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EMPLOYMENT

The provision of transport for employees working overtime beyond 18h00

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Summary

The performance of night work is regulated to, among others, avoid or minimise an employee's health risks, including the safety of workers during their commute to and from work.

An employer is obliged to ensure that adequate transport for employees who perform night work is available. This requirement applies not only to night shift employees but also any employee who is required to work beyond 18h00. In the event that such transport is not available beyond a certain period, the employer cannot then insist on such employees working such period unless suitable arrangements are made.

Court's Decision

In *TFD Network Africa (Pty) Ltd v Singh N.O and others (C 571/11) [2015] ZALCCT*, the employee's contract of employment included a provision that the employee agreed to work overtime when required to do so. On 6 and 7 December 2010 the employee was instructed to work overtime from 17h00 until 19h00 (his normal shift ended at 17h00).

The employee worked until 18h00 but refused to work until 19h00 as the bus that he normally caught home left shortly after 18h00 and the last bus at 19h00 would drop him far away from his home, requiring him to walk home through an area with high criminal activity. The employee was charged with gross insubordination and breach of contract and was dismissed following a disciplinary hearing.

The court's decision whether the dismissal was fair hinged on whether, in requiring the employee to work until 19h00, the employee was, in fact, performing "night work"?

In terms of **section 17 of the Basic Conditions of Employment Act 75 of 1997** ("BCEA") and the provisions within the Main Agreement for the Road Freight Industry ("main agreement") which applied to the employee, "night work" is defined as work performed after 18h00 and before 06h00 the next day.

A condition of requiring or permitting an employee to perform night work is that transportation must be available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift.

The court was required to determine whether an employer must ensure that transport is available to a dayshift employee who is required to work overtime beyond 18h00 and the extent to which the transport must be available between the workplace and the employee's place of residence.

Night work is regulated to avoid or minimise an employee's health risks

To answer these questions the court looked at the purpose of this legislation. The court held that night work is regulated to avoid or minimise an employee's health risks, including the safety of workers during their commute to and from work.

Furthermore, the applicability of the specific provision regarding transport for night work in the BCEA and Main Agreement extends beyond those employees who regularly perform night work and includes any employee who is required to work beyond 18h00.

Applying these considerations to the facts of this case, the court held that although transport was still available at 19h00, that bus would not drop the employee at his "place of residence" as envisaged by the BCEA, or even near its vicinity. The employee's concern about his safety in being dropped some distance from his home and being required to walk through a notoriously dangerous area was a valid concern.

The court found that although there was transport available after 18h00, it was not suitable in that it did not drop the employee at his place of residence, or in the vicinity thereof.

As such, the employee could not be compelled to work from 18h00 to 19h00 in such circumstances. His refusal to do so, therefore, did not constitute gross insubordination warranting his dismissal. His dismissal was therefore unfair.

Importance of the Case

Employers are not obliged to provide transport to employees who perform night work but transport must be available between the workplace and the employee's place of residence.

However, this transport must be suitable. The suitability of the transport will depend on the facts of each case and will include the distance from the drop-off point to the employee's workplace and home as well as the risks associated with the area where the employee resides. In circumstances where the available transport is not suitable, the employer cannot then discipline an employee for insubordination where such employee refuses to work such extra hours.

Lastly, this applies not only to employees who regularly perform night work or whose shift falls predominantly during the hours of 18h00 and 06h00, but to any employee who is subject to the BCEA, the main agreement or any like provision and is required to work beyond 18h00.



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