GUARDIAN EMPLOYERS ORGANISATION
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Assisting Employers in Labour Law

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NEWSLETTER

CAN AN EMPLOYER DEDUCT OR RECOVER LOSSES CAUSED BY AN EMPLOYEE?

Negligence, theft, dishonesty, damage to company property and other misconduct

In Short:

An employer may discipline an employee for misconduct and may pursue recovery of a proven financial loss, but it should not simply deduct that loss from remuneration unless the requirements of section 34 of the BCEA have been met.

Employers are frequently faced with situations where an employee's conduct causes financial loss to the business. This may result from negligence or gross negligence, but can also arise from theft, fraud, dishonesty, misappropriation of company money or property, deliberate damage or other wilful misconduct.

A common reaction is:

"The employee caused the loss, so we can simply deduct the amount from his or her salary."

Unfortunately, the legal position is not that simple.
The important distinction is between disciplining an employee and recovering the financial loss. These are separate legal issues.

1. A DISCIPLINARY FINDING DOES NOT AUTOMATICALLY AUTHORISE A DEDUCTION

A disciplinary enquiry determines whether an employee committed misconduct and what sanction is appropriate. It does not automatically constitute a civil judgment that the employee must repay the employer.

A disciplinary finding may provide important evidence in support of a subsequent damages claim, but the employer must still establish a lawful basis for recovering the money.

2. SECTION 34 OF THE BCEA

Section 34 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) regulates deductions from an employee's remuneration.

Section 34(1) generally requires the employee's written agreement to a specified debt, unless the deduction is authorised by legislation, a collective agreement, a court order or an arbitration award.

Section 34(2) contains further requirements where a deduction relates to loss or damage caused by an employee. The loss must have occurred in the course of employment and be due to the employee's fault; a fair procedure must have been followed; the employee must have had an opportunity to explain why the deduction should not be made; and the deduction may not exceed the actual loss or one-quarter of the employee's remuneration in money per month.

A guilty finding therefore does not automatically authorise a payroll deduction.

3. THIS APPLIES TO MISCONDUCT AS WELL AS NEGLIGENCE

The issue is not limited to negligence.

Consider an employee who:

- steals company cash;
- misappropriates stock or company property;
- uses a company credit card for personal expenses;
- commits fraud;
- deliberately damages company equipment; or
- otherwise causes the employer a financial loss through dishonesty or wilful misconduct.

The employee may face serious disciplinary consequences, including dismissal, and the employer may also consider criminal proceedings.

However, the employer must still distinguish between **disciplinary action** and **recovery of the financial loss.**

For example, if an employee is found guilty of stealing R20,000, the employer may potentially dismiss the employee and pursue recovery of the R20,000. It should not, however, simply deduct the R20,000 from the employee's salary without establishing a lawful basis for doing so.

4. CAN THE EMPLOYER CLAIM DAMAGES?

Yes.

The fact that an employer cannot make an unauthorised payroll deduction does not mean that the employer must absorb the loss.

Where an employee's conduct causes a quantifiable financial loss, the employer may potentially pursue a claim for damages based on contractual or delictual principles.

Depending on the circumstances, the employer would generally need to establish:

1. the employee's relevant duty or obligation;
2. the employee's breach of that duty, whether through negligence or misconduct;
3. that the conduct caused the loss; and
4. the actual amount of the loss.

This applies to both negligent conduct and deliberate misconduct.
The same principle applies where company property is damaged. The employer should establish what was damaged, how the damage occurred, who was responsible and the actual cost of repairing or replacing the property

5. WHAT HAVE THE COURTS SAID?

In Kweyama v Transnet COC Ltd (D847/15) [2020] ZALCD 1, the Labour Court considered the requirements of section 34 of the BCEA.
The Court confirmed that an employer cannot make deductions from remuneration without complying with the statutory requirements. Section 34(1) requires written agreement to a specified debt, while section 34(2) imposes additional requirements where the deduction relates to loss or damage caused by an employee.

6. BE CAREFUL OF BLANKET DEDUCTION CLAUSES

Employers sometimes include clauses in employment contracts stating that employees agree to deductions for losses caused by negligence, dishonesty or misconduct.

Employers should be cautious about assuming that such a clause provides unrestricted authority to deduct future losses.

The safer approach is to identify the specific loss or debt once it has occurred and, where appropriate, obtain a properly drafted written repayment agreement dealing with that particular liability.

A general or blanket clause should not be regarded as a substitute for compliance with section 34.

WHAT SHOULD AN EMPLOYER DO WHEN A LOSS OCCURS?

GEO recommends the following approach:

1. Investigate the loss

Establish what happened, how the loss occurred and the amount involved.

2. Establish responsibility

Determine whether the conduct amounted to negligence, gross negligence, theft, dishonesty, fraud, wilful misconduct or another breach of duty.

3. Follow a fair disciplinary process

Where misconduct has occurred, institute the appropriate disciplinary process and determine the appropriate sanction.

4. Quantify the loss

The employer must be able to establish the actual financial loss suffered.

5. Deal separately with recovery

Consider whether the employee will agree to repay the specified amount, whether a lawful section 34 deduction can be made, whether a repayment agreement should be concluded, or whether a civil damages claim should be instituted.

6. Do not simply deduct the loss

Even where an employee has admitted responsibility or has been found guilty, ensure that section 34 has been complied with before making a deduction from remuneration.

GEO'S RECOMMENDATION TO MEMBERS

Employers should review their employment contracts and workplace procedures to ensure that they adequately address:

- negligence and gross negligence;
- theft, dishonesty and fraud;
- misappropriation of company money or property;
- damage to company property;
- financial losses;
- repayment arrangements; and
- deductions from remuneration.

When a loss occurs, employers should not simply deduct the amount from the employee's salary.

Instead:

Investigate the loss → establish responsibility → follow a fair process → quantify the loss → determine the lawful method of recovery.

An employee may be disciplined and dismissed where justified, while the employer separately pursues recovery of the financial loss.

THE KEY PRINCIPLE FOR GEO MEMBERS:

DISCIPLINE THE MISCONDUCT, BUT DEAL WITH RECOVERY OF THE LOSS AS A SEPARATE LEGAL ISSUE.

Before making a deduction from remuneration, GEO members are encouraged to obtain advice to ensure compliance with section 34 of the BCEA and to determine the most appropriate method of recovering the loss.

This newsletter is intended as general guidance to GEO members and should not be regarded as a substitute for legal advice on the particular facts of an individual matter.

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