

It's leave, Karen, not a savings plan

By [Johan Botes](#)

10 Dec 2020

Whenever an employee's services are terminated, or an annual leave cycle ends, there will be at least two people arguing about whether the employee's old, untaken annual leave could be accumulated and paid out. The unheralded *Botes' Law on Annual Leave Interpretation* holds that if there are two people arguing on the interpretation of annual leave, there will be at least three interpretations of the law on that issue.



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Considering that we are dealing with the interpretation of statutes, written in imprecise language by fallible humans, we should not be surprised at the differences in interpretation. However, the underlying statutory provisions are not new, with both the current and previous versions of the Basic Conditions of Employment Act's (BCEA) annual leave provisions having been considered by the South African labour court. The confusion arises between the conflicting views expressed in two judgments, namely *Jooste v Kohler Packaging Ltd* (2004), and *Jardine v Tongaat-Hulett Sugar Ltd* (2003).

Leave days and extensions

The BCEA provides that employees are entitled to 21 days annual leave per annual leave cycle (12 months). The employer is obligated to provide this annual leave to the employee by no later than the end of the annual leave cycle. Thus, the employee may take such leave (and the employer may place the employee on such annual leave) during the 12-month annual leave cycle. If the leave is not taken, or granted during the annual leave cycle, the employer must grant it to the employee within the next six-month period.

But what happens when the employee does not want to take the annual leave within this extended period of 18 months, or the employer refuses to grant the employee such leave, or neither the employer, nor the employee pays heed to the annual leave period and allow annual leave to roll over from one cycle into the next? The employer will typically not complain where the employee does not take all statutory annual leave, as the employer will have the benefit of the employee's service. The employer's gratitude for the extra work often ends abruptly when the employee demands payment for all untaken annual leave upon termination of employment. An employer can then be faced with a claim of payment for annual leave, at current salary levels, for leave accrued at a much lower salary over the years. This annual leave liability could also encumber the company's financial results.

Differing views

In Jooste, the labour court, per Franklin AJ, held that the BCEA does not envisage that annual leave will not be taken. The employer may place the employee on leave, even unilaterally where the parties are unable to agree. The employee, on the other hand, may compel the employer to grant annual leave where the employer is unwilling to do so within the extended 18-month period (albeit that the employee does not have a general right to take it over a period suitable to the employee). The court concluded that, upon termination of employment, the employee is only entitled to payment for annual leave in respect of the annual leave cycle immediately preceding the termination. Allowing an employer and an employee to accumulate annual leave by not taking it would circumvent the BCEA.

In Jardine, the same court, per Pillay J, came to a different conclusion. It held that the BCEA does not place an obligation on the employee to take the annual leave (during the extended cycle). The employer may compel the employee to take leave. Where the employer does not do so, it would be unfair to penalise the employee where the BCEA does not obligate the employee to take the leave. Thus, the court held, the annual leave not taken in the extended period is not automatically forfeited.

Third opinion

Luckily, the court had opportunity to consider this issue (and both preceding judgments) in *Ludick v Rural Maintenance (2014)*. Here Van Niekerk J critically analysed the underlying provisions in the BCEA and considered the diverging reasoning and judgments. Predictably, both parties to the above dispute sought to rely on the judgment that favoured their argument - that the untaken previous cycle annual leave is forfeited, a la Jooste, or that it is carried over and should be paid, per Jardine.

The court preferred the reasoning and conclusion reached in Jooste. Van Niekerk J held that the employee was only entitled to payment for the statutory annual leave from the current and immediately prior annual leave cycle.

The court then went on to consider the employee's second claim in respect of leave carried over from the annual leave cycle into the following six-month period. The employer's policy limited the employee's right to take such untaken annual within two months following the end of the annual leave cycle. The court held that this left the employee worse off than the statutory provision (to take the leave during the next six months, not two).

This reasoning in the second claim did not detract from the clear and unambiguous ratio laid down by the court in respect of the first claim (accumulation and payment for previous annual leave cycle for annual leave not taken). The interpretation is further strengthened by the clear separation of the two claims in the judgment; the continuation of the discussion on the second claim, and the fact that the interpretation resolves what would otherwise be internal conflict in the ratio of the judgment.

Importance of taking leave

The upshot is that this emphasizes sound human resource management practices in the workplace. Employers should plan for employees' annual leave and, where necessary, force staff to take leave if the employees do not do so on their own accord. Employees who are denied leave during their annual leave cycle, or in the following six months, may lodge a claim regarding the employer's breach of its BCEA obligations. What should be clear is that annual leave is a statutory right and obligation which is intended to allow employees to recuperate.

This guidance from the labor court is even more compelling when considering the gift that is 2020. As businesses face one existential crisis after another, there is temptation to turn a blind eye to staff working without a break, with gazes fixed on outputs and productivity. Staff may also be more tempted to accumulate their annual leave with a view to creating a nest egg upon termination of employment. But as the court clarified in Ludick, it is annual leave, meant for rest and relaxation, and not a savings plan, Karen.

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