



ARBITRATION AWARD

Panellist/s: Karen Kleinot _____
Case No.: PSCB152-18/19 _____
Date of Award: 9 February 2021 _____

In the ARBITRATION between:

PSA obo Mr. L Moemedi _____
(Union / Applicant)

And

Department of Health - NC and Department of Public Service Administration _____
(Respondent)

Union/Applicant's representative: Mr. M Selabe _____
Union/Applicant's address: _____

Telephone: _____
Telefax/email: _____

Respondent's representative: Mr. Pudikwabeka _____
Respondent's address: _____

Telephone: _____
Telefax: _____

DETAILS OF THE ARBITRATION

1. The matter was set down for an arbitration on 27 January 2021. The arbitration took place virtually on the zoom platform. Both parties attended, Mr. Selabe a trade union official from the PSA represented the member, Mr. Moemedi. Mr. Pudikwabeka represented the respondent. Ms. C Sekgoele from the DPISA, was also in attendance as was Mr. Koopman. Parties agreed to submit closing arguments by 5 February 2021.

ISSUE TO BE DECIDED

2. The issue to be decided is the interpretation and application dispute in terms of Resolution 1 of 2007 as it relates to overtime payment.

BACKGROUND TO THE DISPUTE

3. Mr. Moemedi at the time held the position of HR practitioner in the EPMDS unit. This claim relates to overtime from the period 6, 7, 8 & 9 March 2016 and 4, 5, 6 & 7 April 2016 as well as 8 May until 31 May 2016 and 1 June to 15 June 2016. The overall amount owed is R22 554, 00.
4. A settlement agreement exists but the terms of the settlement agreement were not adhered to by either of the parties. An attempt was made to have it made an arbitration award but this was declined. The matter was then re-enrolled.
5. From a brief discussion and the opening statements it is apparent that the crux of the dispute is whether the overtime was authorized or not.

SURVEY OF EVIDENCE AND ARGUMENT

6. Two witnesses were led; Mr. Moemedi and Ms. Fritz.
7. **Mr. Moemedi, the HR practitioner testified:** he was tasked with ensuring that the moderations for various districts were completed. This necessitated travelling to these districts to make sure the documents were on file. Mr. Tsholo the acting director at the time gave him a verbal instruction to ensure that the moderations were finalized. These relate to performance appraisals and conditions of service.

8. Mr. Moemedi stated that he did not have documentary proof that the overtime was pre-approved. He indicated that this was the practice in the Department at the time. Each year as per the conditions of service overtime submission was made and pre-approved. Mr. Moemedi stated that he was aware that the overtime was pre-approved for the period May through to June 2016.
9. The persal records reflects that his colleagues within the department were paid for overtime. His colleague Mr. Van Neels was paid his 77 hours of overtime which was performed in assisting the finalization of the Employee Performance Development Management System (EPDMS).
10. When the issue of overtime was raised with Mr. Tsholo, he was informed that he needed to split the hours as the overtime claimed was excessive. Mr. Moemedi, stated that he did not do so as he was tired and going on leave. He left the matter with Mr. Tsholo. Mr. Tsholo acknowledged that overtime was performed. The policy at the time stated that only 30 hours of overtime could be worked per month. Mr. Tsholo wanted him to break down the hours but this was difficult as there are vast distances travelled in the province. Even though the policy stipulates that an employee cannot exceed 30 hour of overtime per month, the finance department pays the overtime of more than 30 hours per month.
11. Mr. Moemedi confirmed that he did not have written pre-approval as per the policy. He agreed that the policy stated that before overtime could be worked, the responsible manager determined if overtime was necessary and budgeted for such, thereafter he/she would submit in writing to the MEC the overtime for approval. No overtime can be worked without approval. However, he stated that there was nothing contained in the policy that indicated that indicated that he was forced to obtain preapproval for overtime.
12. **Ms. L Fritz the Acting HRA director testified:** that she worked with Mr. Moemedi in the past and they interact throughout the day. Ms. Fritz confirmed that she worked in the EPDMS unit and reported to Mr. Tsholo. Ms. Fritz stated that she was aware that Mr. Moemedi worked overtime in all five districts in terms of moderation and evaluation, and ad hoc responsibilities in terms of the EPDMS. The memorandum from Mr. Tsholo specifies the roll out of the EPDMS and that the moderation schedule for the year 2015 and 2016 be completed and implemented. Mr. Moemedi was responsible for all EPMS and moderations. Ms. Fritz stated that there are two staff members performing 9000 employee moderations. Annually all the districts are visited by Mr. Moemedi and given the distances and number of employee moderations, overtime is worked. In 2016 she was involved in the EPDMS project and worked as team. Mr. Tsholo gave the instruction.

13. During cross examination Ms. Fritz agreed that the memorandum did not constitute an approval, however in terms of the HR process, approval had already been obtained as it was loaded on the persal system. This was the practice in 2016, there was no pre-approval obtained. However, this did change in 2016 or 2017 when pre-approval was obtained from the director, however, she could not recall when this became the practice. Overtime was claimed for May, June, July 2016 and paid as there was approval in terms of the project.
14. Ms. Fritz agreed that there was a policy pertaining to overtime, it had been updated in 2014 and applied to the Northern Cape. Further that overtime that exceeds the prescribed working hours must be authorized by the HOD. Although the policy was in place it was not practiced within the Department as prescribed hours were exceeded and paid for. Ms. Fritz explained that if the HOD approved the excess prescribed this would reflect on the persal system. The documents show that the persal system had a pool of overtime that was approved and could be used. Ms. Fritz explained that this was overtime approved and budgeted for.
15. Mr. Pudikwabeka, elected not to present any evidence. In terms of the argument tendered Mr. Pudikwabeka argued that it was crucial to obtain written authorization for overtime, without such Mr. Moemedi's claim stands to fail. That Mr. Moemedi did not meet the requirements for overtime. The Public Service Regulations implemented on 1 July 1999 places an obligation heads of department to properly manage and control overtime. It was argued that the system regarding overtime was open to manipulation and the control measures are not applied. Managers extended the limit of overtime hours per day. Normally overtime is scheduled in advance and managers are informed in advance to perform such. The onus is on the applicant to show the respondent's act or omission and it is maintained that this has not been met, that is the applicant failed to obtain approval.
16. Mr. Selabe argued that in the settlement agreement the respondent recognized overtime was worked and due. In terms of the agreement the respondent agreed to pay 34.5 hours. Further motivation was requested from Mr. Moemedi in terms of the 84, 5 hours. This was supposed to be handed on 23 November 2018 but was handed in on 16 January 2019. Payment was never made for the 34.5 hours. The evidence of Ms. Fritz shows that she along with colleagues in the HR department were paid overtime for the May to June 2016 period. The overtime was approved as this is done annually and the HR department has a pool of overtime to the value of R133518, 82 and Sunday time of R50471, 82. The overtime claimed does not exceed 30% of Mr. Moemedi basic salary.

ANALYSIS OF EVIDENCE AND ARGUMENT

17. The dispute is one about the interpretation and application of resolution 1 of 2007, in conjunction with the Determination on Working Time in the Public Service 2016. Resolution 1 of 2007 deals with overtime and merely indicates the rates for normal overtime, the calculation of overtime, “the maximum amount of overtime. There is no sectoral bargaining council which has determined the conditions for the averaging of maximum overtime hours”. I accept that there is a policy that regulates overtime and that this has to be read in conjunction with Resolution 1 of 2007.
18. It appears to be common cause that the policy exists and was updated, further that it requires pre-approval of overtime which needs to be in writing. The evidence is that this was not the practice at the time. The evidence of Ms. Fritz is instructive in that it is apparent that overtime for the year was budgeted for and approved as this was loaded onto the persal system. This was not disputed and stands. Evidence demonstrates that other employees, subordinates and managers in the same department were paid overtime in excess of 30 hours per month.
19. From the evidence it is apparent that approval was obtained as the overtime was loaded onto the persal system. That pre-approval in writing did not exist does not detract from the evidence that ; this was not the practice, others were paid for the overtime worked, and that Mr. Tsholo made it clear in the memorandum that the task in respect of the EPDMS project had to be carried out. Mr. Moemedi performed the work, this was not disputed and substantiated by Ms. Fritz.
20. Mr. Pudikwabeka argued that as there was no pre-approval of overtime Mr. Moemedi is not entitled to payment. This is rejected in that the overtime was approved as the persal system reflects the pool of overtime hours. The evidence shows that a number of hours was budgeted for, this too is reflected. If there was an issue with pre-approval then other members of the HR team performing the same functions, on the same project during the same period, such as Ms. Fritz would not be paid their overtime. This is not the case, nor is there any evidence that everyone in the department obtained written approval. Furthermore, there was no evidence presented to rebut the testimony of Ms. Fritz as to the existence of a practice as to how approval for an amount of overtime hours was obtained and then worked and finally paid by the finance department.
21. Mr. Moemedi has established a claim for overtime he is entitled to the overtime for the periods 6, 7, 8 & 9 March 2016, 4, 5, 6, 7 & 8 April 2016, 8-31 May 2016 and 1 June 2016 to 15 June 2016. The sum of R22 554, 00 is due to Mr. Moemedi.

AWARD

22. The respondent has not interpreted and applied Resolution 1 of 2007 correctly.
23. Overtime for the periods 6, 7, 8 & 9 March 2016, 4, 5 6, 7 & 8 April 2016, 8-31 May 2016 and 1 June 2016 to 15 June 2016, is due to Mr. Moemedi.
24. Payment of the sum of R22 554, 00 is to be paid to Mr. Moemedi on or before 26 March 2021.

Panelist/s: Karen Kleinot Sector: Public Sector

Handwritten signature of Karen Kleinot, consisting of a stylized 'K' followed by a series of loops and a horizontal stroke.