# Moonlighting

Earning extra money outside of working hours (also referred to as 'moonlighting') may sound like a good idea. But what if the employer objects? Is the employee accountable to the employer for income earning activities outside of working hours? The answer is not straightforward.

An employee has an obligation to make his/her services available to the employer during the hours that have been agreed upon. As a general rule, the employee is free to pursue his/her own commercial interests outside of working hours. There is an important consideration to bear in mind, though. One of the cornerstones of the employment relationship is the employee's implied duty to serve the employer in 'good faith'. Certain employee activities after working hours could interfere with this duty.

The duty of good faith has been described by the Supreme Court of Appeal (SAC) in ***Ganes v Telecom Namibia Ltd (2004)***, as follows:

*"As an employee of the (company) and in the absence of an agreement to the contrary the (employee) owed the (company) a duty of good faith. This duty entailed that he was obliged not to work against the (company's) interests; not to place himself in a position where his interests conflicted with those of the (company); not to make a secret profit at the expense of the (company); and not to receive from a third party a bribe, secret profit or commission in the course of or by means of his position as employee of the (company)."*

The issue of moonlighting was considered by the Labour Court in the case of ***Martin & East (Pty) Ltd v Bulbring and others (2016)***. The employee was an operators' manager. He also trained the company's employees and had become an accredited assessor and moderator during his employment. It was common cause that the company had a rule against moonlighting. The company alleged that the employee had contravened the rule in that he "did not declare or obtain written approval to present training to an external company for remuneration over the period 27 February 2013 to 3 March 2013." During this period the employee had presented training for his own account to another company in Beaufort West. He did not ask permission to do so.

In addition to moonlighting, the employer also alleged that the employee had been involved in dishonest and fraudulent activities, and that the employee had brought the company into disrepute. After a disciplinary hearing, the company dismissed the employee on the basis that he could no longer be trusted.

The CCMA Commissioner accepted that there was a rule in respect of moonlighting and that the employee was aware of it; yet she found that there was no strict application of the rule when it came to the employee. She found that the employee's dismissal had been unfair and awarded him compensation. The Labour Court disagreed. According to the Court, the employee had clearly been dishonest, had committed fraud, had brought the company into disrepute, had breached the company's rule in respect of moonlighting, and had acted to the prejudice of his employer for his own

2/…

benefit. In the court's view this destroyed the relationship of trust between him and his employer. The CCMA's award was set aside and substituted with a finding that the dismissal of the employee had been fair.

In this case, the Court's conclusion that the dismissal had been fair was not only due to the breach of the rule regarding moonlighting. Other serious forms of misconduct (dishonesty, fraud, bringing the company into disrepute) also had a bearing on the matter. Even so, it is our view that the employee's breach of the company's rule in respect of moonlighting, and that he had acted to the prejudice of his employer for his own benefit, could in itself have been sufficient to justify dismissal.

Employers may, for the sake of clarity, introduce a written rule or provision in the contract of employment that prohibits moonlighting without the employer's written consent. This is not strictly necessary, though. The employee's obligation to serve the employer in good faith (as described by the SAC above) is not dependent on the existence of such a rule or contractual provision. On the other hand, a rule or provision that restricts an employee unreasonably would be unenforceable.

So, how does one know whether there has been a breach of the duty of good faith? Pursuing a hobby that has no relation to the employer's business, is unlikely to present any conflict of interest – hence there would be no breach of the duty. On the other extreme, if an employee does something which is in direct competition with the employer's business, e.g. doing work for a client of the employer and depriving the employer of that income, it would be in conflict with the employer's interests and, accordingly, a breach of the duty of good faith.

If a breach of the duty of good faith has been established, it would inevitably have a detrimental effect on the employment relationship. The breach would normally amount to serious misconduct. But how serious? There are several factors that could have a bearing on the gravity of the offence, e.g. nature of the position, seniority, whether there is an element of dishonesty, and actual or potential harm to the employer. Whether dismissal is justified, depends on whether the breach is serious enough to destroy the relationship of trust.

*Article provided by Jan Truter from Labourwise*

*www.labourwise.co.za is an on-line labour relations service aimed at assisting employers with the implementation of effective labour relations. They can be contacted via the website or info@labourwise.co.za.*