

How useful are contractual notice periods?

Question: Is a contractual notice period of use to the parties in an employment relationship?

Answer: Yes, but its use to an employer is limited.

Brief explanation:

The Basic Conditions of Employment Act (BCEA) provides for minimum notice of termination of employment as follows:

- One week, if the employee has been employed for six months or less;
- Two weeks, if the employee has been employed for more than six months, but not more than one year;
- Four weeks, if the employee
 - ✓ has been employed for one year or more; or
 - ✓ is a farm worker or domestic worker who has been employed for more than six months.

The parties may agree to a longer period than stipulated above, but the employee may not be required to give a longer period of notice than the employer. For example, if the employee is contractually bound to give two months notice, the employer also has to give at least two months notice.

In practice, employers face certain obstacles. Firstly, if the employer wants to terminate employment, it is not good enough for the employer to merely give notice in terms of the contract of employment. The employer must also ensure that the “dismissal” is procedurally and substantively fair – in other words, the employer has to follow the legislative guidelines that apply for misconduct, incapacity or operational requirements.

The second obstacle faced by an employer arises when an employee leaves employment without giving the agreed notice. This amounts to a breach of contract. The employer may have a claim for damages suffered as a result of such breach. However, to recover damages the employer may have to resort to a civil court – this means having to incur legal expenses and having to prove that damage has been suffered. The question is whether it is worth the effort.

What about deducting monies from the remuneration and leave pay that may be due to the employee? Section 34 of the BCEA prohibits an employer from making deductions from an employee’s remuneration without the written consent of the employee. However, to overcome this obstacle one may insert a provision in the contract of employment where the employee gives consent for a deduction to be made in the event of short notice.

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