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EMPLOYMENT

No work on public holidays – a gift from the labour appeal court

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In terms of the Basic Conditions of Employment Act, 75 of 1997 ("**BCEA**"), all employees are entitled to a minimum number of days leave per year. This minimum leave entitlement is 21 consecutive days leave per annual leave cycle, which is in effect 15 working days leave per annum. The BCEA also provides for additional entitlements to leave, such as sick leave, family responsibility leave and maternity leave for female employees. All of the entitlements to these types of leave contained in the BCEA are the absolute minimum which must be given to employees. These minimums can also be set in terms of collective agreements entered into by bargaining councils, or sectoral determinations promulgated for particular industries. Workplace practice often means that employers provide their employees with additional leave entitlements, in any or all of these leave categories.

What the BCEA also provides in section 18, however, is that employers may not require any employee to work on a public holiday, unless the employee agrees. Accordingly, if an employee is requested to work on a public holiday, and the employee refuses, the employer cannot force the employee to do so. However, since the BCEA is not clear whether a specific agreement is required for each request to work on a public holiday, any employee who has agreed in his/her contract of employment, being a general agreement to work on public holidays, is requested to do so, this agreement may be sufficient for compliance with the requirements of section 18 of the BCEA, and the employee can be disciplined for failure to obey a lawful instruction, if he/she fails to work on the public holiday when requested.

The BCEA does provide however that any employee who agrees to work on a public holiday, which is that employee's normal day of work, must be paid double his normal wage for the day, or his normal rate of pay for the day, plus the amount actually earned for work on the public holiday, if this is greater (section 18(2)). If the public holiday is not the employee's normal day of work, and the employee agrees to work on such day, the employee must be paid his normal rate of pay for the day, plus the amount actually earned for work on the public holiday (section 18(3)). Any employee who does not work on the public holiday must be paid his normal wage for that day. If the employee does not ordinarily work on the public holiday and does not in fact work on such day, no adjustment need be made.

The question that sometimes arises is whether a day is a public holiday, or not. This difficulty stems from the wording of the Public Holidays Act, 36 of 94 ("**PHA**") which provides that the public holidays mentioned in Schedule 1 of the PHA shall be public holidays, and whenever any public holiday falls on a Sunday, the following Monday shall be a public holiday. This wording has led some employees to claim that if a public holiday in terms of the PHA falls on a Sunday, and the following Monday is then a public holiday, that the Sunday remains a public holiday and the Monday becomes an additional public holiday. If this is the case, the employee cannot be made to work on either the Sunday or Monday, without his agreement, and if he does work, he must be paid in accordance with the BCEA, or sectoral determination or collective agreement. In the case of *Randfontein Estates Ltd v NUM,* the Labour Appeal Court was faced with just such a situation in which Randfontein Estates operated a continuous operations systems which worked on Sundays, but not public holidays. In 2005, when May Day fell on a Sunday, employees felt that any work done on the Sunday, a public holiday, should be paid in terms of the BCEA. Also, workers felt that the Monday was also a public holiday, and that workers would not work, but would be paid for Monday.

In this case, which was decided by the Labour Appeal Court ("**LAC**") the LAC found that the PHA did not mean to schedule only those public holidays provided for in the PHA as the maximum number of public holidays. Instead, the LAC found that all the PHA did was to provide for at least those public holidays scheduled; if more days of the year became public holidays because of the Monday-after rule, this was allowable in terms of the PHA.

Accordingly, Randfontein estates had to recognise both the Sunday and the following Monday as public holidays.

While this ruling makes sense and can be applied in the majority of workplaces, there are a number of situations in which the application of the PHA read with section 18 of the BCEA can have the effect that employees receive a double entitlement to public holidays. In *Randfontein Estates Ltd v NUM* the applicant, Randfontein, argued that the rationale for section 2(1) of the PHA was to provide that employees who do not ordinarily

work on a Sunday will get the benefit of a paid day off work by transferring the benefit to the following day, which would ordinarily be a working day. Unfortunately the court did not pronounce on the intention of the legislature in this regard and confined its decision to its own argument based on the intention of the legislature to clearly add to the public holidays by making the following Monday a public holiday, in addition to the Sunday. The court felt that the ordinary meaning of the section in plain language, and therefore its intention was clear enough to the court to enable it to rule on the issue without investigating the relevant section from a purposive interpretative viewpoint.

The court may have done itself a disservice in not paying more attention to the purposive interpretation which was advocated by the applicant in its arguments in regard to the rationale for section 2(1). This is for the reason that the outcome of this decision, namely that Sunday and the following Monday are **both** public holidays, may have an unexpected result in regard to a minority of employees who work unusual work days. For the purposes of investigating this anomaly, three situations are envisaged and investigated in terms of the application of the decision in *Randfontein Estates Ltd v NUM*, below:

1. Normal Working Week Employees

- The term 'normal working week employees' is here used to refer to those employees who work a usual or normal working week of Monday to Friday, every week. This category will cover the majority of office workers whose contracts of employment require them to work only five days a week, Monday to Friday.
- For employees who fall within this category, the decision in *Randfontein Estates Ltd v NUM* is of easy application. Here the employee is not ordinarily required to work on the Sunday, which is the Public Holiday. In terms of the BCEA, since the employee does not usually work on the public holiday, and does in fact work in the public holiday, no extra payment is required. It is only if the employee is requested to work, and does, perhaps to cover for employees who are now taking the day as a public holiday, that this relief employee will be paid in terms of section 18(3) of the BCEA.
- It is these employees who would lose out if the Monday did not also become a public holiday. Now, because of the decision in *Randfontein Estates Ltd v NUM*, the Monday becomes a public holiday and these employees can either take the public holiday, or work on it and be paid in terms of section 18(2) of the BCEA.

2. Weekend Work Employees

- The term 'weekend work employees' is here used to refer to those employees who work a usual or normal working week which includes a Saturday and Sunday, or just a Sunday, but which does not require work on a Monday, every week. This category may apply to particular industries such as retail, which requires services to be provided to customers seven days a week.
- In this case Employers need to take into account this ruling when organizing its workforce to work on public holidays, and to ensure that the correct payments of time worked on public holidays are made to employees in terms of the BCEA, or the applicable sectoral determination or collective agreement.



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