

TRANSPORTATION OF
NIGHT WORKERS:
IS IT THE EMPLOYER'S
OBLIGATION?

EMPLOYMENT

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Section 17(1) of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) defines night work as work performed after 18h00 and before 06h00 the next day.

Section 17(2)(b) of the BCEA states that employees, who earn below the BCEA threshold (currently R205,433.30 per annum), may only be required to perform night work if transportation is available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift.

What is apparent from the above section is that transportation need only to be *available* to the employees performing night work. What is not clear is whether the mere availability of transportation between the workplace and the employee's place of residence is sufficient.

In *TFD Network Africa (Pty) Ltd v Singh NO and Others* (C 571/11) [2015] ZALCCT 40, the court confirmed that this question remains unanswered. Therefore, the court was required to consider the purpose of the legislation and the mischief that the legislature sought to combat.

The third respondent (Mr Maas) was employed by TFD Network Africa (TFD) as a truck driver and, in terms of his contract of employment, agreed to work overtime when necessary.

Mr Maas was required to work overtime on 6 and 7 December 2010 from 17h00 to 19h00. On both days he worked until 18h00 and refused to work until 19h00 as his bus home left shortly after 18h00. He stated that if he took the last bus at 19h00, it would drop him off at Mitchell's Plain Town Centre and he would then have to walk a considerable distance, through a dangerous area, to his place of residence.

As a result of his refusal to work until 19h00, Mr Maas was called to a disciplinary hearing to face allegations of gross insubordination and breach of contract. He had a final written warning for similar misconduct and was, accordingly, dismissed.

Mr Maas referred an unfair dismissal dispute to the Bargaining Council for the Road Freight and Logistics Industry. The arbitrator found that Mr Maas' dismissal was unfair in terms of s17(2)(b) of the BCEA and ordered his reinstatement.

On review to the Labour Court, TFD argued that the arbitrator incorrectly relied on s17 of the BCEA as the main agreement for the Road Freight Industry (Main Agreement) regulated the conditions of employment of its employees. TFD further argued that the relevant provisions pertaining to night work only applied to employees who regularly performed night work.

The court held that the Main Agreement contained a clause equivalent to s17(2)(b) of the BCEA and that this section envisages that an employer must ensure the availability of transportation between the workplace and the employee's place of residence *on each occasion* where those employees are required to work beyond 18h00.

The court further agreed with the arbitrator that although transportation was available to Mr Maas, it was *not suitable* and that TFD was therefore obliged to provide transport that would take him closer to his place of residence.

In the circumstances, the court found that Mr Maas did not intentionally refuse to work overtime and informed TFD of his reasons. The fact that he had a prior final written warning for similar misconduct thus became irrelevant and the application for review was dismissed.

The principle to take away from this case is – when requiring employees to perform night work, employers must consider whether:

- transportation is *available* between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift; and
- the transportation is *suitable*.

If the answers to the above questions are in the negative, the transport will not pass muster in terms of s17(2)(b) of the BCEA. Employers thus have a positive obligation to ensure that transport accords with the provisions of the BCEA.

Hugo Pienaar, Lauren Salt and Joloudi Badenhorst



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