

### What do you do with deserters?

Has the employee deserted? Is the employee a deserter? Or has the employee absconded? Or is it “desertion?” Call it what you like, it cannot be tolerated. Or must you tolerate it? Whatever the case, the employee has failed to return to work after the annual shutdown, or leave etc.

Sometimes employees do phone in – like one employee who phoned the employer 10 days after he was supposed to have reported for duty, apologizing profusely for the fact that he had not yet returned to work. He stated the problem as being that he had no money to travel from Mafeking to Johannesburg, and he was really “trying by all means his level best” to get a part time job in Mafeking, to raise money to buy a train ticket. He “really hopes that the boss will understand, because it is not his fault that train fares are so expensive, and the government does nothing to assist workers to get back to work, so it is not his fault.”

The answer to this employee was simply “be at work Monday morning, or face disciplinary action – which may mean your dismissal. If that happens, you won’t have money for anything – not only train fares.

Sounds easy – but is it really that easy?

Firstly, one of the prime requirements in a dismissal for desertion is that you must be reasonably certain – or be able to put forward evidence that entitles you to draw the reasonable conclusion – that the employee has no intention of returning to work.<sup>1</sup>

Another first is that in all cases of dismissal for desertion, the employee is entitled to be given an opportunity to present his side of the matter and explain the reasons for his “disappearance.”<sup>2</sup>

How do you give him that opportunity if he has disappeared and you have been unable to contact him, and his family have reported nothing to you, or they deny any knowledge of his whereabouts?

The Labour Appeal Court has held that when an employee deserts and cannot be traced the employer has no practical choice other than to accept the repudiation. In these circumstances it can probably be argued that the employer did not terminate the contract. However, when an employer accepts repudiation in circumstances where the employee’s whereabouts are known, this amounts to dismissal<sup>3</sup>. Thus if an employer accepts the act of the employee’s desertion, and the employee’s whereabouts are known to the employer, then the employee has not resigned and nor has the employer terminated his employment contract – it is the employer who has terminated the contract by dismissing the employee.

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<sup>1</sup> Sibeko v Tshoedi [1996] 3 BLLR 396 (IC)

Seabelo v Belgravia Hotel [1996] 6 BLLR 829 (CCMA); Mthethwa and Capital Caterers [2007] 28 ILJ 1859 (CCMA)

<sup>2</sup> Seabelo v Belgravia Hotel [1996] 6 BLLR 829 (CCMA)

<sup>3</sup> Sacwu v Dyasi [2001] 7 BLLR 731 (LAC)

And in terms of the Labour Relations Act, every employee has the right to refer a dispute of unfair dismissal to the CCMA if he feels that he has been unfairly dismissed.

So if you dismiss an employee for desertion, who has been in jail for 18 months, then upon his release, that employee has the right to refer a dispute of unfair dismissal to the CCMA if he feels that the dismissal was unfair.

I am not here going to argue the merits of his case – I am only saying that he has the right to do that.

In a case (reported in the Sunday Times 9th October 2005 (by Priyesh Modi, attorney, of Bowman Gilfillan) an employee was held in police custody for 6 weeks. The charges were eventually dropped and he was released. He alleged that he had been unable to contact either family or employer. He returned to work, only to be told he had been dismissed for desertion.

He went to the CCMA, and the arbitrator held that when the employee returned to work, the employer should have given him a fair opportunity to state his defence, in order to establish whether there were any good reasons to explain why the employee had not reported for work for 6 weeks. The Arbitrator stated further that if the employer had done this, the employee could have offered a reasonable explanation.

The Arbitrator ruled that the employee had been dismissed without good reason (substantively unfair) and was therefore unfairly dismissed. The employee was reinstated retrospectively to the date on which he first reported for work after his release.

Does this mean that if an employee is in jail or in custody for 12 months, that is a “good enough” excuse not to attend work, and therefore avoid dismissal for desertion ?

We now to come into the second part of dealing with our deserters. Just to recap on the problems we are faced with, the first is that the Labour Appeal Court has held that if an employer accepts the act of the employee’s desertion then it is not the employee who has resigned but rather the employer who has terminated the contract by dismissing the employee.

Secondly, or as we saw, the CCMA seem to be of the opinion that if an employee is held in police custody then that is a valid reason not to attend work. This would seem to imply that the same conclusion can be drawn if the employee is in hospital or incarcerated.

So does this mean that the employer may not dismiss an employee who has disappeared without explanation until such time as that employee is able to come forward with an explanation?

Also we must bear in mind that whilst an explanation may be valid, it is not necessarily acceptable just because it is valid. For example, an employee who is habitually late for work may have the valid excuse that public transport is lacking in the area in which he resides.

Now, that is a perfectly valid excuse - he is late for work because of transport difficulties. But whilst that excuse is valid, it is not acceptable to the employer because it is the employee's duty to make certain that he can get to work on time in accordance with his obligations in his employment contract.

Therefore, the employer is justified in rejecting that excuse.

As far as our deserters are concerned, what can we do? The employee has been absent for two weeks or three weeks or what ever, and it seems that what ever the reason it would be accepted by the CCMA. In addition, we are obliged to allow the missing employee the opportunity to defend himself and put forward his side of the story.

The only way as far as we can see is that the employer must follow established procedures by firstly attempting to contact the employee, either by letter or telegram, or trying at least to establish his whereabouts by endeavouring to contact the family members. It is of the utmost importance that comprehensive records are kept.

Should this fail, the only safe path that we can suggest is to place the employee on unpaid leave. Even if he does have annual leave to his credit, place him on unpaid leave.

Experience has shown that as soon as the flow of money into the employee's bank account ceases, a miraculous recovery and reappearance of the employee takes place.

In the meantime, or if necessary, you can then employ another person in the place of the missing employee, on a temporary contract which stipulates that the contract shall terminate after a maximum period of six months, or on the return to work of the missing employee, whichever ever is the sooner.

In that way, should you employ another person, you will not be stuck with two employees should the deserter suddenly appear.

If he does appear within the six-month period, you can then hold a disciplinary hearing and allow him to put forward his defence and to state his reasons as to why his employment contract should not be terminated.

Depending on the decision of the chairperson, the employee can either be reemployed as from the date of his appearance or the date on which such agreement is reached, and the temporary employment contract with the other the employee would be terminated.

In our view this seems to be a fair way to handle the matter, and provided the procedure has been properly recorded at every step along the way from the time the employee disappeared, the subsequent hearing at the CCMA should not prove to be too traumatic.