

What does the labour law say about working overtime in South Africa?



As labour law consultants or legal advisors, we often receive queries about employees who refuse to work overtime, or who simply do not pitch for overtime duties.

First and foremost, section 10(1) of the *Basic Conditions of Employment* Act 75 of 1997 (BCEA) provides that an employer may not require or permit an employee to work overtime except in accordance with an agreement.

In this article we will focus on how an employer can deal with such queries with reference to the relevant legislation and case law.

What are the rights of an employee with regard to claiming overtime?

In terms of said agreement, the employee has the legal right and entitlement to demand payment for overtime worked, or alternatively, he/she can arrange with the employer to be given time off work instead of payment for overtime worked.

If there is an agreement and overtime is required, the employee may not work for more than 12 hours a day or more than 10 hours overtime a week; however, it is further noted that a collective agreement can be reached to increase this to 15 hours a week, but only for up to 2 months a year. **Section 10 (5) of the BCEA requires that an agreement to work overtime, concluded during the first three months of employment (typically in a contract of employment), must be renewed after the first 12 months of employment.**

What is the obligation of employers with regard to overtime agreements?

Based on the above, it is clear that there is an obligation on employers to ensure that they renew overtime agreements on an annual basis. Failure to do so will render the initial agreement to work overtime *null in void* and, as such, employees may refuse to work overtime. In such instances, *employers tend to take disciplinary action against said employees*; however, the subsequent dismissal of an employee for refusing to work overtime will be deemed unfair in the absence of a binding agreement or a renewal of the agreement.

Caselaw: *AMCU obo Mkhonto and Others v Commission For Conciliation, Mediation And Arbitration and Others*

This was made clear in the case of *AMCU obo Mkhonto and Others v Commission For Conciliation, Mediation And Arbitration and Others* (JR 2266/17) [2023] ZALCJHB 23 (13 February 2023). Below find a summary of events for ease of reference.

- In the above case, the applicants were charged and dismissed for gross insubordination in that they refused to obey the instruction from their Site Manager to work overtime on 29 May 2017. This was to meet production targets, and it was contended that the refusal of the employees resulted in a loss of production.
- AMCU referred a dispute to the CCMA which remained unresolved at conciliation and proceeded to arbitration.
- The Respondent (employer) argued that the employees were bound by their respective contracts of employment to work overtime. During the proceedings, the employer ultimately conceded that no agreement had been entered into as at 25 May 2017 when the Site Manager issued the instruction to work overtime on 29 May 2017 apart from the fact that the employees did not object to working overtime as requested.
- On the other hand, AMCU argued that the employees had not consented to the overtime requirements for safety reasons in terms of section 23 of the Mine Health and Safety Act (MHSA) with reference to issues pertaining to the “water cart and grader”.
- Initially, the Commissioner held that the dismissal of the applicants was substantively fair, stating:

‘... the Applicants did not disagree to work overtime when they were informed about the need and instruction to work overtime. This entails an implied or tacit agreement. Besides, the absence of explicit agreement, the Applicants have already agreed in their employment agreements that they would work overtime as and when required.

- The matter was then taken on review, where the Labour Court was tasked to determine whether the employer had succeeded in proving the charge of insubordination and, if so, whether dismissal was fair. AMCU contended that the applicant employees could not have been guilty of insubordination because the instruction to work overtime was unlawful. To the extent that the employer relied on the overtime clause in the applicant employees’ contracts of employment, it was further contended that the said clause had lapsed a year after the conclusion of those contracts and thus was not enforceable.

The Labour Court held that the Commissioner had misdirected himself by concluding that three of the four applicant employees had tacitly agreed to work overtime; alternatively, that they were bound by their contracts of employment. Unlike the other two applicants, one applicant did not agree to work overtime in his contract of employment. As such, there was no binding contractual obligation to work overtime.

The employment contracts of two of the applicants contained an overtime clause in terms of which they consented to work overtime. Nonetheless, they had commenced their employment with the employer in July 2008 and January 2011, respectively. Evidently, when the instruction was issued on 25 May 2017, the overtime clause in their contracts of employment had lapsed. It stands to reason that in the absence of an agreement to work overtime on 29 May 2017, the employer's instruction was unlawful as it offended section 10(1)(a) of the BCEA as correctly contended by AMCU.

Caselaw: *Maripane v Glencore Operations South Africa (Pty) Ltd (Lion Ferrochrome)*

This was presented and explained by the Labour Appeal Court (LAC) in *Maripane v Glencore Operations South Africa (Pty) Ltd (Lion Ferrochrome)*, as follows:

'Whether the refusal to obey an instruction amounts to insubordination also depends on various factors, including the employee's conduct before the alleged insubordination, the wilfulness of the employee's refusal to obey, and the reasonableness of the instruction. The reasonableness of any instruction also depends on its lawfulness and enforceability. It seems axiomatic, that any instruction to do what is unlawful, or in breach of a contractual term is not reasonable.'

Judge Nkutha-Nkontwana further held as follows:

'Therefore, it cannot be inferred from the conduct of the parties that it was their unexpressed common intention that the applicant employees would work overtime per Mr Veere's instruction. In my view, an agreement that is contemplated in section 10(1)(a) of the BCEA could be inferred only when an employee had actually worked overtime without prior consent. Otherwise, without a prior consent, an employee would be under no obligation to work overtime.'

The fourth applicant's contract of employment contained an agreement to work overtime and he had been employed less than a year, thus the instruction was lawful. Also, the applicant employee did not seem to take issue with the reasonableness of the notice to work overtime.

In conclusion

Overtime should be included as a clause in the employment contract but the overtime agreement as such needs to be renewed every 12 months otherwise it will not be enforceable, as seen in *AMCU obo Mkhonto v CCMA and Others [2023]*.

Alternatively, in the case of a verbal agreement, the employer will have to prove that an agreement had been reached by citing prior situations where employees had agreed to work overtime and which can be proved without the necessity of a written agreement, i.e. record keeping. It is best practice to always have a written agreement in place with all employees expected to work overtime.

SERR SYNERGY is able to assist employers and simplify the efficient drafting of overtime agreements in a unique manner to safeguard them against labour disputes.

Our legal team empowers the employer to determine whether employee behaviour merits discipline or dismissal and so doing minimise exposure to risk when dismissing staff.

This article was approved by Angelique van der Sandt.

Sources:

Legislation: S10 (1) and (5) of the Basic Conditions of Employment Act 75 of 1997

Case Law:

- *AMCU obo Mkhonto v CCMA and Others [2023]*
- *Maripane v Glencore Operations South Africa (Pty) Ltd (2019) 8 BLLR 750 (LAC)*

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