Exchanging public holidays could increase South Africa's productivity

By Johan Botes

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South Africa's ranking on apparent labour market inflexibility (129th out of 138 countries according to the World Economic Forum Competitiveness rankings 2016/2017) suggests that businesses perceive South Africa to be a rigid operating environment.

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Is this justified and can employers limit their exposure to the cost inherent in paid public holidays?

A foreign business executive recently visiting our shores expressed surprise at the number of public holidays enjoyed by South Africans. With four public holidays, in short succession in April, one can appreciate his amazement. Companies must contend with four consecutive weeks reduced to four-day weeks during April and May 2017, wreaking havoc on productivity and throughput.

Many countries have more public holidays

South Africa guarantees its citizens at least twelve public holidays per year. An average of one public holiday per month does not seem extravagant, or does it? Sri Lanka appears to be the undisputed world champions of public holidays with 25 public holidays per year.

Propping them up in second place, with a respectable 21 public holidays per annum, is India. It comes as little surprise those Scandinavian bastions of labour force protection, Sweden (15) and Norway (13) grant employees significant numbers of public holidays. Some of the countries providing the highest number of public holidays are not those that would regularly spring to mind, including Colombia and the Philippines (18), Thailand, Turkey and Pakistan (17) and, joining Sweden on 15 days, Japan, Malaysia, Argentina and Lithuania. Even South Koreans get a generous allotment of 13 days per year.

It thus seems that South Africans do not enjoy significantly more time off due to statutory public holidays than colleagues in many other jurisdictions do.

However, when faced with an economy that is being challenged on many fronts, some businesses can ill afford to absorb the cost of paying employees for an additional day where they are not expected to work (or to pay them double wages where the employees indeed work on the public holiday). When one sees the number of businesses downsizing, relocating operations to other jurisdictions or closing their doors, the harshness of the realities facing businesses is driven home. For those organisations that have to make tough calls on continued viability and justifying their labour bill or loss in productivity, there may be some reprieve.

Reviewing appropriate Acts

The answer could lie in reading together the obligations and flexibility permitted in both the Basic Conditions of Employment Act (BCEA) and the Public Holidays Act (PHA).

Every employee is entitled to the public holidays published in the PHA (section 5(1) of that Act). Employees are also entitled to remuneration for the public holidays (section 5(2) of the PHA and section 18(2) of the BCEA).

- Where the employee does not work on a public holiday (where the day falls on what would otherwise have been a normal working day), the employee remains entitled to payment for that day. In essence, an employer may not deduct a day's wages from an employee's remuneration merely because the employee did not work because the day was a public holiday.
- Where the employee works on a public holiday (and that day would have been a normal working day) the employee is typically entitled to double normal wage for that day.

The company is thus faced with a situation where it either forfeits the productivity of the employee for that day (and pays normal wage for the public holiday) or receives the benefit of the employee's service, but pays double for it. The phrase Hobson's Choice springs to mind…

Exchanging the day

However, an oft forgotten section of the PHA may unlock some relief for embattled employers.

In terms of Section 2(2) of the PHA, an employer and employee may agree to exchange a public holiday for any other day. Thus, an employee who does not wish to celebrate Christmas may thus exchange that public holiday for another day that have some significance to the employee. The employee would thus work on Christmas Day, at normal remuneration, but would be entitled to take off a day to celebrate Diwali, Rosh Hashanah or another day of significance to the employee or community. The employer would then treat the substitute day as a public holiday for the employee.

Thus, the employee would not be required to attend work on that day and will receive normal remuneration for that day. Should things change and the employer expect the employee to work on this substitute day, the employer would have to pay the employee double for the work done on that day.

Employers could seek to obtain the employee's consent to exchange a public holiday (listed in the PHA) for another day where the employee would ordinarily work. The parties would agree that the employee would work on, say, Workers' Day, but exchange that public holiday for a normal working day, but at a time suitable to the employer's business operation. The employer's operation may require more hands on deck on May Day than, for example, Gin Day (10 June 2017, regrettably not celebrated in South Africa).

The value in this arrangement is that the employer can stagger the impact of either lost production or increased cost occasioned by employees working on public holidays provided the employees agree to exchange the public holidays.

Organisations with 24/7/365 operations could benefit from an agreement allowing them to let employees exchange public holidays for periods during which the business experiences lulls in production or undergoes seasonal maintenance. Considering how jealously some employees guard their public holidays, obtaining their consent for this exchange may be easier said than done. However, prudent employers may wish to insert wording to this effect into their employment contracts for new hires to allow flexibility when this is required at a later stage.

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