RESIGNATION WITHOUT NOTICE: CONSEQUENCES AND IMPLICATIONS

Resignation is a unilateral voluntary act which brings the employer – employee relationship to an end and takes effect as soon as the resignation has been communicated to the correct person or authority. Common law recognizes employees' right to terminate contract on notice. Section 12(4) of the Labour Act [Chapter 28:01] "the Act" provides for the applicable periods whenever a contract of employment is to be terminated on notice. This paper seeks to answer the following questions:

i. Is the employer allowed to deduct employees' salary from the unserved notice period?
ii. Is it an unfair labour practice by the employee to resign without giving notice?
iii. What is the employer`s remedy?

It is customary for many organisations to deduct monies from an employee's terminal benefits equivalent to the notice period when an employee resigns without serving the required notice. If the money deducted from the employee`s terminal benefits is not equivalent, the employee will be owing the company the remaining balance. This leads to the most pertinent question, is the employer allowed to deduct employees' salary from the unserved notice period? The act of deducting monies from employee`s terminal benefits is not only procedurally flawed but contrary to the express provisions of section 12A (6) of the Act and well established principles of our law.

Guided by the provisions of the law, one would note that the employer must not embark on a journey where they exercise self-help by deducting from an employee`s remuneration without authorisation. The position was robustly articulated in the case of *The State v Never Simon* HH 84/2004, where Honourable Justice Bhunu (as he then was) stated that;

> *"It is self-evident that the circumstances under which an employer may make deductions from an employee`s salary or effect set off are specific and exhaustive…<u>It is trite that our law frowns upon and illegalises the exercise of self-help.</u>"* (Underlining for emphasis).

Section 12A (6) of the Labour Act cited above delineates the exhaustive circumstances under which an employer may effect deductions from an employee`s salaries. The list is exhaustive, suffice to say that what is not provided for under the section in discussion is impermissible. The employer thus cannot arrogate itself such powers to deduct from employee`s terminal benefits when he or she resigns without giving adequate notice period. There is no provision in the Act that permits forfeiture of terminal benefits as set-off against notice not served, *ipso facto*, any such action amounts to an unlawful deduction and constitute self-help, which is repugnant to the rule of law.

Moreover, section 13 of the Act unequivocally entitles an employee who resigns to receive all outstanding salaries and benefits, including vacation leave. The vacation leave days earned but not taken, by operation of law, must be converted to monetary compensation upon termination of employment.

Further, section 13(2) of the Act creates a penal sanction against any employer who, *sine ministeriali approbatione* (without Ministerial approval), withholds or delays terminal benefits. Such conduct, if not remedied, may attract both civil and criminal consequences. It is noteworthy that an employee is only expected to give notice in terms of section 12(4) of the Act when he or she resigns as a matter of courtesy to allow the employer to make plans for business continuity. That courtesy, if not extended, does not constitute an unfair labour practice and the act of resigning without giving adequate notice in and itself is not illegal.

Employer`s remedy

The pertinent question is "what recourse does the employer have when an employee resigns without giving adequate notice?" The employer, in the circumstances, can ride on the principle of *ubi jus ibi remedium,* which is a legal maxim that translates to "where there is a right, there is a remedy." This principle asserts that if a person has a legal right, the law must provide a means to enforce that right or obtain a remedy for its violation. Having established that resignation without adequate notice is not illegal, in the face of inconveniences to the business, the remedies that accrue to the employer are specific performance and damages.

i. Specific performance

The term "specific performance" refers to literal performance of one's obligations under a contract. Should a party default on his obligation, a court may issue an order for specific performance, requiring a party to perform a particular action. The action is usually one that has been previously detailed in a contract. The employer will be suing for the employee to provide his service whilst serving notice. This has not been tested in our jurisdiction, but the remedy was granted closer to home in South Africa in the cases of *Nationwide Airlines (Pty) Ltd v Roediger and Another* (2006) 27 ILJ 1469 (H), and *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73. In the cases above, the employees were tied to fulfil the conditions of their employment, thus serving adequate notice.

Whilst suing for specific performance can be ideal, the practical implications can be dire in that forcing an employee to continue working can lead to resentment, decreased morale and create a toxic work environment which can ultimately affect production and service delivery. It may create practical challenges as it will be difficult to manage an employee who is no longer willing to serve the organisation, as they will not perform effectively.

ii. Damages

Another remedy is suing for damages due to the breach caused by the employee in failing to give notice. In the case of *A. C Controls (Pvt) Ltd v Midzi & Anor* HC 2035/10, the court held that "The employer can however institute a claim for the damages he may suffer as a result of the employee's resignation without giving him adequate notice." It is the duty of the employer to justify financial losses incurred by resignation without giving adequate notice, and these may include but not limited to recruitment costs of finding a new replacement, training costs of new hires, loss of productivity during the transition period etc.

The principles applicable in claiming these damages were set out in the following South African cases: *South African Music Rights Organisation v Mphatsoe* [2009] JOL 23 476 (LC),

National Entitled Workers Union v CCMA (2007) ILJ 1223 (LAC) and *Labournet Payment Solutions (Pty) Ltd v Vasloo* (2009) ILJ 2437 (LC). In Zimbabwe at the moment, there are no precedent cases where an employee was sued for damages for failure to give notice, and the South African cases are only persuasive to our courts.

Are the remedies worthy to pursue

While it is within the employer`s right to exercise their right to file lawsuit in light of the breach by the employee in failing to give notice, such action has drawbacks worthy considering, namely:

i. Legal battles can attract negative attention, potentially harming the company's reputation and affecting relationships with other employees or stakeholders.
ii. Litigation can be expensive and time-consuming, diverting resources away from more productive activities. Legal fees can accumulate, and the process can take months or even years. The legal fees may outweigh potential recoveries.
iii. A history of litigation against employees may deter potential candidates from applying, fearing a rigid or hostile work culture.
iv. There is no guarantee of success in court, and the outcome may not favour the employer, leading to a waste of resources.
v. Legal action against a former employee can create a negative atmosphere within the workplace, affecting morale and trust among current employees.

Conclusion

In summary, the sentiment that it is illegal for an employer to deduct an employee's terminal benefits upon resignation without notice is grounded in legal principles that protect workers' rights. It is safe to say that our labour laws were designed to safeguard employee rights, including the right to receive earned wages and benefits upon termination of employment. These laws typically prohibit employers from making arbitrary deductions from terminal benefits unless explicitly allowed by law. Upholding employees' rights to their earned benefits is not only a legal obligation but also a vital aspect of fostering a respectful and productive work environment. It is noteworthy that while it is possible to sue for specific performance and damages, the disadvantages often outweigh the potential benefits.

Prepared by Takawira Munyanyil, Designated Agent for NEC Catering Industry.