

24th April 2017

CONTRACT OF EMPLOYMENT

The contract of employment entered into by employees when they work for employers, is more appropriately called a Service Agreement.

This arises from the notion that the employee places their service for the employer to utilize; the employer has a duty to provide work.

The contract of employment is descended from Roman Law, where it had its origins in a lease agreement.

The roots of the contract in Roman Law are important, as the basis of our legal system is Roman Dutch Law. It is important to note that these legal systems allowed for slavery, thus it is important to note that the modern contract of employment, whilst descended from these systems has safety mechanisms which preclude inappropriate employment practices. This means that there are many laws which a contract of employment must pay attention to as background. Thus the modern contract of employment in South Africa is based largely on the Basic Conditions of Employment Act No. 75 of 1997 (BCEA) which inter-alia sets terms and conditions for hours of work, forbids forced labour and regulates / forbids child labour.

In ancient Roman times one could sell oneself into slavery to discharge ones debts. In the modern idiom this is no longer permissible as contracts of this nature are prohibited by statutes.

A contract of employment can be written, verbal or inferred from the conduct of the parties. This means that even if you don't receive a contract of employment but work for somebody, they cannot claim that you are not an employee because you don't have a contract. It is obviously most appropriate to have a contract which sets out the arrangements between the parties, and this is a basic requirement of the BCEA.

The BCEA was promulgated in 1997 and succeeded an earlier BCEA which had been promulgated in 1984. Prior to this employment terms and conditions were regulated by The Shops and Offices Act and the Factories Act.

Chapter 4 of the BCEA deal with particulars of employment and remuneration and S29 deals with the written particulars of employment, this is what an employer is required to place in a contract of employment.

29 Written particulars of employment

- (1) *An employer must supply and employee, when the employee commences employment, with the following particulars in writing-*
- (a) *The full name and address of the employer;*
 - (b) *The name and occupation of the employee, or a brief description of the work for which the employee is employed;*
 - (c) *The place of work, and, where the employee is required or permitted to work at various places, an indication of this;*
 - (d) *The date on which the employment began;*
 - (e) *The employee's ordinary hours of work and days of work;*
 - (f) *The employee's wage or the rate and method of calculating wages;*
 - (g) *The rate of pay for overtime work;*
 - (h) *Any other cash payments that the employee is entitled to;*
 - (i) *Any payment in kind that the employee is entitled to and the value of the payment in kind;*
 - (j) *How frequently remuneration will be paid;*
 - (k) *Any deductions to be made from the employee's remuneration;*
 - (l) *The leave to which the employee is entitled;*
 - (m) *The period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate;*

- (n) *A description of any council or sectoral determination which covers the employer's business;*
 - (o) *Any period of employment with a previous employer that counts towards the employee's period of employment;*
 - (p) *A list of any other documents that form part of the contract of employment, indicating a place that is reasonably accessible to the employee where a copy of each may be obtained.*
- (2) When any matter listed in subsection (1) changes-
 - (a) *The written particulars must be revised to reflect the change; and*
 - (b) *The employee must be supplied with a copy of the document reflecting the change.*
 - (3) If an employee is not able to understand the written particulars, the employer must ensure that they are explained to the employee in a language and in a manner that the employee understands.
 - (4) Written particulars in terms of this section must be kept by the employer for a period of three years after the termination of employment.

Contracts for employees are normally drafted on the basis of an indefinite period; that is an employee has certain undertakings for a period of time from the employer. In respect of particular issues, larger scale employers often have policies and procedures which are referred to in the contract of employment. Often smaller scale employers will include these in the document.

It is important to note that at the time of accepting an offer of employment one should ask for the contract to see what the full terms and conditions of employment are. It often happens that an offer that is made to an employee is aspectual. A more complete contract is signed afterwards, or is not signed as often there is a dispute between the employer and the employee as to what their respective expectations are. It will obviate much difficulty in the workplace if the employee is absolutely certain of the job they are applying for and accepting.

In respect of Fixed Term contracts, these are exactly what the term implies they are. They are fixed term in law. Our law, subject to amendments made in 2014 promulgated in 2015 states that anybody who earns below the earnings threshold of R205 433.30 may not work longer than 3 months whereafter they may be deemed to be permanent employees. There are however certain exceptions to this such as contract work etc. A typical example of this would be work on a construction site.

In the event that such contracts are for more than 2 years, the employee will be paid severance pay upon the completion of the contract.

These provisions do not apply to fixed term employees earning more than the earnings threshold.

In respect of signing fixed term contracts of any kind, as stated they are exactly what they say they are. There is a fixed date and time for when they terminate. This means that the employee can expect to be paid for that period of time and notice is due to them. In the event that an employer wishes to end a contract early there is an argument that they should pay out the complete balance of the contract. Thus employers often insert what is termed 'an escape clause' into their contract which allows them to terminate the employment earlier. Legitimate reasons for escape are operational requirements, misconduct on the part of the employee etc.

This means that if an employee misconducts themselves seriously, that they can be dismissed, even if on a fixed term contract. If the employer has no work, they can retrench following an operational requirements process as set out in the Labour Relations Act. The employer will then not be obliged to pay out the balance.

In respect of Occupational Health Practitioners, their terms and conditions are regulated by the BCEA. However, they may find themselves working in industries which are regulated by Bargaining Council agreements such as the Metal Industries and the Motor Industries, alternatively by Sectoral Determinations such as the retail industry and the security industry. These industries and others like them have terms and conditions which may not contravene the BCEA but which may be seen as a constitution for employment, but they have variations which allow for different employment practices.

Contracts of employment often have confidentiality and restraints of trade. A Confidentiality agreement is an important document and the employer can require its employees to maintain

confidentiality of their employment information during employment and after employment for a specified period of time.

Can your contract of employment be changed? A contract is an agreement between two parties and as such can only be changed by agreement. Thus one could approach the employer to vary certain terms and conditions and the employer could approach the employee to do the same. An example of this is the wage negotiations which take place in many industries each year, which change employment terms and conditions and wage levels.

In the event that an employee attempts to force a change on an individual and unilaterally changes a contract of employment, after discussing this with the employer the employee may take action against the employer in terms of Section 64 (4) of the Labour Relations Act or in terms of S77 of the BCEA which means that the breach could be taken to the Labour Court.

I would recommend that SASOHN members read the BCEA as it contains chapters on all the employment issues which are of interest to them. It sets out provisions for leave, overtime, shift work and the like. There is no substitute for having the knowledge of your terms and conditions of employment when you engage with your employer about your work situation.

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