



NEWSLETTER



**TO DEDUCT
OR NOT TO
DEDUCT
THAT IS THE
LEGAL QUESTION**



To deduct or not to deduct - that is the legal question

Monies can often be overpaid to employees, or can be erroneously paid into the wrong account – as in the newsworthy case recently of the Wits student.

Can overpaid salary amounts simply be deducted from future wages? And what can an employer do if money has been deposited into the incorrect account, particularly if that money has been spent by the recipient account holder?

In both instances, legal advice should be sourced as there are still grey areas that – if not clarified – could cost the employer dearly.

First, let's consider amounts overpaid to an employee:

The Basic Conditions of Employment Act 75 of 1997

Section 34(1) of the BCEA distinguishes between the two types of deductions that can be made, viz: 1. Deductions with the consent of the employee, and 2. Deductions for which the consent of the employee is not required. Section 34(5) of the BCEA specifically deals with the recovery of any overpayment made erroneously to an employee by the employer, resulting from an error in calculating the employee's remuneration. This section allows the employer to require the employee to repay remuneration overpaid due to a calculating error.

Cases where the court found in favour of the employer include 'Jonker versus Wireless Payment Systems cc (2010)', where it was found that 'Where an employee was however overpaid in error, the employer is entitled to adjust the income so as to reflect what was agreed upon between the parties in the contract of employment, without the employee's consent.'



So what should an employer do?

Hopefully, the issue can be solved through positive communication from both sides. An agreement must be reached between the employer and the employee for the repayment of the overpaid amounts, with suitable repayment terms. If this is not forthcoming, however, Section 35(5) of the BCEA can be instituted.

And now, the legal resources that can be applied when monies have been paid into the incorrect account, or – in the first case below – a comma was misplaced!

We all know about the case of the university student who had a windfall of R14 million suddenly appear in her bank account a few months ago. The university spokesperson indicated that as the student had signed an original agreement with NSFAS to adhere to the terms of how that money should be used, she was legally bound to repay the money she had spent, which was about R800 000. Even though it will take years, the money will eventually be retrieved.

Two further cases not so easily resolved:

1. An employer deposited R500 000 into an employee's account, having meant to pay R50 000. The employee immediately transferred the money into his wife's account and refused to repay the employer. An interesting fact is that in banking law, when a deposit is made into a person's bank account, the money actually belongs to the bank and not the account holder. The bank has an obligation to pay to the account holder whatever money is to his credit, on demand. Therefore, as the R500 000 payment was an instruction from the employer to the bank to be paid into the employee's bank account, the employee's bank has to get permission from the employee to reverse the deposit. As the worker transferred the money, he is liable for theft, as he obviously knew he shouldn't have been the recipient of that windfall.

2. The second case NONTOTBEKO GEORGE (Applicant) and MEC FOR HEALTH, EASTERN CAPE (Respondent) involves a payment error, where a deposit of R42 937.33 was incorrectly made. The woman who received the deposit acknowledged the receipt of the payment, but had spent it all. She agreed to repay the money. However, this didn't happen and her employer began to deduct R1 310.00 every month from the employee's salary. The employee took her employer to court, claiming she had not agreed to these deductions and that department had a duty to establish the debt. The ruling? 'As shown above, the respondent might have properly invited the applicant to make representations as to how to refund the amount owing but that would not give the respondent any entitlement to simply make deductions from the applicant's salary when the scenario does not fall within the parameters of section 38 of the Public Service Act. The conduct of the respondent is therefore unlawful.'

So the answer to the question: 'To deduct or not to deduct?' is **'Contact a GEO official first!'**

Regards
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For assistance with
POPI compliance,



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GEO members are advised to subscribe to the CIRIS internet labour law advice site. It provides valuable information on all matters related to Labour Law. Contact Andre Rabe on 0824910708 or email him on andrerr@geo.org.za

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Summary

There's an error made in the calculation of your employee's remuneration... are you entitled to deduct the amount overpaid without the written consent of the employee?

Is that a fact...



According to an article
Dec 2016: nordic.
businessinsider.com

Countries with the happiest and most loyal workers:

10. Czech Republic
9. Hungary
8. Belgium
7. Finland
6. Netherlands
5. Austria
4. Sweden
3. Costa Rica
2. Norway
1. Denmark



**IN THE NEXT
ISSUE OF
THE GEO
NEWSLETTER:**

**THE CORRECT
METHOD OF
ISSUING NOTICES
AND DRAFTING
CHARGES**

by Daniel Q. Berry
(GEO Official)