A prescription for **PUBLIC HOLIDAYS**: A Mixed Blessing!

Gerald Jacobs

“Oh no! Not another public holiday this month!” moaned Charlie to his all-enduring wife Mona (Oh yes!...role reversal for a change), tearing out what little grey hair remained (of his, not hers). “Are they meshuge? (Sesotho for “mad” – as in Lesotho Highlands Mad Cow Disease). How am I supposed to run a successful business when every other day is a public holiday? How many more are there this year!? (1. How many public holidays actually are there annually in South Africa, when and what are they?) And they always seem to be smack bang in the middle of the week, this one coming up too is no exception. I am definitely going to swap this for some other day!”

(2. Is it legal to swap public holidays for other days? Do you need permission?)

“What’s more,” he continued “the law is no help. Apparently staff must even get paid if they don’t work (3. Must you really pay staff if they do not work a public holiday?) And although I can force them to work (4. Can you force an employee to work a public holiday?) it costs me an arm and a leg – actually, make that two arms and two legs because it’s always double pay or double time off.”

(5. Is it always double pay for working a public holiday – and is that double daily pay or simply double pay for the actual hours worked? 6. Can you legally give double time off for work on a public holiday instead of paying?)

“Wait! There’s more...” he said stopping Mona in her tracks as she tried to disappear unobtrusively. “As if they don’t get enough time off on public holidays, my staff – bless them (for we are talking about holy days... or at least that was what they all were originally) – also want their own religious holidays (or at least those which aren’t official religious public holidays) as extra paid time off too!” (7. Must you give extra time off for religious holidays? Paid? If you don’t, can you be accused of unfair discrimination on religious grounds?)

“And, how is this for chutzpah? (Sesotho for “cheek” – usually also exposed in the Lesotho Highlands by men wearing traditional loincloths). My manager also wants to be paid for public holidays now! He talks about human rights. I talk about human wrongs – his bankrupting me, his boss. How am I supposed to make any profit? Over my dead body will I pay him extra! (8. Does Charlie have a death wish, or does he not have to pay his manager for public holidays? 9. If his manager is excluded, are others perhaps?)

“And to top it all, if it’s not already generous enough that a public holiday on a Sunday becomes a public holiday on the Monday, some judge has now decided that there are actually 2 public holidays, the Sunday and the Monday, and I must pay extra for not just one, but both days if they work both! More arms and legs!!

(10. Can this be right?)

“Finally, I have this one member of staff who is more than happy to work each and every single public holiday year in and year out. (11. Is this legal or must you give him some public holidays?)

“The only trouble is that on the last occasion when he promised to pitch, he didn’t! My question is: can I give him a double warning because public holidays are double!”

You be the judge!

**Answers:**

1. How many public holidays are there annually in South Africa, when and what are they?

According to the Public Holidays Act 36 of 1994 they are:
In addition to these 12, the State President may declare any other day to be a public holiday, which he does from time to time, such as for elections. Interestingly, South Africa ranks among those countries internationally with the highest number of public holidays.

Finally, while it is to be noted that every employee is entitled to at least these 12 paid public holidays, there can be an entitlement to even more “public” holidays (as opposed to annual leave) by agreement with an employee in the contract of employment! For example, that employee’s religious holidays.

(See question 7 below)

2. Is it legal to swap public holidays for other days? Does the employer need permission?

The Public Holidays Act says that a public holiday is exchangeable for any other day which is fixed by agreement or agreed to between the employer and employee.

“Fixed by agreement”, for instance, would be in an agreed contract of employment which is usually negotiated between the parties before employment starts. However, in the absence of such an agreement (verbal but preferably written), it is clear that the employer cannot unilaterally decide to exchange a particular public holiday, but must do so in agreement with each employee. In reality, this means that employees have the power to say no. Or if only some of them say no, the employer is forced to consider whether it is operationally feasible to operate the business on the day which is not a public holiday with only those employees who agree to the exchange. (Democratically speaking, perhaps it can be agreed that the will of the simple majority would prevail in the event of no total consensus.)

No permission is needed from the Department of Labour for an exchange.

3. Must the employer pay staff who do not work on a public holiday?

Yes. Anyone who is an employee on a public holiday is entitled to be paid, even if they do not work. This includes a temporary employee. The amount paid must be at least as favourable as that in the Basic Conditions of Employment Act, which specifies payment of their ordinary daily wage.

4. Can the employer force an employee to work on a public holiday?

No. The employee must agree to work on a public holiday. This agreement need not be in writing. If this is a signed written agreement in an employment contract then, arguably, the employer can try to demand that the employee work on a particular public holiday, as there has been prior agreement in writing. Nevertheless, even in that situation, short of going to the employee’s home, handcuffing the employee and dragging him to work, the employer cannot actually force an employee to work on a public holiday if they choose not to do so! The employer’s remedy would be to consider dismissing for operational requirements (“retrenching”) – i.e. the business requirement to operate on all or some public holidays – the employee who consistently refuses to work public holidays, despite contractual agreement. In such a case, the employer could argue not to have to pay severance pay because continued employment is offered on condition that (some or even all, depending on what was agreed) public holidays are worked in future.

5. Is it always double pay for working a public holiday – and is that double daily pay or simply double pay for the hours actually worked?

If an employee works on a public holiday which falls on a day on which that employee would ordinarily work, the employer must pay at least double the employee’s ordinary daily wage, or if it is greater, double the daily wage plus “the amount earned by the employee for the time worked on that day”.

Let’s look at an example to illustrate what this means: assume the employee works Monday to Friday, a nine-hour day, at R10 an hour. The employee’s ordinary daily wage is R90. Assume, further, that a public holiday falls on the Wednesday (smack bang in the middle of the week... to quote you know who) and the employee does work. There are a few possibilities:

- The employee works less than nine hours, say 3 hours. He must nevertheless be paid R180, however few he may work!
- The employee works exactly 9 hours. He must be paid R180
- The employee works more than nine hours, let us say 12 hours (the maximum hours permissible by law on any day). He must be paid R180 plus his ordinary hourly wage for the three additional hours – not double his ordinary hourly wage for the three additional hours. This means the employee would get paid R180 plus 3 hours at R10 per hour (not double at R20 per hour), totalling R210.

If, however, an employee works on a public holiday on which the employee would not ordinarily work, the employer must pay the employee’s ordinary daily wage plus the amount earned by the employee for the work performed that day.

Using the same basic facts, let’s illustrate what this means with an example:

Assume the public holiday falls on a Saturday. The employer must pay the ordinary daily wage of R90. In addition the employer must pay “the amount earned for the work performed.” The law specifically does not say “double” the amount earned for work performed.” This means that the ordinary hourly rate of R10 an hour will be

| New Year’s Day  | 1 January |
| Human Rights’ Day | 21 March |
| Good Friday | Friday before Easter Sunday |
| Family Day | Monday after Easter Sunday |
| Freedom Day | 27 April |
| Workers’ Day | 1 May |
| Youth Day | 16 June |
| National Women’s Day | 9 August |
| Heritage Day | 24 September |
| Day of Reconciliation | 16 December |
| Christmas Day | 25 December |
| Day of Goodwill | 26 December |
applied to the number of hours the employee worked that day.

Now follow a few possibilities:
- The employee worked 3 hours. He must be paid R90 + R30 = R120
- The employee worked 9 hours. He must be paid R90 + R90 = R180
- The employee worked 12 hours. He must be paid R90 + R120 = R210

Conclusion: Only if an employee agrees, and only if the employee works on a public holiday which does not fall on his ordinary working day, and only if he works fewer than his ordinary daily hours does it cost the employer less for that public holiday worked.

6. Can you legally give double time off for work on a public holiday instead of paying?

No. The law says the employer “must pay”. There is no time off as compensation option, as for example for overtime or Sundays worked. However, if an employee does agree to accept time off instead of payment, the amount of time off is premium time off, not 1 for 1, and should be calculated on the same principles as set out in question five above.

7. Must you give extra time off for religious holidays? Paid? If you don’t, can you be accused of unfair discrimination on religious grounds?

No, the employer does not have to give extra time off for religious holidays, in addition to Public Holidays, whether this is paid or unpaid. This should ideally be discussed during the job interview. If the applicant has special religious requirements which are important to him, you could reasonably expect him to raise this. If he does not, there is no obligation on the employer to raise it.

If he does raise it at the job interview, there is no legal obligation on the employer to grant extra religious holidays beyond those specified in the Public Holidays Act. Most employers allow an employee to take a day’s annual leave here and there as paid religious holidays, or indeed perhaps any event in their lives of special significance (even though annual leave is supposed to be for the purpose of annual leave only!)

If, on the other hand, the employer closes for religious reasons at specific times of the year beyond those in the Public Holidays Act, it would be wise at the interview stage to advise the applicant accordingly – and tell him that these additional days would be expected to come out of his paid annual leave, and stipulate that in writing in any offer of employment.

While there is nothing to really stop an applicant or employee making accusations, and the employer certainly could be accused of unfair discrimination on religious grounds, such a claim would fail as the employer is acting both lawfully and reasonably. Clearly, a job applicant or employee feeling this strongly about special religious holidays should perhaps be seeking an employer who shares the same views and could accommodate his special and unusual requests for additional holidays – paid or unpaid.

8 & 9 Who is excluded for payment on public holidays?

Senior managers, employees who work less than 24 hours a month, and sales staff who travel to customer’s premises and regulate their own hours of work.

Senior managers are those defined by law as earning above a certain financial ceiling laid down by the Minister of Labour from time to time. However, even employees earning below this financial ceiling may in law be “senior managers” (irrespective of their job title) because they have all four of these authorities: authority to hire, authority to discipline, authority to fire and authority to represent the company externally. The law says that senior managers are excluded from all working time provisions like ordinary hours of work, overtime, meal intervals, rest periods, Sunday work, and also payment for public holidays – by virtue of the fact they have senior authority and are also usually highly remunerated.

10. Does the law which says that if a public holiday falls on a Sunday then the following day – the Monday – is a public holiday, mean that the Monday is a public holiday instead of the Sunday, or that the Monday is another public holiday in addition to the public holiday on the Sunday?

Sunday 24 and Monday 25 September 2006 would be an example.

Despite the specific list of 12 paid public holidays in the Public Holidays Act, and despite the custom and practice over the last 16 years since the Act came into force of everyone treating the Monday as the public holiday instead of the Sunday, a judge in the Johannesburg Labour Court, in the case of Randfontein Estate Limited vs National Union of Mine Workers, most unfortunately recently decided that what the Public Holidays Act meant was that the Monday was a public holiday in addition to the Sunday!

For employers, as we have seen in the questions and answers above, this now means (unless the mining employer takes the matter on appeal and succeeds) that:
- employers can’t force staff to work either the Sunday or the Monday without agreement
- employees, if they agree to work, will be entitled to extra pay for either day (or both days if they work the Sunday and Monday)
- in most cases this will cost the employer double if they do work
- it will cost the employer an extra ordinary day’s pay even if staff don’t work

11. Is it legal for an employee to work every single public holiday?

Yes. The Public Holidays Act says that every employee is “entitled to” at least the 12 paid public holidays. We have seen that the choice is the employee’s as to whether he wishes to work on any or all public holidays or not. If he freely chooses to do so, and is paid according to the legal formula, the employer is not acting illegally or unfairly in any way, nor is the employee.