Basic Conditions of Employment Act

1. Chapter Two: Application of this Chapter

Section 6:

Sub Section (1)-

“This Chapter except section 7, does not apply to –

(a) senior managerial employee;
(b) employees engaged as sales staff who travel to the premises of customers and who regulate their own hours of work;
(c) employees who work less than 24 hours a month for an employer.”

The sections that do not apply to the above employees are:
Section 8 Interpretation of day;
Section 9 Ordinary hours of work;
Section 10 Overtime
Section 11 Compressed working week;
Section 12 Averaging of hours of work;
Section13 Determination of hours of work by Minister;
Section 14 Meal intervals;
Section 15 Daily and weekly rest period;
Section 16 Pay for work on Sundays;
Section 17 Night work;
Section 18 Public holidays

Section 7, Regulation of working time, however does apply.

A senior managerial employee is defined in the Act as:

“senior managerial employee” means an employee who has the authority to hire, discipline and dismiss employees **and** to represent the employer internally and externally. (my emphasis)

In order for an employee to be classed as a senior managerial employee, regardless of his or her job title, the employee must;

(1) have the authority to;
1.1 hire employees;
1.2 discipline employees;
1.3 dismiss employees;
1.4 represent the employer internally;
1.5 represent the employer externally.

If for example, the employee has the authority to hire and discipline an employee, but lacks the authority to dismiss an employee, such

employee is not a “senior managerial employee” for the purposes of the Act. The provisions of Chapter two will therefore apply.

Like wise, should the employee have the authority to hire, discipline and dismiss an employee, but does not have the authority to represent the employer internally or externally, such employee is not a “senior managerial employee” for the purposes of the Act.

2. Earnings threshold determined by Minister

The Minister, in terms of section 6(3) of the Basic Conditions of Employment Act, in Government Gazette no 34287, No R 422 dated 13 May 2011 determined that all employees earning in excess of R172000.00 be excluded from the following sections of the Basic Conditions of Employment Act;

Section 9 Ordinary hours of work;
Section 10 Overtime;
Section 11 Compressed working week;
Section 12 Averaging of working week;
Section 13 Determination of hours of work by Minister;
Section 14 Meal intervals;
Section 15 Daily and weekly rest period;
Section 16 Pay for work on Sundays;
Section 17 Night work;
Section 18(3) Public holiday remuneration in respect of the sub-section only.

Sections 7 and 8, however, apply.

In *MONDI PACKAGING (PTY) LTD v DEPARTMENT OF LABOUR & OTHERS (2008) 29 ILJ 371 (LC)* the court examined the correct method of calculating an employee‟s‟ gross earning‟ for the purpose of determining whether he fell within the threshold set for payment of overtime in accordance with s 6 of the BCEA 1997. The Court found that, having regard to the social imperatives underpinning the Act, the legislature could not have intended a literal interpretation of the Act, which would have included overtime in the calculation og „gross earnings‟. This would lead to unfairness and uncertainty for the employee. A purposive interpretation was therefore adopted which excluded overtime from the calculations.

A word of caution, employers must not interpret this to mean, because an employee earns more than the threshold and is excluded from the sections mentioned above, an employee can be forced to work any number of hours of normal time that the employers requires, and that the employee can be forced to work any amount of overtime, including Sundays and public holidays without any remuneration or compensation whatsoever. That is certainly not the case.

Sections 7 and 48 of the Basic Condition of Employment Act covers all employees, and states:-

"**7**. **Regulation of working time. –** Every employer must regulate the working time of each employee –

(a) in accordance with the provisions of any Act governing occupational health and safety;
(b) with due regard to the health and safety of employees;
(c) with due regard to the Code of Good Practice on the Regulation of Working Time issued under section 87(1)(a); and
(d) with due regard to the family responsibilities of employees."

"48. Prohibition of forced labour. – (1) Subject to the Constitution, all forced labour is prohibited.

(2) No person may for his or her own benefit or for the benefit of someone else, cause, demand or impose forced labour in contravention of subsection (1).
(3) A person who contravenes subsection (1) or (2) commits an offence."

3. What does this mean

The meaning of the exclusion is purely and simply that an employee earning above the threshold cannot demand to be paid for overtime worked or for excessive hours worked, as he or she has no legal entitlement to demand such payment.

The employer cannot force the employee to work overtime simply because the employee is not in a position to demand compensation for it. Section 48 of the Act protects the employee against forced labour.

The employee still has the right to refuse to work in excess of normal time and refuse to work overtime if the employer is not prepared to compensate.

The situation therefore is, that employees earning above the threshold must negotiate their normal working hours and overtime hours with the employer, and they must negotiate the rate of pay or compensation for overtime hours worked.

This also applies to the so called senior managerial employee.

4. Implementation

Employers who wish to invoke the above must tread warily, for due regard must be had for the provisions of any existing contract of employment, which may entitle the employee to provisions that in

terms of the above are now excluded. Should this be the case, the terms of the employment contract will prevail, unless the employer and employee have negotiated a new contract of employment incorporating the exclusions, with due regard to sections 7 and 48 above.

Any unilateral implementation of the above by employers can be seen as a repudiation of the employment contract by the employer, and the employee will be able to institute proceedings for an unfair dismissal dispute, bearing in mind the employee‟s constitutional right to fair labour practices.

In *ERASMUS & OTHERS v SENWES LTD & OTHERS (2006) 27 ILJ 259 (T)* the Court held that where a contract of employment provided that the employer could amend terms without notice to or consent of employees, the employer‟s power to amend its own contractual obligations was not unfettered – employees‟ constitutional right to fair labour practices – Court to enforce rather than to invalidate contractual obligations. Although this case deals with the employer subsidising medical aid to retired employees, the principle that an employer may not unilaterally implement changes to terms and conditions within an employment contract, applies.