

FORFEITURE OF ANNUAL LEAVE

Question: Can annual leave be forfeited?

Answer:

- (a) Non-statutory annual leave (i.e. leave granted in excess of the minimum statutory leave) can be forfeited.
- (b) The forfeiture of statutory annual leave is more controversial, but the most recent labour court judgement indicates that it can be forfeited.

Brief explanation:

Non-statutory annual leave: Leave in excess of the statutory minimum is not regulated by the Basic Conditions of Employment Act (BCEA), but by the contract of employment. The parties can therefore determine by agreement how much leave may be accumulated, when it would be forfeited, etc.

Statutory annual leave:

The relevant sections of the BCEA can be summarised as follows: S 19 (2) of the BCEA provides that the Act does not apply to leave granted to an employee in excess of the employee's minimum entitlement in terms of the Act; S 20 provides that an employee is entitled to 21 (calendar) days' leave per leave cycle of 12 months; S 20(4) provides that the employer must grant annual leave not later than six months after the end of the annual leave cycle; S 40(b) provides that on termination of employment the employer must pay the employee for any period of annual leave that the employee has not taken.

It is normally upon termination of employment that disputes arise about what leave pay-out an employee is entitled to.

The most recent Labour Court judgment on the issue is *Ludick v Rural Maintenance (Pty) Ltd* (JS 633/07) [2013] ZALCJHB 291 (30 October 2013). Here the court referred to the conflicting approaches adopted by the Labour Court in *Jardine v Tongaat-Hulett Sugar Ltd* [2003] 7 BLLR 717 (LC)(forfeiture not permitted) and in *Jooste v Kohler Packaging Ltd* (2004) 25 ILJ 121 (LC) (section 40 of the BCEA contemplates payment only in respect of leave immediately preceding that during which the termination takes place). The court applied the approach adopted in the *Jooste*-case and found that leave not taken within 6 months after the end of the most recent leave cycle, could be forfeited.

The effect of the *Ludick*-case case is that an employee should submit a leave application in respect of all annual leave accrued in the most recent leave cycle, and that this should be taken within the 6 month period after the end of the leave cycle. If the employer refuses to grant such leave, the employee may approach the Department of Labour to assist with enforcement. If the employee fails to apply for such leave, that leave would be forfeited. (The latter is subject to more favourable provisions that may be contained in the contract of employment or the employer's leave policy).

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