.20 to N\$ 2.87 per hour became effective from 1 June 2009.

Employers providing rations or food, should take note that the value thereof may not exceed 35% of the employee's basic wage.

Employers not providing rations or food must pay the employee an amount of N\$ 300.00 per month in order to make up the full minimum wage of N\$859.61 per month on a 45-hour work week.

4. AFFIRMATIVE ACTION

INTRODUCTION

The Affirmative Action (Employment) Act, 1998 (Act 29 of 1998) was passed to redress the imbalances in the workplace arising from the discriminatory socio-economic dispensation which had previously existed in Namibia.

The Affirmative Action Act places an obligation on certain employers to apply fair employment practices with regard to matters such as recruitment, selection, appointment, promotion and equitable remuneration for previously disadvantaged people.

WHO ARE THEY?

Persons previously disadvantaged on the basis of race as well as women and persons with disabilities.

WHAT DOES IT MEAN IN PRACTICE?

The Act requires certain "relevant" employers to meet the main objectives of the Act.

The Minister promulgated a Government Notice in terms of Section 20 of the Act, declaring employers who employ more than 25 employees as "relevant" employers.

A relevant employer must submit an Affirmative Action Plan to the Employment Equity Commission and in this regard the first Affirmative Action Plan was supposed to have been submitted on 6 February 2001.

An employer who becomes a relevant employer must notify the Commission within 30 days of becoming a relevant employer. He must then submit an Affirmative Action Plan within 18 months of the date of the notice to the Commission.

WHAT DOES THE "PLAN" ENTAIL?

Your Affirmative Action Plan consists of the following:

1. A numerical workforce profile of employees, indicating the following:
 - a. (In which) job categories you employ racially disadvantaged and racially advantaged persons and persons with disabilities, according to gender. The job categories vary from executive directors to unskilled labour.
 - b. Your recruitment of employees during the 12 months preceding your plan.
 - c. Promotion of employees during the 12 months preceding your plan.

- d. Termination and reasons for termination of employees during the 12 months preceding your plan.
 - e. Training of employees during the 12 months preceding your plan.
2. An indication of whom you consulted when drafting and planning your report and how regularly you met with them.
 3. An identification of employment barriers.
 4. Numerical goals of affirmative action to be attained in the first, second and third year of the plan.
 5. In conclusion, an envisaged new workforce profile, resources allocated to implement your affirmative action plan, and the salary scales of the disadvantaged groups compared to those of non-disadvantaged groups.

Once your plan has been submitted, the Employment Equity Commissioner will appoint a Review Officer who will evaluate your plan and ascertain compliance with the Act. He/she will recommend the approval or non-approval of the plans. If there are aspects with which they are not satisfied you will be requested to adjust and comply.

Affirmative Action plans must be submitted in a prescribed form promulgated in terms of the Regulations issued in accordance with the Act. These forms are available on the government's website.

A relevant employer must also submit Affirmative Action progress reports annually.

If a relevant employer fails to submit a plan, the employer may be liable to a fine not exceeding N\$16 000 or to imprisonment of a period not exceeding 4 years, or both.

If you need any assistance or guidance with the drafting and submission of your Affirmative Action Plan, please feel free to contact any of our offices and a legal advisor will gladly be of service.

5. HOW TO DEAL WITH EMPLOYEES ON PROBATION

WHAT IS PROBATION?

Probation is a tool which an employer can use when he employs a new employee in order to determine whether he/she is suitable to do the work, and to evaluate his/her performance before he/she is appointed permanently.

The employer must allow the employee to work, and during this period:

- train, monitor and correct areas of poor performance by guidance and counselling, as well as;
- regularly evaluate the employee and afford him/her the opportunity to meet the employer's performance standards.

An employee on probation is an employee in all respects, with the exception that continued employment is conditional on the successful completion of the probation period.

WHAT IS A REASONABLE PROBATION PERIOD?

Probation must be for a reasonable period. It must be determined in advance and be reasonable in relation to the:

- nature of the work;
- time needed to train, assist, monitor, assess, evaluate and counsel the employee and
- time it takes to improve the performance.

Probation periods are usually between three and six months. There may be exceptions where a longer period may be needed, for example in specialist working environments.

WHAT ARE THE REQUIREMENTS TO SAFELY DISMISS AN EMPLOYEE ON PROBATION?

MISCONDUCT

An employee who is guilty of misconduct during his/her probation period may only be dismissed if the conduct is of such a serious nature that it justifies dismissal in a substantive sense and only after a fair procedure had been followed, namely a proper disciplinary hearing.

POOR WORK PERFORMANCE / INABILITY TO MEET THE STANDARD

An employee on probation, who after everything reasonable had been done from the employer's side as stipulated above, may be dismissed in terms of a proper procedure, if he/she is unable to meet the performance standard.

WHAT PROCEDURE MUST BE FOLLOWED TO DISMISS A PROBATIONER?

1. When the person is employed, there must be clear set of performance standards;
2. The employee must know exactly what is expected of him/her;
3. If, after a reasonable period of work, training and monitoring, the employee still shows shortcomings, a fair evaluation must be conducted;
4. The employee must be notified of a poor work performance meeting. During this meeting, the following needs to be addressed:
 - 4.1 What standard of work is required by the employer?
 - 4.2 Does the employee have knowledge of what is expected?
 - 4.3 The specific shortcomings need to be indicated to the employee.
 - 4.4 The reasons for the poor performance have to be determined.
5. After establishing the reasons, a decision must be taken on how to address the shortcomings, and a reasonable period must be determined to allow for improvement.
6. After the meeting the employee should be allowed to work and improve his/her performance while receiving re-training, assistance etc.
7. At the end of this improvement period the employee should be evaluated and if there are still shortcomings, follow-up meetings should be conducted.
8. The employee should be warned that if he/she does not improve, he/she may be dismissed.

The poor work performance meetings should be officially recorded.

If, after the second improvement period, it is clear that the employee will not meet the standards of work expected by the employer, the services of the employee may be terminated.

A letter should be given to the employee basically stating that he/she had not successfully completed the probation, that he/she will not be employed on a permanent basis and that his/her service is terminated.

The employee should be given the necessary notice and be paid what is due to him/her. No formal poor performance inquiry/hearing is required as the minuted counselling sessions will suffice.

The employer must, however, prove that they had done what was necessary to assist the employee to reach the expected standard of work and that the employee had in fact performed poorly.

The employer should also prove that they had conducted formal poor work performance counselling sessions and that the employee was given the opportunity to state his/her case during those sessions. It should not be a one-sided affair.

6. **SAY "YOU'RE FIRED" AND GET AWAY WITH IT**

You can, just do it right!

The employer has the right to "fire" an employee. However, it is a right that should be exercised with caution.

When it concerns dismissals, there are a few basic principles that apply. These are as follows:

- 9.1 Always avoid dismissals - only resort to dismissal in serious cases of misconduct, poor work performance, ill health and retrenchments;
- 9.2 You may dismiss for non-serious misconduct, but only after progressive disciplinary action had been taken (warnings) and if the employee persists in his/her conduct;
- 9.3 Comply with your "code of conduct".

For purposes of this issue, we will deal with dismissals for misconduct.

You may only dismiss an employee after conducting a fair procedure (a hearing) and if the conduct is of such a serious nature that it justifies dismissal.

Dismissals must be procedurally and substantively fair.

Procedural fairness

This relates to the procedure of the hearing and constitutes the following:

1. The employee must be given reasonable notice to attend the hearing (at least 2 working days);
2. He/she must be informed of the charges against him/her in clear and simple terms in order to know what to answer to and to prepare his/her defence accordingly;

3. The notice should also inform the employee of the following:
 - i. Date, time and place of the hearing;
 - ii. Right to an interpreter;
 - iii. Right to representation;
 - iv. Right to question witnesses;
 - v. Right to give evidence (state his/her case);
 - vi. Right to call witnesses in support of his/her case;
 These rights should be exercised during the formal hearing.
4. The chairperson should be impartial, conduct the hearing fairly, make a finding on the facts/merits of evidence (guilty/not guilty) and on a balance of probabilities;
5. If the employee is found guilty, a sanction must be imposed after mitigating and aggravating factors have been submitted and considered;
6. The employee should be notified in writing of the finding and the sanction imposed; and
7. The employee must be informed of his/her right to appeal against the finding and sanction, and be informed of the outcome of the appeal within a reasonable time if he/she had lodged one.

SUBSTANTIVE FAIRNESS

The substantive fairness of a dismissal relates to the following:

1. Guilt – Did he/she, on the facts / merits of the case, commit the offence/s?
2. Sanction – Is the sanction (dismissal) justified in the circumstances?

These factors are objectively judged and not subjectively.

The criteria for substantive fairness of the dismissal is whether it was of such a nature that it rendered the employment relationship to be irrevocably broken down or irreparable.

Substantive fairness also relates to consistency, not only in terms of “same offence – same punishment”, but also when it comes to the same action taken against different employees. Inconsistency may occur, but the employer will have to have good grounds to justify the inconsistency.

Some employers are under the misconception that they may summarily terminate an employee’s services if he/she commits a serious offence. Their interpretation of summary dismissal is dismissal “without a hearing”. This is not so. Summary dismissal means dismissal without a notice period. If an employer considers dismissing an employee, it must be preceded by a hearing.

In conclusion, if you are patient, have proper evidence, can prove your case, follow a fair procedure and can justify the dismissal, you can indeed say “You’ re fired”, and get away with it.