



## DEFINING REMUNERATION PERPLEXES EMPLOYERS

Regulation 691, which determines the definition and meaning of “remuneration” for the purposes of calculating the remuneration of employees under certain circumstances, was published on 23 May 2003. Its provisions became effective on 1 July 2003. These provisions created several questions and uncertainties among employers.

Prior to the implementation of these provisions, uncertainty often existed about the definition of remuneration for the purposes of payment of for example leave credit upon termination of service, the payment of severance pay at retrenchments and payment during annual leave. Employers followed various approaches, often resulting in inconsistent practices and unnecessary risks. Even before Regulation 691 became effective, the court found in terms of section 35(5) of the Basic Conditions of Employment Act in *NUFAW obo Mgijima & Others and Friedlein & Co (Pty) Ltd [CCMA 1731-01]* that an employer's contributions to an employee's provident and medical funds are included in "remuneration", while discretionary payments not related to working hours or work performance and allowances paid to employees, enabling them to perform their duties, are excluded from "remuneration".

The regulation attempts to address this situation by specifically referring to elements of payment that are included and excluded in the definition of remuneration, for the following purposes:

- the calculation of severance pay at retrenchment,
- pay-out of leave credit,
- payment of employees during annual leave, and
- payment of employees who are requested not to work during their notice period.

The regulation inter alia specifically provides for the inclusion of the following in the definition of "remuneration":

- a housing subsidy or allowance or accommodation received as benefit,
- a car allowance or the provision of a vehicle (unless it is merely provided to enable the employee to perform his work),
- any cash payments (except those expressly excluded by the regulation),
- employers' contributions to medical, provident and pension or similar funds, and
- employers' contributions to funeral or death benefits.

Excluded from the definition of "remuneration" are the following:

- any cash payment or payment in kind that enables the employee to perform his duties (for example an equipment or tool allowance or the provision of transport or the payment of a transport allowance in order to enable the employee to get to work),
- a relocation allowance,
- gifts or gratuities,
- payments in respect of profit-sharing schemes,
- discretionary payments not related to the employee's work hours or performance, and
- entertainment allowances and education or schooling allowances.

The value of payment in kind is determined by either the employment contract or a collective agreement, provided that the agreed value is not less than the cost thereof to the employer, or it is determined by the cost to the employer of providing the benefit.

Where payment fluctuates, for example in the case of an employee earning commission, remuneration must be calculated over a period of 13 weeks, or if the employee has been in employment for shorter than that, for such shorter period.

The regulation in question holds the following implications for employers: when severance pay is calculated when retrenching employees, or when someone is remunerated while he is on leave or when someone is dismissed or resigns, any pay must be calculated with reference to the above inclusions and exclusions. In other words, leave credit cannot be calculated with reference to "basic" salary only.

Similarly, in the case of the payment of the minimum statutory severance pay at retrenchments, namely one week's pay, the amount paid cannot be calculated on basic salary only, but must be calculated on the inclusive definition of remuneration as indicated above. It should be kept in mind however, that, should an employer pay two weeks' severance pay based on basic salary and the sum total thereof is equal to, or more than, one week's pay, statutory requirements are still being met.

Many employers are already applying the broader definition of remuneration. Others would probably find that larger amounts need to be paid out in the above cases than before.

Employers need to keep the following in mind:

- The term "remuneration" as defined applies only in respect of the statutory minimum payments under the Basic Conditions of Employment Act, namely 1 week's severance pay (remuneration) in the case of retrenchments and payment for 21 successive days' annual leave;
- Remuneration as defined therefore does not apply when calculating severance pay that exceeds the statutory minimum of 1 week's remuneration for every year of service rendered;

- Where an employer grants more than the statutory minimum of 21 calendar days' annual leave, the additional leave can be calculated or paid on the cash portion of the employee's remuneration, unless the employment contract states otherwise;
- When the employee takes annual leave, he is remunerated as usual (excluding the items listed as exclusions above). The principle is that the employee who is on leave should be in the same position with respect to remuneration as he would have been, had he worked during the leave period; and
- If the employee gives notice of termination of service and the employer requests him not to work during the notice period, the employer must still receive the same remuneration that he would have received had he worked during the notice period.

How is an employee on leave remunerated?

For the purposes of calculating payment for annual leave under section 21 of the Basic Conditions of Employment Act, the following items are *expressly included*:

- "any cash payments made to an employee, except those listed as exclusions in terms of this schedule".

Paragraph 2 of the Regulation provides for certain exclusions, none of which refer to a shift allowance or overtime remuneration for example. The general exclusion refers to "discretionary payments not related to an employee's hours of work or performance", which evidently does not include a fixed, permanent shift allowance and fixed-pattern overtime remuneration either. These items are consequently included in the definition of "remuneration" for the purposes of payment to an employee who is on annual leave.

The only question remaining is how the leave payment payable should be calculated? The answer is found in section 21(1) of the Act. Section 21 provides that an employer must pay an employee leave payment at least equivalent to what the employee would have earned for a period worked equivalent to the period of annual leave, calculated (a) at the employee's rate of remuneration immediately before the start of the annual leave and (b) in accordance with section 35.

In brief, this means that if the employee takes two weeks' leave, his leave payment is determined by his rate of remuneration (as defined above) during the two weeks before taking his leave. If he didn't work fixed-pattern shifts or overtime in this period, the calculation is based on the average worked over the preceding 13 weeks.