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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 571/11

In the matter between:

TFD NETWORK AFRICA (PTY) LTD **Applicant**

and

SINGH N.O. **First Respondent**

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY **Second Respondent**

MTWU OBO I MAAS **Third Respondent**

Heard: 22 April 2015

Delivered: 6 May 2015

Summary: Review – BCEA s 17(2)(b) – availability of transport at conclusion of shift – employee working dayshift refusing to work overtime after 1800 due to unavailability of transport to his place of residence – arbitrator finding dismissal for gross insubordination unfair – not reviewable.

JUDGMENT

STEENKAMP J

Introduction

[1] This application for review considers the interpretation of s 17(2)(b) of the Basic Conditions of Employment Act[1] and the identical provision in the Main Agreement for the Road Freight Industry dealing with the availability of transport for employees who work after 1800. As far as I could ascertain, our courts have not dealt with the interpretation of that subsection previously.

Background facts

[2] The employee, Mr Maas[2], is a truck driver. In terms of his contract of employment he agreed to work overtime when required to do so. The main agreement concluded in the National Bargaining Council for the Road Freight and Logistics Industry (the second respondent) also provides for overtime work. The applicant, TFD Network Africa (Pty) Ltd, instructed the employee to work overtime from 1700 until 1900 on 6 and 7 December 2010. (His normal dayshift ended at 1700). He worked until 1800 on both days but refused to work until 1900. He said that the last bus that normally dropped him off near his residence in Lentegeur in Mitchell's Plain left shortly after 1800. If he took the last bus to Mitchell's Plain at 1900, it would drop him off at the Mitchell's Plain town centre, far from his residence. He would then have to walk home through a dangerous crime area.

[3] The employee was called to a disciplinary hearing to face allegations of gross insubordination and breach of contract. He had a previous final written warning for similar misconduct. He was dismissed.

[4] The employee referred an unfair dismissal dispute to the Bargaining Council. The arbitrator (the first respondent) found that his dismissal was unfair and ordered the company to reinstate him. The arbitrator found that, in terms of s 17 of the BCEA, any work performed after 1800 was

[1] Act 75 of 1997 (BCEA).

[2] The third respondent, represented by his trade union, MTWU.

considered night work; that the employer was obliged to ensure that transport was available to the employee's place of residence; that the available transport was "not suitable" to the employee; and the fact that the employee was prepared to work until 1800 showed that he did not have the intention to be "deliberately insubordinate".

The legal framework

[5] Mr *Snyman*, for the applicant, criticised the arbitrator for applying the provisions of s 17 of the BCEA when, in fact, the parties' conditions of employment were covered by the Main Agreement. But the Main Agreement contains a clause identical to that in s 17 of the BCEA, which reads:

> "(1) In this section, "night work" means work performed after 18:00 and before 06:00 the next day.
>
> (2) An employer may only require or permit an employee to perform night work, if so agreed, and if –
>
> (a) the employee is compensated by the payment of an allowance, which may be a shift allowance, or by a reduction of working hours; and
>
> (b) transportation is available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift".

[6] What does it mean to say 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?

[7] Two issues may immediately be disposed of:

7.1 Transportation need only be "available"; the employer need not provide transport if there is public transport available.

7.2 If the employee's full shift falls in the hours after 18:00 and before 06:00, there is no doubt that the subsection applies.

[8] The difficult situation arises in a situation such as this one: Must the employer ensure that transport is available to a dayshift employee who is required to work overtime beyond 18:00? And what does it mean to say

that it must be available between the workplace and the employee's "place of residence"? Does it need to take the employee to her doorstep? A block away? A kilometre away, or 5 km?

[9] These questions are untested. The Court cannot take comfort in precedent. It has to consider the purpose of the legislation and the mischief that the legislature (and the Bargaining Council) tried to combat. The Explanatory Memorandum to the Basic Conditions of Employment Bill does not spell it out. The Court must follow a common-sense, purposive approach. The learned authors in Du Toit et al, *Labour Relations Law: A Comprehensive Guide*[3] say that the purpose of the regulation of night work is to avoid or minimise health risks. In my view, that must also include risks to the safety of workers, including their commute to and from work. Indeed, the authors of that work say:

> "For safety reasons, transport for employees performing night work must be 'available' between the workplace and the employees' residences at the commencement and conclusion of their shift [s 17(2)(b)]. No clear duty is placed on the employer to provide such transport where other transport exists. However, it would seem that the availability of public transport in the vicinity of an employee's residence may, in certain circumstances, not necessarily be enough to relieve the employer of a duty to provide transport."

[10] It is a notorious fact that Lentegeur is in the midst of the Cape Flats ganglands.[4] Now consider the hypothetical example of a young female employee who works a nominal dayshift starting at 1100 and ending at 2000. There is public transport available to the Mitchell's Plain town centre. From there she has to walk, say, 2 km through the gang infested badlands of Lentegeur to her home in the dark. This is not an area where the good citizens of Lentegeur take an evening stroll along the promenade. The streets are ruled by guns and Okapi knives. Can it be

[3] 6th ed (LexisNexis 2015) p 605.

[4] For example, earlier this year, a man was shot and killed at Lentegeur High School in gang-related violence: http://ewn.co.za/2015/02/26/CPF-concerned-over-ongoing-gang-violence. (accessed on 22 April 2015).

said that this employee is not entitled to transport, because she works dayshift? I think not.

[11] It was argued on behalf of the applicant that s 17(2)(b) of the BCEA (and the equivalent clause in the main agreement) is only applicable to those employees who regularly do night work. I do not agree. That interpretation would deprive employees such as the hypothetical woman discussed above of any protection.

[12] Such an interpretation is also, in my view, not borne out by the wording of the section. Sections 17 (1) and 17(2) refer to 'night work' as work performed after 1800. In those cases, transport must be available. That must be juxtaposed against the provisions of ss 17(3) and (4) that are only applicable to employees who perform work "on a regular basis" after 2300 and before 0600 the next day and in respect of whom more onerous conditions apply.

[13] I conclude, therefore, that s 17(2)(b) envisages that an employer must ensure that transportation is available between the workplace and the employee's place of residence on each occasion where that employee has to work beyond 1800, and not only where that employee regularly performs night work or where his or her shift falls predominantly during the hours after 1800 and before 0600.

The facts of this case

[14] Those considerations must now be applied to the facts of this case. The employee, Mr Maas, usually worked until 1700. When asked to work overtime, he was willing to do so until 1800. He could then use the bus that would drop him off "in the vicinity" of his residence, to use the phraseology of Du Toit et al.[5] That seems entirely reasonable. But was it unreasonable for him to refuse to work until 1900?

[15] It is common cause that transport was still available at 1900. But that bus would not drop him at his "place of residence" as envisaged by s 17(2)(b), or even in its vicinity. His concern that it would endanger his life to walk

[5] *Labour Relations Law: A Comprehensive Guide (supra)* p 605.

home for a considerable distance in that area at that time of night appears to be a valid one.

The award

[16] The arbitrator found that the employer "was obliged to provide transport". That is an incorrect reading of the subsection. The employer must only ensure that transport is available between the workplace and the employee's place of residence. But that in itself does not make the award reviewable. The arbitrator further noted that the transport that was available, was "not suitable" for the employee. It is in those circumstances that the employer was obliges to provide transport that would drop the employee off closer to his place of residence. The arbitrator also found that the fact that the employee worked part of overtime that he was required to work, suggested good faith on his part. He did not appear to have had the intention to be deliberately insubordinate. The arbitrator also took into account that the issue of transportation had been raised with the trade union and that it was engaging with the employer in this regard.

Award unreasonable?

[17] Taking into account the factors set out above and my reading of the purpose of s 17(2)(b) of the BCEA and the equivalent clause in the main agreement, the conclusion reached by the arbitrator was not so unreasonable that no other arbitrator could have come to the same conclusion.[6]

[18] The employee did refuse to work overtime beyond 1800 in circumstances where the employer could not ensure that transportation was available between the workplace and's place of residence. He made it clear to the employer that that was the reason for his refusal. The finding by the arbitrator that he did not have the intention to be deliberately insubordinate, is not unreasonable. In those circumstances, the fact that

[6] *Sidumo v Rustenburg Platinum Mines Ltd (*2007) 28 *ILJ* 2405 (CC); *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA), (2013) 34 *ILJ* 2795 (SCA).

he had a prior final written warning for a similar offence becomes irrelevant.

Conclusion

[19] The conclusion reached by the arbitrator is not so unreasonable that no other arbitrator could have come to the same conclusion.

[20] With regard to costs, I take into account that the employee was represented by a trade union official and thus did not have to incur any legal costs. I also take into account that there is an ongoing relationship between the trade union and the employer; and that the interpretation of s 17(2)(b) of the BCEA is *res nova* that has not previously been considered by this Court or a higher court. In law and fairness a costs order is not appropriate.

Order

[21] The application for review is dismissed.

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Steenkamp J

APPEARANCES

APPLICANT:	S Snyman (attorney).
FIRST RESPONDENT:	E Mabua (union official).