IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: CA 16/15

In the matter between:

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

and

SINGH A, NO **First Respondent**

NATIONAL BARGAINING COUNCIL FOR THE ROAD

FREIGHT AND LOGISTICS INDUSTRY **Second Respondent**

MTWU obo I MAAS **Third Respondent**

Heard: 6 September 2016

Delivered: 08 November 2016

Summary: Night work in terms of the National Bargaining Council Agreement for the Road Freight Industry (as it was then known) promulgated in Government Gazette 26268 of 30 April 2004 as amended and applicable in December 2010 means work performed after 18h00 and before 06h00 the next day. Night work may

only be worked if certain conditions including transportation are available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift which does not bear its defined meaning but means the end of the working day including overtime. 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 measure as a defence to a charge of failing to work or disobeying an instruction.

Coram: Waglay JP, Landman JA *et* Savage AJA

Neutral citation: *TFD Network Africa (Pty) Ltd v Singh NO and Others* (LAC: PA 16/15)

JUDGMENT

LANDMAN JA

Introduction

[1] TFD Network Africa (Pty) Ltd, the appellant, appeals against a judgment of the Labour Court (Steenkamp J) upholding an award by Singh NO acting under the auspices of the National Bargaining Council for the Road Freight and Logistics Industry, the first and second respondents reinstating Mr Maas (Maas), represented by Motor Transport Workers Union (MTWU), the third respondent. The appeal is with the leave of the court *a quo*.

Background

[2] It is common cause that Maas, a truck driver, employed by the appellant, was contractually obliged to work overtime when his employer required him to do so. His terms and conditions of employment were regulated by the National Bargaining Council Agreement of the Bargaining Council for the Road Freight

Industry of 2004 as amended and certain provisions of the Basic Conditions of Employment Act 75 of 1997 (the BCEA).

[3] On 6 and 7 December 2010, while working his usual shift that ended at 17:00, Maas was instructed to work overtime until 19:00. He was of the view that he could not work until 19:00 because of a lack of transport to his home. But, he was prepared to work until 18:00 and did so. He then left to catch the bus, which would drop him off near his place of residence. He explained why he could not work until 19:00. This was because he would be obliged to board a bus that left at 19:15 and disembarks at the centre of Mitchell's Plain. He lived in Lentegeur and so would have to walk about 2 km to his place of residence. He said that it was not safe to walk home at this time of night.

[4] Maas was called before a disciplinary inquiry charged with breaching his contract by failing to work overtime and refusing to obey a reasonable order. Maas related his defence as set out above and added that in terms of the BCEA, public transport had to be readily available for night shift workers and there had been no suitable transport available. The chairperson rejected his defence and dismissed him as he had previously been disciplined for a similar offence.

[5] Maas's union referred a dispute to the Bargaining Council for the Road Freight and Logistics Industry which had jurisdiction. The dispute was arbitrated before the first respondent. The appellant contended that Maas had not been requested to perform night work as the majority of the shift did not fall within the hours 18:00 and 06:00.

The award

[6] The arbitrator rejected these contentions and found for Maas. In doing so, he said:

> *'18. The onus rests on the employer to prove that the dismissal was fair and that [a] fair procedure was followed in arriving at the decision to dismiss. It is common cause that the Applicant was given an instruction to work overtime as is required in terms of his contract of employment. The issue of contention is whether or not the*

period of overtime which the Applicant refused to work falls under night work. In terms of section 17 of the BCEA, any work performed after 18h00 and before 6h00 the following day is considered night work. If an employee is required to perform work at night, the employer must ensure that transportation is available between the employee's place of residence and the work place at the commencement and conclusion of the shift.

19. The Respondent contends that transport was available, but that in any event, there was no obligation to provide transport since the period of overtime was regarded as dayshift, as the majority of the period of work was before 18h00. In my view, this is a convenient misinterpretation of the provisions of the BCEA. When overtime work is performed beyond 18h00 it falls under night work. There is nothing in the BCEA to suggest otherwise.

20. … The employer was obliged to provide transport and clearly the transport that the employer claims was available, was not suitable for the Applicant. In terms of the BCEA, it is a requirement that transport is available to the employee's place of residence. The fact that the Applicant, worked part of the overtime that he was required to work, suggests good faith on his part. He does not appear to have had the intention to be deliberately insubordinate.'

Judgment of the court *a quo*

[7] The appellant was dissatisfied with the award and launched review proceedings which came before Steenkamp J who declined to review and set aside the award. Steenkamp J concluded that:

(a) the applicable legal instrument was the collective agreement but that it reflected the provisions of the BCEA as regards night work;

(b) transportation needs only be available; the employer needs not to provide transport if there is public transport available;

(c) if the employee's full shift falls within the hours 18:00 and 06:00 there is no doubt that the transport subsection applies;

(d) with reference to Du Toit *et al Labour Relations Law: A Comprehensive Guide* 6th ed (Lexis Nexis 2015) at 605,the judge *a quo* held that the purpose of the regulation of night work is to avoid or minimize health risks and includes risks to the safety of workers during their commuting to and from work;

(e) it is notorious that Lentegeur (where Maas lives) is in the midst of the Cape Flats' ganglands;

(f) the concept of night work does not require work to be regularly performed; and

(g) the award was not so unreasonable that no other arbitrator could have come to the same conclusion.

Appellant's submissions

[8] The chief submissions made on behalf of the appellant, in this Court, are the following:

(a) the preponderance of the working shift must resort within the hours of 18:00 to 06:00 for the employee's work to constitute night work;

(b) permissible overtime work, following on a normal working shift that ends before18:00, that resorts within the hours of 18:00 to 06:00 does not constitute night work;

(c) there is to be no overlap or contamination between the overtime section and night work;

(d) the concept of night work is informed by the necessity for a specific agreement to do night work, transport being available, payment of an additional allowance for night work, and additional obligations as regards regular work after 23:00 and before 06:00;

(e) in the case of night work specific reference is made to the working "shift" falling within night work period. Logically this means it is about the working "shift" as a whole and not individual hours worked as a component of a shift;

(f) an employee would not be entitled to overtime and a night shift allowance;

(g) safety is not the prime consideration as regards transport in relation to night work. It is wrong to ask can the employee get home safely;

(h) an employee may not put himself in a position eg by relocating that it is the cause of his or her inability to secure transport. See *National Union of Metal Workers of SA on behalf of Hlekwayo v Bell Equipment Co SA (Pty) Ltd* (2007) 28 ILJ 1632 (BCA); and

(i) Maas was thus not entitled to refuse to work overtime or part of his overtime and was fairly dismissed as he had a previous warning.

The applicable provisions/clauses

[9] At the outset, it is necessary to consider the relevance of the BCEA to the issue at hand. First, it must be noted that at the date of Maas's refusal to work overtime in December 2010, Maas and his employer were governed by the National Bargaining Council Agreement for the Road Freight Industry (as it was then called) promulgated in Government Gazette 26268 of 30 April 2004 as amended from time to time (the council agreement) and, to an extent, the BCEA.

[10] Secondly, s 4 of the BCEA provides, *inter alia*, that a basic condition of employment constitutes a term of any contract of employment except to the extent that the basic condition of employment has been replaced, varied, or excluded in accordance with the provisions of the BCEA. As far as night work is concerned, s 49(1) of the BCEA permits a collective agreement concluded in a bargaining council to alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of the Act provided that the

collective agreement does not reduce the protection afforded to employees who perform night work in terms of s 17(3) and (4).

[11] When the council agreement of 2004 was concluded, it excluded and replaced section 17(1) of the BEAC and replaced it with its own formulation. "Night-shift" was defined in clause 2(1) of the council agreement of 2004, unless inconsistent with the context, to mean:

> *'a shift during which five and a half or more ordinary hours of work, overtime excluded, fall within the period reckoned from 18:00 to 06:00 the next day.'*

[12] The council agreement of 2004 was extended from time to time and was in force when Maas refused to work overtime in December 2010. However, the council agreement was amended as regards night work in 2007 in Government Gazette 30041 of 6 July 2007. The definition of night work in clause 2 was deleted and replaced with the following:

> *'"Night work" means work performed after 18h00 and before 06h00 the next day.'*

[13] Clause 17(1) of the council agreement was substituted by a new clause. The following amendment is relevant:

> *'(1) An employer may only require or permit an employee to perform night work, if -*
>
> *…*
>
> *(b) transportation is available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift.'*

[14] The definition of night work and the obligation regarding transportation in the council agreement, at the time Maas was dismissed, mirrors those of the BCEA.

Analysis

[15] The background facts are not decisive in this appeal. The clauses relating to night work apply regardless of gender, geographical location, whether it is light or dark

at 18:00 or 06:00, and whether the employee lives in a dangerous area or one that is generally considered to be a safe area.

[16] Night work raises a number of concerns, including the health, safety, compensation and transport of employees who perform work at night. It is for these reasons that night work is regulated by statute and by bargaining council agreements for the protection of these employees. Crucial to the governance of night work is the concept of night work.

[17] The submission that the preponderance of the working shift must resort within the hours of 18:00 to 06:00 for the employee's work to constitute night work, has no foundation. To a large extent, this submission echoes the definition of night work that has been scrapped by the parties to the bargaining council. There is simply no indication that the parties to the council agreement intended night work to bear anything resembling the previous concept. The definition is unambiguous and does not lead to absurd results. It is apparent from clause 17 that all work performed between 18:00 and 06:00, whether occasional or regular work, is night work. But, work performed between 23:00 and 06:00 on a regular basis attracts further obligations for the employer as regards these employees.

[18] The submission that permissible overtime work, following on a normal working shift that falls within the prescribed period does not constitute night work, does not take cognisance of the structure of the agreement. The agreement provides for ordinary hours, overtime, work on Sundays and public holidays etc. Leaving aside substitute measures, if an employee works his or her ordinary hours on a Sunday, it attracts double pay. If the employee works overtime, it attracts a special rate. Similarly, if the employee works ordinary hours or overtime after 18:00 and 06:00, it attracts a special night shift allowance. Each situation attracts a different rate or allowance according to the nature of the activity performed or time that it is performed and for different reasons. The result may be an accumulation of allowances but there is nothing inherently unfair or improper in this. The ancillary submissions that there is to be no overlap or contamination between the overtime

clause and the night work clause, and that an employee would not be entitled to an overtime and a night shift allowance, also ignore the purpose of the different allowances.

[19] The submission that the concept of night work is informed by the necessity for a specific agreement to do night work, transport being available, payment of an additional allowance or night work, and additional obligations as regards regular work after 23:00 and before 06:00, holds good insofar as the definition of night work must be interpreted with regard to its context. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras 17 and 25 -26. But, none of the clauses triggered by night work suggest that the definition does not mean what it says.

[20] It was submitted that safety is not the prime consideration as regards transport in relation to night work and it is wrong to ask can the employee get home safely. It is unnecessary to decide whether safety is the prime consideration although there is much to be said for it, but safety is most definitely one of the considerations. The Code of Good Practice on the Arrangement of Working Time, published, in terms of section 87(2) of the BCEA, concerning the Design and Evaluation of Shift Systems, in item 4.2.5, enjoins employers to obtain, *inter alia*, information on:

> *'means, costs and availability of transport to and from the place of residence and the personal security of the employee while commuting.'*

[21] The Code also provides in item 10.3.2 that employers who engage employees on night work should ensure, *inter alia*, that employees are able to obtain safe, affordable transportation between their places of residence and their workplace.

[22] The issue concerning an employee that is obliged to work overtime who disables himself or herself from doing so is not germane to this appeal and does not require attention in this judgment.

[23] I turn to the final submission, namely that in the case of night work specific reference is made to the working "shift" falling within the night work period. The

word “shift”, in this context, is a reference to clause 17(1)(b). Logically, it was submitted, this means the working “shift” as a whole and not individual hours worked as a component of a shift. The council agreement defines shift in clause 2 as meaning:

> ‘*any consecutive period of work, subject to the provisions of clause 5(1), in the course of a working day as defined that has been set by an employer for an employee, but shall not be deemed to include any period of overtime, as defined…’*

[24] If this definition of shift were to be applied then, somewhat extraordinarily, when night work is done transportation must be available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift working day excluding overtime, ie transport needs not be available at home time but at the beginning of the overtime. This absurd result could not have been intended. The conclusion is therefore that when the word “shift” is used in clause 17(1)(b), it means the end of the working day including overtime.

[25] The finding by the arbitrator that the dismissal was substantively unfair is a finding that cannot be interfered with and cannot be faulted. 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.

Order

[26] I make the following order:

The appeal is dismissed with costs.

_____

A A Landman

Judge of the Labour Appeal Court

I concur,

_____

B Waglay

Judge President of the Labour Appeal Court

I concur,

_____

K M Savage

Acting Judge of the Labour Appeal Court

APPEARANCES:

FOR THE APPELLANT:

FOR THE THIRD RESPONDENT: