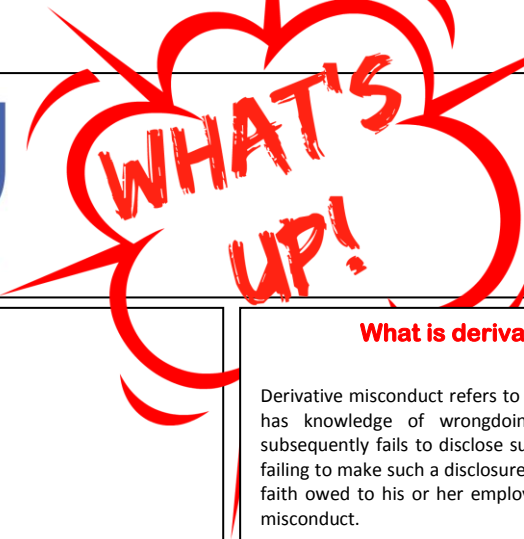




NTEU at NMMU



**The Common Law Contract of Employment : Part 1.**

In the next number of What's Ups, we are going to deal with aspects from the Common Law Contract of Employment with particular reference to how it impacts on employees and employers.

A contract of employment may be defined as an agreement in terms of which one party (the employee) agrees to make his/her personal services available to the other party (the employer) under the latter's supervision and authority in return for remuneration.

The essential elements are:

- Provision of personal services by the employee.
- Remuneration by the employer.
- Supervision and control by the employer.

This means that all employees are paid to do a job as contained in a job description for the post they occupy. All employees are obliged to perform the duties associated with the position they are in. That may seem obvious, but it has important implications for employees, as it means that if an employee fails to perform these duties for reasons that are not legitimate, corrective action (which may include discipline) can be taken.

For example:

1. Employees who engage in an unprotected strike (wild cat strike) are in breach of this requirement as they are not providing their personal services to the employer and can be disciplined. Furthermore, those who engage in a protected strike are not entitled to pay while on strike because they are not working – no work, no pay. The converse also holds – no pay, no work – as we saw with the Eastern Province Kings rugby players recently.
2. Employees absenting themselves from work on a regular basis, even with a sick note, are in breach of this element of the Common Law Contract of Employment and employers would be entitled to take corrective action (counselling, getting a medical opinion as to the authenticity of the sick notes, and even requiring a medical opinion as to whether the employee has the capacity (good health) to do the job. If the medical opinion is that the employee is medically incapacitated, the employee's services can be terminated. Normally it will take the form of early retirement or being boarded as it is sometimes referred to.

The other important element to note is that the employee accepts to work under the supervision and control of the employer. Those in positions of authority (supervisors/managers) have the legitimate power to give instructions that the employees reporting to that position must carry out (as long as it is lawful) and take corrective action against employees whose performance is lacking which could include discipline. Not carrying out a lawful instruction amounts to insubordination and disciplinary action may be taken. So, for example, if an HOD instructs a member of the lecturing staff to use the official student feedback questionnaire to get student feedback, and the staff member refuses to use it, that could be regarded as insubordination.

Members need to be aware of the implications of the Common Law Contract of Employment so that they do not unwittingly make themselves guilty of misconduct.

CREDIT: Prof Norman D Kemp, Former NTEU President

**What is derivative misconduct?**

Derivative misconduct refers to a situation where an employee who has knowledge of wrongdoing towards his or her employer subsequently fails to disclose such knowledge to their employer. In failing to make such a disclosure, the employee breaches the duty of faith owed to his or her employer and may be disciplined for such misconduct.

*"Can I be dismissed I was aware of theft or fraud or some other form of dishonesty allegedly committed by other employees? Or: Must I tell management of what I know? And: If I do not tell, can I be disciplined for not telling?"*

The answer to these questions is not as simple as one would expect, however, in short: yes, one can discipline (or even dismiss) an employee for failing to report a particular incident (or general propensity of misconduct committed by another employee or employees). The charge sheet that will eventually be used against such an act of failing to report will contain one (or more) charges of "derivative misconduct".

In order to find the employee guilty of such a charge three things at least should be proven:

1. That the employee failed to report such misconduct and of what s/he knew about it, without having a good reason for not reporting it. (For instance, if an employee as the guilty party to an act of misconduct has already been identified, an employee who knew what was going on doesn't necessarily need to then also come forward).
2. That the employee indeed knew of the act(s) of misconduct of other employees
3. Or that the employee must have known- / could reasonably have been expected to have known- / could reasonably have acquired knowledge of those act(s) of misconduct.

Employees have a general obligation to act in the best interests of an Employer. Including in such an obligation, is the reporting of wrongdoing. However, it must be made clear that failing to report any wrongdoing of which an Employee may be aware, does not necessarily mean the Employee had been colluding with the perpetrator. The Employer can expect a degree of cooperation from its Employees to eliminate acts of fraud and theft or any similar act, or in trying to catch the perpetrators.

The Employer can also reinforce its position by instituting a rule in the workplace that obliges Employees to report wrongdoing (or suspicious conduct for that matter) by other Employees as alleged perpetrators.

In addition, the Employer should rather ensure that its Disciplinary Code or Disciplinary Policy and Procedure, together with its Schedule of Offences is updated, to include the misconduct charge of "Derivative Misconduct" and communicate to all Employees the charge as an offence, as well as the penal outcome of either dismissal - first offence, or perhaps: final written warning for first offence; dismissal for second offence.

**BRING THE NMMU'S NAME IN DISREPUTE IS A DISMISSABLE OFFENSE**

It is important to consider our comments on social and printed media carefully as it may very well lead to charges brought by the employer on the basis of bringing the NMMU's name in disrepute. With the fast paced environment of social media, it is easy to comment in haste without considering the consequences. We need to remember that whilst we may innocently participate in an online conversation, there are always journo's who sit and wait to grab an opportunity which may in the end destroy careers and reputations. Consider your comments and remarks on social media carefully. Do not fall prey to the sensation hounds!

