IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL
HELD AT CAPE TOWN

CASE NO: PSCBC233-20/21

PSA obo Mvune, S and 3 others **APPLICANTS**

and

Department of Health **FIRST RESPONDENT**

and

DPSA **SECOND RESPONDENT**

ARBITRATION AWARD

DATE OF ARBITRATION	:	28 June 2021
CLOSING ARGUMENTS	:	05 July 2021
DATE OF AWARD	:	08 July 2021
ARBITRATOR	:	I de Vlieger-Seynhaeve

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The matter was set down for a virtual arbitration hearing on 28 June 2021 through Zoom. Ms Hassan from the PSA, represented the applicants. The first respondent was represented by Mr Nene. The second respondent was represented by Ms Sehoana.

1.2 The applicant's representative stated that the facts were not in dispute and that the first respondent and the applicant were in the same venue sharing the equipment. The parties agreed to do a statement of case and then submit closing arguments in writing.

2. ISSUE TO BE DECIDED

2.1 The issue to be determined is whether the first respondent breached Resolution 1 of 2007 when it did not pay out the applicant's claim for overtime.

3. SUMMARY OF EVIDENCE/ARGUMENTS

Statement of case

3.1 The applicants are employed by the first respondent and are stationed at Clairwood Hospital. S Mvune and N Govender are drivers in the Systems Component. D Naidoo is a launderer in the Systems Component and SG Siyela is a staff nurse in the Nursing Component. The applicants had been requested to work overtime due to COVID19. The overtime was for certain periods between April 2020 and September 2020. It is not in dispute that they were requested to work overtime and that they effectively worked the overtime. The overtime was in excess of 30% which was approved. The overtime for the Systems Component was approved by the cash flow committee in May 2020. On 24 August 2020, the applicants lodged a grievance about the non-payment of overtime. A grievance hearing was held on 20 October 2020 which remained unresolved. The dispute was then referred to the PSCBC. The overtime worked was as follows:

S Mvume: June 2020 to September 2020: 171 hours (other) plus 60 hours, 40 minutes (Sunday) = total **231 hours and 40 minutes** worked.

N Govender: May 2020 to September 2020: 213 hours 45 minutes (other) plus 70 hours (Sunday) = total **283 hours, 45 minutes** worked.

D Naidoo: June 2020 to July 2020: 37 hours and 30 minutes (other) plus 36 hours and 30 minutes (Sunday) = total **74 hours** worked

SG Biyela: April 2020 to August 2020: Total **162 hours and 5 minutes** (other) worked.

Applicants' arguments

3.2 The issue is about the interpretation of the provisions of Resolution 1 of 2007 in so far as it relates to overtime payment. Reference was made to clause 9.1 of the Resolution. On 30 April 2020, the Head of Health issued Human Resource Management Circular No 16/2020 Approval of Overtime during COVID-19 Processes. Paragraph 6 states: "*The following staff is anticipated that they would be required to perform overtime above 30% of their salary, including drivers and nurses."* In paragraph 8, it further directed Hospital Managers, Heads of Institutions and District Managers "*Please ensure that approval documents are filed timeously before the execution of the overtime and that overtime attendance registers, calculation and payment documents are approved timeously."* The applicants had all completed and submitted the prescribed overtime claim forms to their respective supervisors. The specific hours of work for all relevant periods were also reflected in the overtime attendance registers which are kept by the respondent. It was the supervisor's responsibility to forward all relevant documents to Human Resources. If there was negligence on the part of the supervisors, the applicants cannot be held responsible for that. In terms of the provisions of the Resolution, the first respondent is obliged to pay.

3.3 The first respondent's representative stated that he is raising a point *in limine* because the matter had been referred prematurely to the Council. It is common cause that the applicants worked overtime. The applicants have not submitted their overtime sheet yet which is standard procedure. Not all internal structures for dispute resolution have been exhausted yet. The matter should therefore be dismissed.

4. ANALYSIS OF EVIDENCE AND ARGUMENT

4.1 I have considered all the evidence and argument, but because the LRA requires brief reasons (s 138(7)), I have only referred to the evidence and argument necessary to substantiate my findings and decision. It need to reiterate that this dispute is about the interpretation of a collective agreement. It does not fall within my jurisdiction to pronounce myself on the fairness of the Resolution nor is this an alleged discriminate dispute or a dispute about equal pay for work of equal value.

4.2 A dispute over the interpretation of a collective agreement exists when the parties disagree over the meaning of a particular provision and a dispute over the application of a collective agreement arises when parties disagree over whether the agreement applies to a particular set of facts or circumstances.

4.3 When interpreting collective agreements, arbitrators should follow the judgement of the LAC in *North-East Cape Forests v SAAPAWU & Others (2) 1997 (18) ILJ 971 (LAC): "A collective agreement in terms of the Act is not an ordinary contract and the context within which a collective agreement operates under the Act is vastly different from a commercial contract. Froneman DJP has indicated that the primary objects of the Act were better served by a "practical approach to the interpretation and application of collective agreements rather than by reference to purely contractual principles". This is not to say however that the ordinary principles of interpretation of contract are never appropriate when interpreting and applying collective agreements. In Northern Cape Forests, the Court merely stressed that the interpreter should ask the further question whether an interpretation yielded by these principles accords with the objectives of the LRA. The fact is that a collective agreement is a written memorandum which is meant to reflect the terms and conditions to which parties have agreed at the time that they concluded the agreement. The courts and arbitrators must therefore strive to give effect to that intention. Thus, the courts frequently apply the "parole evidence" rule - that is that evidence outside the written agreement itself is not generally permissible when the words of the memorandum are clear - when interpreting collective agreements."*

4.4 The first respondent's representative stated in his closing arguments that the matter was raised prematurely. I fail to understand why the first respondent did not raise this point during the arbitration hearing. A jurisdictional point cannot be made for the first time during closing arguments. During the arbitration hearing, the first respondent indicated that they did not dispute any of the facts and he did not raise any jurisdictional issues. I can therefore not entertain this issue as it should have been raised before or during the hearing. I however wish to state that the applicants went through the grievance procedure where the chairperson gave the first respondent 10 days to solve the matter, after which the matter remained unresolved. There is therefore no prematurity to the referral. It was further never disputed that overtime sheets had been submitted.

4.5 Clause 9.1 of the Resolution reads as follows: section 1.8: *Overtime on a Sunday or public holiday shall be 2x basic salary of the employee without the option of granting time off. All other overtime shall be 1,5X basic salary of the employee, without the option of granting time off.*

4.6 Regulation 49 (1) of the Public Service Regulations, 2016 determines:
"An Executive Authority shall compensate an employee for overtime worked if -

(a) The department has an approved written policy on overtime;
(b) the executive authority has provided written authorisation in advance of the work, and
(c) the monthly compensation for overtime constitutes less than 30 percent of the employee's monthly salary.

It was not disputed that the applicants were requested to work overtime and that overtime sheets were submitted. It was also not disputed that there was a policy nor that authorisation was given. In terms of the last requirement: An internal circular was issued on 30 April 2020 by Dr Tshabalala which approved the performance of overtime above 30%.

4.7 Seeing that all conditions were complied with, I find that the first respondent was indeed in breach with Resolution 1 of 2007 when it failed to pay out the applicants' claim for overtime.

5. AWARD

5.1 The first respondent did not apply Resolution 1 of 2007 correctly when it failed to pay out the applicants' claim for overtime. The first respondent must pay the applicants for the following overtime worked:

S Mvume: **231 hours and 40 minutes**
N Govender: **283 hours, 45 minutes**
D Naidoo: **74 hours**
SG Biyela: **162 hours and 5 minutes**

5.2 The payments must be made on or before 31 August 2021;

5.3 There is no order as to costs.

Signed at Cape Town on this 08 July of 2021

I De Vlieger-Seynhaeve
PSCBC Panelist