



ARBITRATION AWARD

Panellist/s: Karen Kleinot _____
Case No.: PSCBC347-22/23 _____
Date of Ruling: 28 July 2023 _____

In the matter between:

PSA obo R Rampersad _____

(Union / Applicant)

and

Dept of Health - KZN _____

(Respondent)

Details of the hearing

- 1 The matter was scheduled for arbitration on 14 July 2023 and held on a virtual platform, Zoom. The parties attended, Mr. I Moloo a trade union organizer, represented the applicant. Ms. Mlotshwana represented the respondent. A directive was issued requesting parties to provide a stated case by 21 July 2023, as the matter to be determined was narrow. Both parties submitted a stated case.

Issue in dispute

- 2 The issue that must be determined is the interpretation and application of Resolution 1/2007 in respect of whether the Applicant's overtime stands to be paid.

Survey of the submissions

Applicant's case

- 3 Applicant submits that the respondent is in breach of clause 9.1 of the Resolution.
- 4 The KZN department of Health comprises eleven districts, and provincial hospitals function within the districts. The eThekweni District is one such district, and Wentworth Hospital resorts under this district.
- 5 The Applicant is a pharmacist working at the pharmacy situated within the Wentworth Hospital. Normal working hours are from 07h30 to 16h00 Monday to Friday. The Applicant does not normally work over weekends.
- 6 Applicant is claiming to be paid for the overtime hours that were worked during the weekend of 9 and 10 April 2022.
- 7 Clause 9.1 reflects that "Overtime on a Sunday of a public holiday shall be x 2 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. This provision excludes employees on commuted overtime.
- 8 Clause 9.3 "The mechanisms and conditions for averaging of maximum overtime hours shall, where required, be determined in the respective bargaining council. This excludes employees on commuted overtime."

- 9 These clauses find expression in the Public Service Regulations Part 2 Remuneration and Other Benefits. In terms of Regulation 49 (1) An executive authority shall compensation an employee other than a member of the SMS for overtime work if-(a) the department has an approved written policy on overtime, (b) the executive authority has provided written authorization in advance for the work; (c) the monthly compensation for overtime constitutes less than 30% of the employee's monthly salary or the limitation determined by the Minister, whichever is the lesser."
- 10 The hospital was administering COVID-19 vaccines over the weekend as part of the Vooma Weekend Campaign. Wentworth Hospital received a directive from the eThekweni Health district informing the Gateway Clinic of a Vooma Weekend that was to take place on Saturday 9 and Sunday 10 April 2022.
- 11 The ONM manager submitted urgent plans reflecting the sites, and dates, mobilization and demand, creation, team leaders and supervisors by 5 April 2022.
- 12 The campaign was executed over the weekend of 9 and 10 April 2022.
- 13 Overtime claims were submitted to the HR office on 11 April 2022 as previous standards campaigns after Vooma Weekend Campaigns, which included the Applicant's claim. This claim was misplaced by the hospital and a second claim for the same dates as submitted on 7 December 2022.
- 14 After a previous Vooma Weekend, staff had been paid for the overtime worked without being asked to write a submission to request to participate in the Vooma Weekend campaigns.
- 15 Only after 15 June 2022 did the applicant realize that her overtime was not paid. When enquiries were made by Ms. De Palo about such claim, Mr. Mgoza advised that it was discovered that staff had previously been paid without following procedure. Ms. De Palo was requested to apply post facto for approval.
- 16 The overtime claims have been in the HR office since April 2022 and were not attended to. The hospital could not disregard the request as the directive came from the District Office for the Gateway Clinic and Pharmacy staff to partake in the 9, 10 April 2022 weekend vaccination campaign.
- 17 An appeal was made for the Gateway Clinic and pharmacy to be paid overtime for the dates 9, 10 April 2022.

- 18 COVID-19 had and still has an underestimated impact on the world. It was necessary and important for the respondent to conduct vaccination campaigns.
- 19 Applicant was directed by the pharmacy manager Mrs. Z Ebrahim to work the overtime. The manager acted in accordance with the directive from the hospital and the manager conceded that she assumed the necessary approvals were in place.
- 20 Circular 82 of 2018 issued by the respondent reflects that all applications for overtime must be on the prescribed form. Applicant has complied with such.
- 21 Secondly that written authorization must be obtained prior to the commencement of overtime. Retrospective application should only be considered if there are exceptional circumstances. Reasons must be provided as to why it was impossible to obtain prior written authority within 24 hours of commencement of overtime. It is the responsibility of management to ensure that prior authorization is obtained before they instruct employees to work overtime. The Vooma Weekends should be considered as exceptional circumstances. The hospital could not ignore the directive issued by the District Office.
- 22 Applicant referred a grievance this was attended by Mr. Moza an HR manager. The statement by the line manager issued in 2023 a year after the application there is no evidence that this was ventilated at the grievance hearing. The allegation that the applicant was required to issue stock and return later and receive the unused vaccines from placement in cold storage. The applicant was not alerted to the time that clinic staff would return. This was not raised at the grievance hearing.
- 23 Applicant worked 5 hours and 10 minutes on Sunday and 6 hours and 10 minutes on Saturday. Sunday rate was R964,07 per hour and R506,14 for Saturday. Applicant worked for 5 hours for Sunday and is owed R4820,35. Applicant worked 6 hours on Saturday and is owed R3036,84. The total amount owing to the Applicant for the overtime worked is R7857,19.
- 24 It was submitted that the respondent is in breach of Resolution 1/2007 and that interest is applicable at the prescribed rate.

Respondent's case

- 25 The matter concerns the non-payment of overtime for the weekend of 9 and 10 April 2022. The Department of Health sent an email to the eThekwin district institutions informing them about the Vooma weekend that was scheduled for the 8-10 April 2022 and advising them to submit their vaccination sites. A further

email was sent on 4 April 2022 reminding institutions to submit their plans which included sites, dates, mobilization and demand creation team leaders and supervisors by no later than 5 April 2022. This email was forwarded to the relevant departments.

- 26 Respondent submits that Ms. Rampersad has not proven that she performed the alleged overtime. In terms of the policy as well as circular 82 of 2018 the following are prerequisites to support a claim for overtime; written authorization prior to the commencement of overtime must be obtained. Retrospective applications should only be considered if there are exceptional circumstances. These reasons must be stipulated on the application form as to why prior authorization could not be granted and the application must be submitted within 24 hours.
- 27 The request to perform overtime must be on the prescribed form and presented to the institutions cash flow committee for the availability of funds, recommendation from the head of the institution/CEO and approval from the District Chief Director must be obtained. Only once the overtime has been approved are the employees informed of such and can perform overtime. The overtime claim forms are to be submitted by an employee on a monthly basis and no later than five working days after the end of the month or period of overtime.
- 28 In this case there was no prior authorization of overtime that was obtained. There was sufficient time to do so. The fact that the email came from the District Office did not automatically grant authority to perform overtime.
- 29 The request for overtime was submitted three months late. On the submission the categories of staff who were utilized for that campaign did not include a pharmacist who worked the Vooma weekend. The Vooma weekend vaccination roll out micro plan that was submitted did not reflect the applicant's name.
- 30 The applicant did not submit the necessary supporting documentation for the claim of overtime and was not paid.
- 31 Consequently, it was argued that the applicant's claim stands to be dismissed.

Analysis of submissions

- 32 The issue that must be determined is the application and interpretation of Resolution 1 of 2007 in terms of payment of overtime. The dispute was referred in terms of S24 of the Labour Relations Act, an interpretation and application dispute. According to Grogan (Workplace Law tenth edition,2012) "the

constitutional injunction that where possible, all legislation must be interpreted to give effect to fundamental constitutional rights, rather than limit or exclude them” It is important to ensure that an absurdity does not result.

- 33 In **National Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)** the court held that “Interpretation is the process of attributing meaning to the words used in a document, be it legislation or some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness like results or undermines the apparent purpose of the document. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document”.
- 34 The courts have indicated that a dispute about an interpretation and application of a collective agreement can only exist whether parties either disagree over the meaning of a clause or whether the clause applies or not. That is a dispute about the application of a collective agreement requires at a minimum a difference of opinion about whether it can be invoked and whether it is applicable at all. That is whether the activity which gives rise to the controversy is covered by the collective agreement and whether the collective agreement applies to the facts in question and the manner in which the agreement is applied which includes non-compliance. (**HOSPERSA obo Tshambi v Dept of Health, Kwa Zulu Natal (DA1/20150 [2016] ZALAC 10 and IMATU obo Bubb & Others v SALGBC [2012] BLLR 334 (LAC)**)).
- 35 In **M U Tabane v I De Vlieger-Seynhaeve NO, PSCBC and the Department of Justice and Constitutional Development, C27/15** the learned judge stated that the purpose of section 24 of the LRA is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to apply its terms either correctly or at all. The principles are trite as stated in *Western Cape Department of Health v Van Wyk and Others* “a) *When interpreting a collective agreement, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract, and he/she is therefore required to consider the aim, purpose and all the terms of the collective agreement. b) The primary objects of the LRA are better served by an approach which is practical to the interpretation of such agreements, namely, to promote, effective, fair, and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.*”

- 37 There is no dispute about the meaning of the words as contained in clauses 9.1 and 9.3 or even regulation 49. There is a dispute as to whether the Applicant is due the overtime performed. The respondent contends that there was no authorization for such overtime and that the applicant did not submit the necessary documents for post facto authorization of the overtime. From the submissions and documentation submitted by both parties, it is clear that pre-authorization of the overtime was not obtained.
- 38 It was argued that the vaccination roll- out constituted an exceptional circumstance as to why pre-authorization could not be obtained. It is common cause that the directive was issued on 1 April 2022 and that a follow up email requesting the plans be submitted. It appears that this was done as per the documents. The vaccination roll out was part of a planned roll out. Had this occurred in 2020 or 2021 then the argument that this constituted exceptional circumstances would have been supported but not in 2022 when this was part of an established roll out. The timelines for executing the program were tight, and it is clear that this impacted on the obtaining of authorization. However, this was an instruction by the District Office and could not be ignored nor could the roll- out be delayed. There was an imperative for the hospital to act.
- 39 The documents reflect that a post facto application was made for overtime on behalf of the applicant and others. An attendance register was submitted. The plan was submitted but does not reflect the pharmacist. The letter from Ms. Rampersad's line manager reflects that she believed that relevant authority had been obtained and that Ms. Rampersad was on standby and had been briefed about the protocol. That is to issue and receive the returned vaccines and adhere to the cold storage protocol. The manager mentions that Ms. Rampersad was not required to remain on the premises. It was argued that Ms. Rampersad had to remain on the premises as she would be unaware as to when the vaccines would return. This is accepted in that it is possible that staff would return during the day or earlier in the day and as such her presence would be necessary.
- 40 Respondent declined the submission for application of overtime payment as further documents were not submitted. There is a list of items on a letter dated 26 April 2023, such as information as, who was leading the team, supervising the process, and capturing systems of 09 April 2022 and 10 April 2022. *“Different roles and responsibility played by team members who physically participated on site during vaccinating time. Statistics collected for patients who were vaccinated. Proof of EVDS as evidence that all people who were vaccinated were captured on the system. Comprehensive report on protocols followed during performance of this*

vaccination program." From the documents submitted by both parties and the application made for post facto authorization this information is missing.

- 42 It was argued that the claim was not submitted timeously. The information provided supports the applicant's contention that the claim was submitted timeously but that the hospital did not act immediately on the claim. The fact that the hospital paid other staff, albeit incorrectly, does not add to the applicant's case.
- 43 From the documents it appears that Ms. Rampersad was requested to be on standby by her manager who believed that the necessary authority was in place. The attendance register reflects that Ms. Rampersad worked the hours. That there is a deficit in information pertaining to the EVDS does not create grounds for declining the claim, as this is not part of documentation that is required for an application for overtime. What is required is the overtime form, the attendance register for the overtime worked and the application for performance of remunerated overtime. These were submitted.
- 44 Ms. Rampersad had demonstrated that the overtime was worked, an instruction was given to work such overtime, a claim form was submitted as well as a register. Even though the post facto application did not meet the criteria for exceptional circumstances, the roll out of the vaccination program was an instruction from the District Office and could not be delayed or ignored, it was given with a short lead time to prepare, the manager believed authority had been obtained, and taking a purposive approach to the dispute, these factors tilt the matter in favour of granting the overtime to Ms. Rampersad.
- 45 Overtime of 5 hours and 10 minutes on Sunday and 6 hours and 10 minutes on Saturday. Sunday rate was R964,07 per hour and R506,14 for Saturday. The applicant worked for 5 hours for Sunday and is owed R4 820,35. The applicant worked 6 hours on Saturday and is owed R3 036,84. The total amount owing to the Applicant for the overtime worked is R7857,19.

Award

- 46 The Respondent has not complied with Resolution 1 of 2007.
- 47 Overtime for the 9 and 10 April 2022 is due to Ms. Rampersad the amount due is R7 857,19 (seven thousand, eight hundred and fifty-seven rand and nineteen cents only).
- 48 Respondent is directed to pay such overtime on or before 25 August 2023.

A handwritten signature in black ink, appearing to be 'K Kleinot', written in a cursive style.

Signature:

Panelist/s: Karen Kleinot