

THE EMPLOYEE'S ENTITLEMENT TO ACCUMULATED LEAVE PAY: HOW MUCH SHOULD THE EMPLOYER PAY?

1 Introduction

The Basic Conditions of Employment Act 75 of 1997 (hereinafter "the BCEA") as well as its predecessor, the Basic Conditions of Employment Act 3 of 1983 (hereinafter "the BCEA 1983"), make provision for an employee's entitlement to pay for accumulated leave on termination of employment (s 40 and s (12)(4) of the respective Acts).

Although it is clear that the legislature intended that an employee be compensated for accumulated leave on termination of employment, it is unclear whether an employee is entitled to compensation for all accumulated leave, or only the leave accumulated by the employee since the start of the leave cycle preceding the termination of the employee's services. It is pertinent to note that the uncertainty likewise existed under the forerunner to the BCEA, the BCEA 1983. This uncertainty is exacerbated when employers, employees and labour practitioners, faced with a dispute, have to consider the effect of collective agreements and contracts purporting to regulate an employee's entitlement to accumulated leave pay.

The purpose of this article then is to attempt to quell some of this uncertainty through an analysis of the relevant statutory provisions and case law, and ultimately a suggestion proffered on the way forward.

2 The statutory provisions

Section 40 of the BCEA states:

"40 Payments on termination

On termination of employment, an employer must pay an employee –

- (a) ...
- (b) remuneration calculated in accordance with section 21(1) for any period of annual leave due in terms of section 20(2) that the employee has not taken; and
- (c) if the employee has been in employment longer than four months, in respect of the employee's annual leave entitlement during an incomplete annual leave cycle as defined in section 20(1) –
 - (i) one day's remuneration in respect of every 17 days on which the employee worked or was entitled to be paid; or
 - (ii) remuneration calculated on any basis that is at least as favourable to the employee as that calculated in terms of subparagraph (i)."

In turn, section 20 of the BCEA states:

“20 Annual leave

- (1) ...
- (2) An employer must grant an employee at least –
 - (a) 21 consecutive days’ annual leave on full remuneration in respect of each annual leave cycle; or
 - (b) by agreement, one day of annual leave on full remuneration for every 17 days on which the employee worked or was entitled to be paid;
 - (c) ...
- (4) An employer must grant annual leave not later than six months after the end of the annual leave cycle ...
- (11) An employer may not pay an employee instead of granting paid leave in terms of this section except –
 - (a) on termination of employment; and
 - (b) in accordance with section 40(b) and (c).”

It bears relevance that section 12(4) of the BCEA 1983 was a similar provision to the contemporary section 40 of the BCEA. Further, clause 6 of schedule 3 to the BCEA provides that any accrued leave to which an employee was entitled in terms of section 12 of the BCEA 1983 should be added to the paid leave earned by that employee under the contemporary Act. It is therefore clear that both section 12(4) of the BCEA 1983 and section 40 of the BCEA may be relevant to an employee’s claim for accumulated leave pay on termination of employment. In the authors’ view, due to the similarity of the wording of these provisions, the Labour Court will most likely adopt a uniform interpretation.

3 Case law

Two conflicting decisions handed down in the Labour Court are at the epicentre of the debate surrounding the entitlement to accumulated leave pay.

In the first decision, *Jooste v Kohler Packaging Ltd* ([2003] 12 BLLR 1251 LC), Franklin AJ postulated that the very purpose of the BCEA is to ensure that an employee takes annual leave. In other words, the BCEA contemplates that leave will be taken so that the problem of accumulation does not arise. Accordingly, Franklin AJ took the view that both section 40 of the BCEA and section 12(4) of the BCEA 1983 contemplate payment upon termination of employment only in respect of leave accrued in the cycle immediately preceding that during which termination takes place (apart from the pro rata entitlement for the then current cycle). In essence, the judge reasoned that to permit payment upon termination for statutory leave accumulated from prior cycles would be to allow both the employer and the employee to circumvent the respective Acts (par 3.4).

The *Jooste* decision went further in that the judge expressed the view that when there is an agreement to give an employee additional leave (over and above that which the particular employee would be entitled to in terms of the BCEA), then unless there is an agreement to the contrary, there is no

obligation on termination of employment to pay out for the leave entitlement in excess of 21 days, plus the pro rata portion for the then current cycle (par 3.9). Of course, if there was in fact such an agreement to pay out for the contractual leave, payment would be made in terms of the agreement. In other words, the judge was of the view, and in the authors' view correctly so, that an employee's entitlement to accumulate leave should be distinguished from an employee's entitlement to pay in respect of accumulated leave.

However, the *Jooste* decision is not without criticism. It is unclear why the judge accepted that an employee should be entitled to pay for leave not taken during the cycle immediately preceding the contemporary cycle if termination occurs outside the six month "window period" permitted by the BCEA: applying the *ratio* of the decision, such leave should also be forfeited by an employee. Furthermore, the judgment ignores the realities of working life in which the employer may create an environment in which it is made difficult for an employee to enforce the entitlement to leave without jeopardising the employee's prospects for advancement within the particular undertaking. Quite simply, the *Jooste* decision fails to have adequate regard to the realities of an inherently unequal bargaining relationship.

In *contra mundum* of general legal sentiment, in the second decision, *Jardine v Tongaat-Hulett Sugar Ltd* ([2003] 7 BLLR 717 LC), the Labour Court came to the conclusion that an employee should be entitled to be paid in respect of all untaken leave upon termination of employment. The decision finds support in the wording of section 40 of the BCEA, which grants employees the entitlement to compensation in respect of *any period* of annual leave owing to employees. In this case, the Labour Court relied heavily on the absence of a forfeiture clause in the BCEA. The judgment, handed down by Pillay J, postulates that the statutory provision requiring employers to grant annual leave within six months after the end of the annual leave cycle was designed to protect employees who might otherwise be denied annual leave; it imposes an obligation on an employer to grant annual leave, and not on an employee to take it (par 14).

The conflicting cases have been the subject of some debate but the position has yet to be considered by the Labour Appeal Court. As the law stands, the scales are therefore evenly balanced.

4 An alternative approach

It is submitted that there is merit in both the *Jooste* and *Jardine* decisions:

- 1 the *Jooste* decision, because it recognizes the importance of leave and its benefits to both the employer and employee;
- 2 the *Jardine* decision, for the protection it extends to employees who have enriched their employers through the sacrifice of their leave entitlement, often at the behest of their employers.

What is required then, in the authors' view, is an interpretation of the BCEA which finds a middle ground between these two conflicting decisions of the Labour Court.

This middle ground has found expression in a decision by the Employment Appeal Tribunal in the United Kingdom, *Canada Life Ltd v Gray* (2004 ICR 673 EAT). In this case, the Employment Appeal Tribunal had to consider, *inter alia*, whether the Working Time Regulations 1998 (hereinafter “the WTR”) entitle an employee to pay in respect of all untaken leave upon termination of employment. Of relevance to the Employment Appeal Tribunal’s decision, were the following regulations:

“16(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at a rate of a week’s pay in respect of each week of leave.”

“13(1) a worker is entitled to four weeks’ annual leave in each leave year ...”

“13(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but – (a) it may only be taken in the leave year in respect of which it is due, and (b) it may not be replaced by a payment in lieu except where the worker’s employment is terminated.”

At first glance, it is immediately clear that the WTR, like the BCEA, attempts to regulate employees’ entitlement to the accumulation of leave and payment in lieu thereof. Similarly, the WTR only makes payment for accumulated leave possible on termination of employment. After due analysis of the WTR, the Employment Appeal Tribunal came to the following conclusions:

- 1 The WTR are designed to ensure, by the requirement on employers to give their employees paid holiday leave, that an employee is not restricted from taking holidays, necessary for his/her health, because he/she would otherwise lose money where his employer would not permit paid holidays under the contract of employment (par 21).
- 2 Balancing the interests of the employer, the employee’s entitlement to paid leave during employment is circumscribed. The entitlement is limited to a specified duration of annual leave; if the employee wants more holiday it will not be paid holiday, absent contractual agreement. The employee is discouraged from not taking his full holiday entitlement by the express prohibition of the employer making payment in lieu of holiday. The employee cannot save up his paid leave entitlement in one year and demand it as accrued paid leave in a subsequent holiday year. All of these measures are directed to a simple proposition: employees need their annual holidays in the interests of their health (par 22).
- 3 However, following termination of employment the provisions applicable during employment, designed to regulate and enforce holiday arrangements between employer and employee, *cease to be relevant* (par 23). An employer who refuses to acknowledge an employee’s entitlement to paid leave throughout his/her employment should not escape liability for compensating the employee for that breach of his/her statutory rights (par 49).

In the authors’ view, the above principles enunciated in the *Canada Life* decision, reflect a logical middle ground by which the Labour Court in the future could reconcile the *Jooste* and *Jardine* decisions. On such an interpretation of the BCEA and the BCEA 1983, an employee, during the

tenure of the employee's employment, would at most be entitled to take leave accumulated since the start of the preceding leave cycle (which right *must* be exercised by the employee within the six month window period permitted by the BCEA). However, upon termination of employment the employee becomes entitled to payment in respect of all untaken leave. Such an interpretation would not only give effect to, and reinforce, the objectives of the respective Acts, but further recognise the employee's entitlement to remuneration where the objectives of the respective Acts have been defeated at the employer's behest. This is particularly just when one considers the repercussions of the *Jooste* decision for employees in instances where employers wrongfully insist they are not employees, but independent contractors, and disentitle employees to leave on that basis.

5 The position where collective agreements and contracts have been concluded

It may be that employers and employees, or trade unions, agree to vary, to the detriment of employees, the default provisions of the BCEA applicable to the accumulation of annual leave and/or payment in lieu thereof, either in collective agreements or contracts. (Whether a variation is to the detriment of an employee would depend on which interpretation of the discussed leave provisions of the BCEA finds favour with the Labour Court. Of course, no problem arises should the variation be beneficial to the employee; in such instances the collective agreement or contract will apply.)

Where these aspects of the employment relationship are regulated by a collective agreement concluded in a bargaining council, such collective agreement will take precedence over the BCEA, *provided* that the provisions of the collective agreement are not inconsistent with the purposes of the BCEA *and* the collective agreement does not vary a basic condition of employment that is entrenched as a core right, for example by reducing the annual leave entitlement below two weeks (s 49(1) of the BCEA). In the authors' view, factors which may be taken into account in evaluating whether a variation is consistent with the purposes of the BCEA include:

- the extent to which any basic condition of employment is reduced;
- any "trade-offs" involved in the agreement containing the variation;
- the employees' conditions of employment as a whole;
- the possible impact of the variation on the health and safety of the employees; and
- any relevant international labour standards, particularly those ratified by South Africa.

Whatever the circumstances of the variation, however, the Labour Court will always be hesitant to set aside the provisions of a collective agreement (or to refuse to implement or enforce an offending provision), especially one concluded in a bargaining council. The institution of collective bargaining and self-regulation is enshrined in the Labour Relations Act 66 of 1995

(hereinafter “the LRA”) and positively endorsed by the Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”). In *Collins v Volkskas Bank, a division of ABSA Bank Ltd* ([1994] 12 BLLR 73 IC), the Industrial Court had to determine whether a collective agreement could properly vary the maternity leave provisions of the BCEA 1983 to the detriment of an employee. The court stressed that it retained a discretion to refuse to uphold collective agreements, although in the court’s view this was a discretion that was to be exercised sparingly and only if the outcome of the collective bargaining process was a manifestly gross unfair labour practice. Although the harsh approach of the court may not be warranted under the present BCEA, the principle is clear that collective agreements will not likely be struck down by our courts. Nevertheless, the principle that courts should not interfere in the process of collective bargaining and power play may be met with argument that it is inconsistent with the purposes of the BCEA to disentitle employees to compensation for work done in excess of that required by them. In the authors’ opinion, the prospects of success on this type of argument are, at the very best, modest in relation to collective agreements concluded in bargaining councils for the reasons set out hereinabove. It is noteworthy that in the BCEA a distinction is drawn between collective agreements concluded in bargaining councils and other agreements, including collective agreements concluded outside of bargaining councils and contracts, the latter being permitted to vary a basic condition of employment only to the extent permitted by the BCEA (s 49(2) of the BCEA). Thus the scope of other agreements to vary basic conditions of employment is considerably more restricted than that of collective agreements concluded in bargaining councils.

It may also happen that an employee, whose entitlement to accumulate leave and payment in lieu thereof is frustrated by a collective agreement, seeks to impugn the constitutional validity of the collective agreement on the basis that it infringes upon the employee’s guaranteed right to fair labour practices (s 23(1) of the Constitution). In the authors’ view, this type of contention should not be dealt with by the Labour Court as a separate constitutional enquiry. The BCEA is an embodiment of the right to fair labour practices conferred by section 23(1) of the Constitution. Any variation of basic conditions of employment consistent with the BCEA should therefore not constitute an unfair labour practice. This is implicit in section 2 of the BCEA, which reads:

“The purpose of this act is to advance economic development and social justice by fulfilling the primary objects of this act which are –

- (a) to give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution –
 - (i) by establishing and enforcing basic conditions of employment; and
 - (ii) by regulating the variation of basic conditions of employment ...”

In summation, it is unlikely that any collective agreement concluded in a bargaining council varying the entitlement to accumulation of leave and payment in lieu thereof could be successfully attacked, either in terms of the BCEA itself or on the basis of its constitutional validity, unless the outcome

of the collective agreement is a manifestly gross unfair labour practice. The validity of contracts and collective agreements concluded outside bargaining councils would depend substantially on which interpretation of the discussed leave provisions of the BCEA ultimately finds favour with the Labour Court, and whether the BCEA permits a variation.

6 General considerations

Given the extent of the uncertainty existing with regard to an employee's entitlement to accumulated leave pay upon termination of employment, the cause for future legal disputes in this regard is certain. The question arises then as to the appropriate forum in which an employee should seek to enforce his/her entitlement, especially in instances where collective agreements and contracts have been concluded which purport to regulate the entitlement.

To the extent that an employee's cause of action is based on the original contract of employment and/or the contract of employment as varied by the BCEA, the employee will be entitled to seek relief in the Labour Court (see s 77(3) of the BCEA).

Further, even to the extent that a collective agreement purports to regulate an employee's entitlement to the accumulation of leave and payment in lieu thereof, it is arguable that the Labour Court nevertheless retains jurisdiction to determine such claims. Section 23 of the LRA confirms the binding nature of collective agreements and provides for the incorporation of its terms into the contract of employment. With reference to this provision, it was held in *Hlope v Minister of Safety and Security* ([2006] 3 BLLR 297 (LC)) that a dispute concerning the breach of a collective agreement is justiciable in the Labour Court insofar as parties seek to found their rights on the contract of employment (par 20). The judgment suggests that the Labour Court will retain jurisdiction over such claims, even if the Labour Court finds a collective agreement to be a valid and enforceable variation of the BCEA, as long as an employee's claim is based on the contract of employment. However, in the authors' view, an employee's claim based on the contract of employment is only properly justiciable in the Labour Court to the extent that the employee wishes to impugn the validity or applicability of the collective agreement, because in such instances the cause of action is not reliant on the collective agreement. In instances where the employee seeks to rely solely on the contract of employment as varied by a collective agreement, the employee ought to resort to the dispute resolution procedures contained in the collective agreement to enforce his/her claim (s 24 of the LRA).

As to the calculation of the amount of leave days in respect of which an employee is entitled to payment in terms of the BCEA and/or a collective agreement, it is noteworthy that there is an obligation on an employer to keep records of time worked by an employee (s 31 of the BCEA). As regards the extent of the annual leave entitlement in terms of the BCEA, it is generally accepted that an employee's 21 consecutive days annual leave

entitlement refers to calendar days. This interpretation is a logical one when consideration is given to the fact that by agreement the employer and employee may agree to one day of annual leave for every 17 days worked as an alternative (s 20(2)(b) of the BCEA). Further, the provision dictating that an employer must grant an employee an additional day of paid leave if a public holiday falls on a day during an employee's leave on which the employee would ordinarily have worked, would be rendered redundant should the employee's leave days be taken to refer to court days or work days.

7 Severance pay analogy

In terms of section 41(b) of the BCEA an employee may refer a dispute about entitlement to severance pay in terms of section 41 to the CCMA or accredited bargaining council for conciliation and, if conciliation fails, for arbitration. If the Labour Court is adjudicating a dispute about a dismissal based on the employer's operational requirements it may also determine the amount of any severance pay to which the dismissed employee may be entitled to (s 14(10)). In *Mamabolo v Manchu Consulting CC* (1999) 6 BLLR 562 (LC) the Labour Court held that it has no power to order severance pay in addition to the minimum set out in the BCEA. Rights to contractual severance pay or severance pay additional to the statutory minimum must be claimed elsewhere and not in terms of section 41 of the BCEA. In deciding this the court rejected the view pronounced in *Whall v Branddad Marketing (Pty) Ltd* (1999) 6 BLLR 626 (LC). This view is supported by Du Toit *et al* (*Labour Relations Law: A Comprehensive Guide* 5ed (2007) 549 fn 226).

If the right derives from contract the civil courts or Labour Court (s 77(3)), will have jurisdiction, and if the source is a collective agreement section 24 of the LRA will apply.

What is apparent from this view is that the Labour Court or an arbitrator can only enforce the minimum statutory entitlement in terms of section 41. The analogy is that leave, including accumulated leave, that derives from contract or a collective agreement and which is additional to the statutory minimum cannot be claimed in terms of the BCEA. Only the statutory minimum can be claimed.

8 Conclusion

The BCEA, and the BCEA 1983, have made provision for payment in respect of accumulated leave upon termination of employment. To date, clarity exists neither on the issue of the exact extent of the entitlement to accumulate leave, nor on the extent of accumulation for which the employer becomes liable to compensate the employee on termination of employment.

In relation to these issues, two conflicting decisions of the Labour Court have been reported: the *Jooste* decision, in which the view was taken that the entitlement to accumulate leave and compensation in that respect is

limited to leave accumulated since the beginning of the leave cycle preceding termination of employment; the *Jardine* decision, in which the view was taken that upon termination of employment an employee becomes entitled to compensation for all untaken leave. Both decisions, in the authors' view, have undeniable merit.

Given the financial implications and potential benefit these issues have for employers and employees respectively, especially in instances of longstanding employees, it is difficult to conceive how these issues have evaded judicial scrutiny for so long.

How then, when the time comes for the law to be forged on these issues, will the judiciary respond? Given the merit inherent in both judicial decisions to date, a decisive answer would be impudent. However, a suggestion is proffered. In the authors' view, the answer exists in the middle ground between the *Jooste* and *Jardine* decisions. This view entails that employees, during the tenure of employment, should insist on exercising their annual leave entitlement, failing which it cannot be exercised outside the six month window period permitted by the BCEA; conversely, the view also postulates that, upon termination of employment, employers should compensate employees for all untaken leave entitled to in terms of the BCEA. Additional accumulated leave that originates from different sources cannot be claimed in terms of the BCEA.

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