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EMPLOYMENT ALERT

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IN THIS ISSUE

WHEN OVERTIME AND NIGHT WORK OVERLAP, ARE EMPLOYEES ENTITLED TO TRANSPORTATION?

Night shifts raise concerns, especially about the safety of employees and the transport available to employees who perform night work.



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WHEN OVERTIME AND NIGHT WORK OVERLAP, ARE EMPLOYEES ENTITLED TO TRANSPORTATION?

The employee was contractually required to work overtime as and when his employer required.

The employer argued that the employee did not perform night work on the basis that the majority of his shift was not worked within the hours 18:00 and 06:00. The arbitrator found that the employee's dismissal was unfair.



Night shifts raise concerns, especially about the safety of employees and the transport available to employees who perform night work. Although section 17(2)(b) of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) requires suitable transport to be available for night shift workers, it does not explain whether an employee who works overtime beyond 18h00 is also entitled to such transport. This question was dealt with by the *Labour Appeal Court (LAC) in TFD Network Africa (Pty) Ltd v Singh NO and Others (LAC: PA 16/15)*.

In this case, the employee was contractually required to work overtime as and when his employer required. The terms and conditions of his employment were regulated by the BCEA and National Bargaining Council Agreement of the Bargaining Council for the Road Freight Industry of 2004 (Agreement).

The employee's shift ended at 17:00 but he was instructed by this employer to work overtime until 19:00. He however only worked until 18:00. His explanation was that there was a lack of transport to his home. He also explained that although there was a bus that left at 19:15, after getting off the bus, he was required to walk about two kilometres to his home and he stated that it was not safe to walk around his neighbourhood at that time of night.

He was later dismissed for breach of contract and for refusing to obey a reasonable instruction. The employee argued that in terms of the BCEA, public transport was required to be available for night shift workers.

The employee challenged his dismissal. The employer argued that the employee did not perform night work on the basis that the majority of his shift was not worked within

the hours 18:00 and 06:00. The arbitrator found that the employee's dismissal was unfair. The employer took the arbitrator's decision on review to the Labour Court. The Labour Court did not review and set aside the award. The employer then took the matter on appeal to the LAC.

The employer raised various arguments, in essence, relating to the fact that the work performed by the employee was not night work and that the employee was not entitled to refuse the instruction to work overtime. In particular, the employer argued *inter alia* that the majority of the shift must fall between 18:00 and 6:00 to constitute night work and "overtime work following on a normal working shift that ends before 18:00, that resorts within the hours of 18:00 to 06:00 does not constitute night work".

The LAC considered the provisions of the Agreement and held that the night work definition and transport obligations mirrored those set out in the BCEA. In terms of the Agreement, an employer could only require an employee to perform night work if transportation was available between the workplace and the employee's home when the employee's shift started and ended.

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CONTINUED

The LAC held that it is clear that in terms of the Agreement all work performed between 18:00 and 06:00 is night work regardless of whether it is overtime or not.



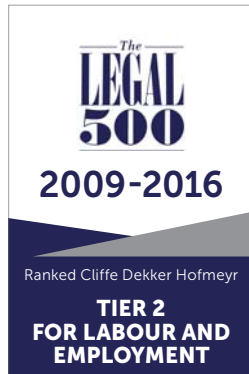
The LAC held that it is clear that in terms of the Agreement all work performed between 18:00 and 06:00 is night work regardless of whether it is overtime or not. However, work performed on a regular basis between 23:00 and 06:00 attracts further obligations.

The LAC rejected the argument that the majority of the shift comprised a day shift because whether it is overtime or regular work, work performed between 18:00 and 06:00 constitutes night work. The requirement of available transport exists

once an employee works beyond 18:00, regardless of whether it is an overtime or actual nightshift. In conclusion, the LAC held that:

"Where the protective measures are not available to an employee required to perform night work, the employee is entitled to raise the absence of those measures as a defence to a charge of failing to work or disobeying an instruction".

Fiona Leppan and Bheki Nhlapho



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