LETTER FROM THE EDITOR

We are pleased to report another successful year of trade, aid and bills paid. Our heartfelt thanks to all our loyal clients who have made this possible.

In your Invictus gift bag this year, find a collection of answers to the most common and bothersome questions that face employers during what should be a joyous time of year.

We look forward to another year of challenges and victories. From the Invictus team: Season’s Greetings!

Regards,
The Editor
The majority of employers host their year-end functions as compulsory attendance events – comparable to a company organizing a seminar or a normal day’s work. Even if the normal procedures for absenteeism are more relaxed (insofar as employees don’t have to apply for leave or submit good reason for non-attendance) this does not stop the year-end-function from being a work event. As such the employer may insist on a certain standard of behaviour.

First off, it is advisable that an employer have a pre-existing code of conduct stating that consumption of alcohol during work or being under the influence of alcohol during working hours is an offence. It is best to be clear on the rules before attempting to sanction an employee for breaking them.

Since the end-of-year function is an obvious exception to this rule, it is up to the employer to set the required standard. It is a good idea to remind employees (in writing if at all possible) that they may consume alcohol in moderation during this time but that a certain level of professionalism is still required and that they will be held accountable for any indiscretions. A by-line on the inter-office memo or small print on the party invitation should suffice.

Remember that employees have the right to refuse to undergo breathalyser- or similar alcohol tests. The employer will most likely rely on the observations of witnesses: did the employee present with bloodshot eyes, slurred speech, lack of balance, smell of alcohol, tabletop-dancing, etc.

Improper behaviour may be investigated and may lead to a disciplinary inquiry. It needs to be mentioned that the employer is obligated to investigate at such inquiry whether the employee, apart from having been intoxicated, also has a drinking problem. Where a drinking problem is found to exist, disciplinary sanction ceases to be the appropriate remedy. Instead, it is expected that the employer aid the employee (not financially but administratively) in seeking help or counselling in order to deal with this problem.

Although there are no hard-and-fast rules to regulate end-of-year functions, employers might consider limiting the amount of alcohol available to the employees or providing the employees with transport to and from the venue.
HUMAN RESOURCES

DECEMBER SHUTDOWN

– EMPLOYER’S CONTROL OVER LEAVE –

Every festive season the majority of employers have what they call a “December shutdown”, sometimes also referred to as an “annual shutdown or lockdown”. This denotes the time when an employer stops trading, shuts its doors and – basically – goes on holiday, leaving its employees to do the same.

The pertinent question asked by many employees at this point becomes: does the shutdown detract from my annual / paid leave? The short answer is yes.

Many employees find it unfair that their employers take the decision away from them as to when they will be allowed their annual leave. Employees would, preferably, themselves decide when to take their annual leave. This is, of course, an understandable impulse. However, the question is not only one of fairness but also of legality.

The Basic Conditions of Employment Act (BCEA) promises each employee 21 consecutive days of paid annual leave per annual leave cycle. If the employee habitually works a 5 day week, then 21 consecutive days of annual leave boils down to 15 working days worth of paid leave. If the employee habitually works a 6 day week, 21 consecutive days are equal to 18 working days worth of annual leave, etc. Naturally, public holidays that fall within any period of leave do not detract from leave.

Section 20(10)(a) of the BCEA makes it clear that leave is to be taken in accordance with an agreement. “Agreement” here mostly refers to the employee’s terms and conditions of employment. Since employers who have December shutdowns habitually include this in their contracts of employment or their accompanying company policies, employees would be aware that their annual leave is reserved (by the employer) for use during this shutdown period.

Even if there is no agreement, section 20(10)(b) allows that leave will only be taken “at a time determined by the employer”, giving voice to the principle that all leave is subject to prior approval by the employer. In this way, an employer may again reserve the employee’s annual leave for the December shutdown.

Of course, where Sectoral Determinations, Main Agreements or other Collective Agreements vary the rules surrounding leave or shutdown, these rules supersede those of
the BCEA and an employer must give effect to them.

There are, of course, ways for employees to whittle away at their leave entitlement outside of the December shutdown. For example, an employee on unpaid leave can rely on BCEA section 20(6), which states that “an employer must permit an employee, at the employee’s written request, to take leave during a period of unpaid leave.” Our emphasis.

This certainly answers the question of legality. But one must also address the issue of fairness. It is an unfortunate fact that the majority of low income employees in South Africa are woefully inexperienced at effective financial planning, budgeting and debt management. Lacking bonuses and assuming their paid leave has been exhausted for the year – receiving only half their normal remuneration for December can render most low income employees penniless. It is therefore fair for employers to restrict the unwarranted use of annual leave by their employees.

For further information on the implications of December shutdowns and how it relates to annual leave, contact Invictus or your normal service provider.

**INDUSTRIAL RELATIONS**

**RIGHT TO BONUSES**

– THE LEGITIMATE EXPECTATION –

The Labour Law as a whole is silent on the question of bonuses, giving employers the freedom to regulate their own policies and procedures relating to the payment of bonuses. This also means that employers are free not to pay bonuses at all, if they so choose (subject to Main Agreements and Sectoral Determinations, where applicable).

Hence, an employer who has never paid bonuses is free at any point to begin doing so. However, an employer who has been paying bonuses is prohibited from varying this established practice.

This prohibition has nothing to do with any statutory entitlement of the employees to bonuses but relates to the right of the employees to be free from unilateral changes to the terms and conditions of their employment by their employers.

In other words, since the employer has as a general rule been paying bonuses, this practice has created with the employees a legitimate expectation of receiving bonuses. This expectation is equated with a term and
condition of the employees’ employment, as though specifically stated in their contracts.

Many employers hearing this argument for the first time are understandably taken aback and refer to clauses in their contracts of employment which state that bonuses are discretionary or based on the performance of the individual employees or the business as a whole.

Unfortunately, if bonuses have been consistently paid – and paid according to some uncertain discretionary impulse or with reference to some other system of measurement which remained undisclosed and unscrutinized – an expectation could understandably have been created with the employees.

This is especially likely if the bonus is termed a “13th cheque” which, on the face of it, purports to be a scheduled payment reliant on timing and not on merit or external circumstance.

This does not mean that the employer is now bound to continue paying bonuses indefinitely: there is a way of curing this legitimately held expectation and that is to engage in consultation or negotiation with the affected employees.

In these consultations the employer can either show how the previous bonuses were calculated with reference to the same objective standard which (most recently) resulted in bonuses not to be paid or not to be paid in full. In other words, the employer argues that there has been no change of the terms and conditions of employment.

Or the employer must seek an acceptable compromise with its employees in terms of how the expected bonuses are to be diminished, allocated, calculated, split or changed in any other way to give direction to this expectation. The employees can agree either explicitly or tacitly. If they allow the change in silence, it will be difficult for them to argue against it later.

Whether or not the majority of employees consent to the change, some employees might very well approach the CCMA or Labour Court seeking relief in terms of alleged unilateral changes to their conditions of employment. Employers with legitimate business concerns and rationale and who have followed a fair process are on good footing should such matters be adjudicated.

It is very important that these consultations be fairly and timeously held. Bonuses (like any remuneration) constitute “matters of mutual interest” and employers may engage
in protected lock-out to try and force acceptance by employees, who may in turn engage in protected strike to force a reversal.

This picture changes entirely should the employer attempt to force its employees to accept these changes under threat of dismissal, particularly via retrenchment. But that, of course, goes without saying and is the subject of a different article altogether.

It is no surprise, bearing in mind the complicated nature of this issue, that various Main Agreements and Sectoral Determinations have made specific provision for the payment of bonuses. Employers should consult these agreements and determinations before contracting with their employees one way or the other concerning bonuses.

Alternatively, contact Invictus or your regular service provider.

LEGAL

SEXUAL HARRASSMENT
– X-MAS TO EX-EMPLOYEE –

Every year employers are faced with employees who (under the influence of eggnog) either pluck up the missing courage or throw away the pesky inhibition that insulates them from a sexual harassment allegation.

Employers are often fooled into dismissing “sexual harassment” as an infrequent and none-too-serious buzzword used by difficult employees to express dissatisfaction. Especially during end-of-year functions, where rules are relaxed and the alcohol is free-flowing. Employers are more hesitant to hold offenders responsible where alcohol is involved. The alcohol-defence holds about as much water as “the devil made me do it...” and should not be entertained.

The truth is that sexual harassment, while certainly unique, is an extension of the well known phenomenon of unfair discrimination. The problem, of course, lies in correctly identifying sexual harassment or, more precisely, in determining whether a particular incident amounts to sexual harassment. Extreme cases like rape or strip
searching or uninvited fondling does not present much challenge in this regard and are fairly black and white.

Incidents which might otherwise be interpreted as innocent, accidental or inoffensive can easily slip past the notice of employers, especially if the victim has no confidence that these transgressions will be viewed with the necessary seriousness.

One of the very first recorded cases of sexual harassment in South Africa was that of J v M Ltd (1989) 10 ILJ. In this landmark case, sexual harassment was defined as “any unwanted sexual behaviour or comment which has a negative effect on the recipient”. A decade later, the flavour of this definition is echoed in the Code of Good Practice on the Handling of Sexual Harassment Cases, which states that “Sexual harassment is unwanted conduct of a sexual nature.”

Both “verbal” and “non-verbal” forms of sexual harassment are indentified. These can include jokes, gestures, innuendos, pictures and objects, to name but a few. A person could, for instance, make a comment about someone’s chosen costume for the theme party. Someone might greet their co-worker with a hug that lasts too long. Someone who finds his colleague very attractive might find some excuse to take an uninvited picture of him/her or perhaps snatch a kiss under the mistletoe.

The key word in the definition of sexual harassment is “unwanted”. This implies that the test for whether specific conduct classifies as sexual harassment lies not in the intention of the originator, or in some objective measure, but in whether or not the recipient thereof welcomes it.

Someone might dress sexy for the party without the intention of inviting any sexual comments. Not everyone finds a hug to be an appropriate greeting. The subject of the photograph, who gave no permission for such photo to be taken and who is made uncomfortable by it, might feel their privacy has been invaded. And mistletoe (and the requisite kiss) might not be accepted by all as a South African custom. All these incidents (which seem innocuous at first) bear the seeds of sexual harassment.

Therefore, the answer to the question “have I just been sexually harassed?” is this: If you feel you have been sexually harassed, you have been sexually harassed. The reverse is probably also true: if you need to ask whether you have been sexually harassed, then you most likely have not been. This is not to say that the seriousness of the sexual harassment is determined solely by the person complaining of it. But certainly the
fact of whether there has been sexual harassment is so determined.

Employers would do well to act immediately on allegations of sexual harassment, as inaction may be construed as condoning an atmosphere of sexual harassment. This could lead to allegations of unfair labour practice and provides excellent evidence for allegations of constructive dismissal.