

# THE IMPACT OF THE COMMON LAW ON AN EMPLOYMENT CONTRACT

## 1) Introduction

The fact that parties are in an employment relationship has consequences.

The impact of the common law relates to *basic* rights and duties of employees and employers.

## 2) Duties of the Employer & Employee

The common-law duties of both are very broad. These duties are indirectly also covered by legislation, but they remain valid and important to the employment relationship.

### \* Duties of Employers

- ✓ To remunerate the employee: The primary duty of the employer is to pay the employee, but if the employee doesn't work then no payment is due. However the BCEA provides for paid leave in certain circumstances. If no leave is applicable in terms of the BCEA, the principle of 'no work, no pay' still applies.
- ✓ To provide the employee with work: The employer isn't generally required to provide the employees with work to do except in special circumstances, such as where the employee's salary is commission-based and dependent on actual work done.
- ✓ To provide safe working conditions: This duty entails that the employer may have to provide the employee with protective devices, install safety equipment and exercise proper supervision. This duty might even include protection against any type of harassment in terms of the EEA by the employer or colleagues.
- ✓ To deal fairly with the employee: This duty is captured by the constitutional right to fair labour practices. The LRA protects employees against unfair treatment during the time of employment and against unfair dismissal.

### \* Duties of Employees

- ✓ To render services to the employer: The primary duty of the employee, through which the labour potential of the employee is placed at the employer's disposal.
- ✓ To work competently and diligently: When the employee enters into the employment contract they guarantee that they are capable of doing the work, and that it will be performed competently and diligently.
- ✓ To obey lawful and reasonable instructions: The employee is under the control and authority of the employer. Non-compliance of this duty will constitute serious insubordination and breach of contract, except if the employee refuses to follow orders outside the scope of their employment contract.
- ✓ To serve the employer's interests and act in good faith (fiduciary duty): An employment relationship is built on trust and confidence which is an implicit term of any employment contract.

## 3) Doctrine of Vicarious Liability

The doctrine of vicarious liability (based on considerations of public policy) may further impact on the employment relationship. According to this doctrine an employer is liable for the illegal or delictual acts of an employee performed during the course of business. The operation of this doctrine is regulated by the common law and not by employment legislation.

This doctrine is based on the principle that the employer (who by its profitable operations creates a risk of harm to others) has to compensate those who suffer injury as a result of an employee's wrongful conduct. Vicarious liability protects third parties. It doesn't mean that the employer won't have recourse against the employee.

In order for the employer to be held liable for the employee's wrongful conduct, the following three requirements must be met:

- ∞ there must be a contract of employment
- ∞ the employee must have acted in the course and scope of employment
- ∞ the employee must have committed a delict (an act which caused damage/injury to a third party)

The most problematic requirement is normally to determine whether the employee acted in the course and scope of their employment

#### **4) Impact of the Contract of Employment on the Employment Relationship**

##### **\* Introduction**

When determining the impact of the contract of employment on the employment relationship, one has to consider the contents of the contract in the first instance, as this contains the agreement between employer and employee.

##### **\* General Contract Principles**

A contract of employment must meet all the requirements that the law prescribes for the conclusion of a valid contract:

- there must be agreement between the parties
- the parties to the contract must have acting capacity (legally allowed to contract)
- the agreement must be legally possible
- performance under the agreement must be physically possible
- if any formalities are prescribed for the formation of the contract then they must be satisfied

As a general rule there are no formal requirements that a contract of employment must be in writing, although for the sake of clarity and certainty it is desirable.

The employer must keep written particulars of the employee for 3 years after the termination of the employment contract. The employer is also required to display a statement of the employees' rights in terms of the BCEA in the workplace, in the prescribed form and in the spoken languages.

##### **\* Remedies for Breach of Contract**

If the parties don't perform in terms of the agreement, that will constitute breach of contract in terms of the common law. In the event of breach of contract the innocent party has the choice either to accept the breach and cancel the contract, or compel the defaulting party to perform. In addition the innocent party can claim damages.

The LRA has largely replaced the processes provided by contract law for resolving breach of contract. In terms of the LRA a breach by the employer would probably amount to an unfair labour practice, unfair discrimination or an unfair dismissal. If the employee breaches the contract, it is most probably misconduct. If an employee were to claim breach of contract, the High Court, not the Labour Court, will have jurisdiction and only common-law remedies will be available.

##### **\* Restraint of Trade**

A restraint clause is normally included in employment contracts to protect the interests of the employer (against unfair competition from employees during and after their contract has ended). The purpose of a restraint-of-trade agreement is to protect the employer's trade secrets, goodwill and business connections.

### **\* Changes to Contractual Terms and Conditions of Employment**

Even though the terms of the employment relationship are contained in the contract, the employee and employer will also be bound by other (relevant) statutory provisions and applicable collective agreements.

An employer may not unilaterally change terms and conditions of employment. It can only be changed in the following ways:

- by agreement between the employer and the employees or in line with the method prescribed in the employment contract
- by means of a collective agreement between employer and trade union
- by operation of law, for example the BCEA
- through a sectoral determination issued by the Minister.

It's important to know the employment contract provides the basis for the individual employment relationship. Labour Laws may impact on this however.

### **\* Customs and Practices in the Workplace**

In addition to the consequences that result from the common law and law of contract, customs and practices in the workplace also have an important impact on the employment relationship. The employer doesn't have to obtain permission or an agreement from the employees to implement or change these.