ARBITRATION AWARD

Panellist/s: Karen Kleinot
Case No.: PSCBC446-21/2
Date of Ruling: 28 June 2022

In the matter between:

PSA obo J Geldenhuys
(Union / Applicant)

And

Department of Mineral Resources & Energy
(Respondent)

Details of the hearing

1 The matter was set down for arbitration on 17 June 2022. The parties attended and were represented. The DPSA was in attendance. Mr. A Moribe from the PSA represented Mr. Geldenhuys. Mr. G Matsimela represented the Department. Various bundles were presented at the arbitration. The proceedings were recorded.

Issue in dispute

2 The issue in dispute is the interpretation and application of Resolution 1/ 2007 as it pertains to overtime.

Survey of the evidence and argument

Applicant's version

3 **Mr. Geldenhuys** a Senior Security Risk Officer at the Department of Mineral and Resources testified: he was appointed in 1993.

4 On 30 September 2020 he received a 'whats app' message from Mr. Mathebula, his supervisor that the private security contract expired on 1 October 2020. The instruction received from Mr. Mathebula was that he and Mr. Leko had to work 12- hour night shifts, that is four days on and four days off. Until such time as the new company was appointed which would take place within 15 days.

5 Mr. Geldenhuys stated that he complied with the instruction and worked the shifts as required. Prior to the 15- day period expiring he alerted Mr. Mathebula that their overtime would exceed 34 hours which is what is pre-approved. He asked for guidance but there was no response. At one point a colleague took leave and he had to work her shifts in the day- time. Mr. Geldenhuys stated that he kept asking Mr. Mathebula about the overtime and his concerns about exceeding the 34 hours as prescribed.

6 A new company was not appointed within 15 days. Prior to the expiry of this period, he received further instruction from Mr. Mathebula that as the new company had not been appointed, he would have to continue working these hours until the new company was appointed. A new company was not appointed. He was supposed to work overtime from 1 to 15 October 2020. As the new company was not appointed, he worked the entire month of October 2020 and November 2020. At the end of November 2020, the instructions were to continue to work into December 2020 as the new company was not in place. The total hours of overtime accrued was 146 hours less 34 hours left 112 hours outstanding.

7 He and his colleagues struggled to obtain payment for the overtime worked. The Department offered them time off in lieu of payment, this was rejected. One hundred and twelve hours of overtime is

outstanding. An email was sent to Mr. Mabena on 6 October raising his concerns regarding the excess overtime work. He was informed that the department would only pay the authorized overtime of 34 hours. He agreed that overtime was pre-approved and that staff members filled out a form prior to the month. He agreed that he had done so in September 2020 for October 2020. He agreed that it authorized 34 hours of overtime only. The document does specify that an employee will only work 34 hours overtime and such overtime must not exceed 30% of an employee's salary. Further that any deviation must be motivated by the Director General. That the calculation of overtime on an employee's salary notch cannot be higher than level 8. Mr. Geldenhuys agreed that Mr. Mabena indicated that he would only be paid 34 hours of overtime. Mr. Geldenhuys stated that this was his response, and he was never instructed not to work. He agreed that there was no authorization but that he was instructed to work. He agreed that the Public Service Regulation indicates that overtime cannot be more than 30% of his salary.

8 The DPSA circular 17 of 2018 reflects that the executing authority no longer has the authority to approve overtime compensation due to exceptional circumstances. Mr. Geldenhuys reiterated that they were instructed to work. He agreed that there was no approval, but they were instructed to work it. There was no instruction informing them not to work.

9 On one occasion a colleague fell ill and booked off sick. He had been in contact with her and informed the office about such. The only response he received was that someone had to be in the office. Consequently, he had to work the shift and his overtime exceeded the 34 hours. In 2009 his overtime had exceeded the authorized overtime and a submission was made by the executive and it was paid. Mr. Geldenhuys stated that he felt that the respondent had treated him unfairly and he had given 29 years of service.

Respondent's version

10 **Mr. Mabena Assistant Director Physical Operations for Security testified**: security fell within his responsibility. He monitors and checks all regional offices are operating up to standard. He received an email from Mr. Geldenhuys that the overtime would exceed 34 hours and he indicated that only 34 hours of overtime would be paid. At the time he received the email the submission had been made for overtime for the period October to December 2020. Overtime could not be worked without approval. Mr. Mabena stated that after this communication there was no further follow up from Mr. Geldenhuys. Mr. Mabena was of the view that Mr. Geldenhuys worked without approval.

11 Mr. Mabena agreed that he was aware that the private security company had not been appointed in the period October 2020 to December 2020. He was aware that one of the security officers was ill in this

period. It was put that with this person off the 34 hours of overtime would be exceeded if her shifts were covered. Mr. Mabena stated that he suggested that the building close at night and that there should only be a day shift. He had said this to Mr. Mathebula and was surprised that there was an instruction to work.

12 He confirmed that the Director of Employee Relations had offered the officers time off in lieu of payment. He agreed that the resolution indicated that overtime worked on a public holiday was x2 of his/her basic salary and all other overtime was 1.5 x basic salary. The resolution states that this provision excludes commuted overtime as well as time off. He agreed that the department was incorrect in requiring staff to take time off.

13 **Ms. M Mpapele Assistant Director HRA testified**: the DPSA circular 17 of 2018 provides guidance on the Public Service Regulations specifically 49. Ms. Mpapele indicated that a person could not work more than 34 hours of overtime. This is authorized and a form is filled in prior to the overtime being worked. The Regulation and DPSA circular reflect that overtime cannot exceed 30% of the staff members' basic salary. Further that if there are exceptional circumstances overtime can be worked and this can be authorized prior to the time. Prior to exceeding overtime that is greater than 30% of basic salary approval of such overtime can only be approved by the DPSA. Employees can only work 34 hours of overtime per month. This is applied for prior to the time which was done. The executing authority can no longer approve overtime compensation which may exceed 30% of the employee's monthly salary. There must be a mutual agreement to work overtime, this is reflected in the form 226. Thirty- four hours per month was approved this equates to 102 hours over three months.

14 Ms. Mpapele stated that as the executive authority could no longer approve overtime in excess of 30% of the monthly basic salary of an employee, it was her assumption that only the DPSA could do so. The Department did not refer the issue to the DPSA as there was no prior approval of overtime obtained. It was her view that the over time worked was due to a miscommunication between the staff and manager. There was nothing beyond the 34 hours that could be paid and there was nothing to be done in the circumstances. Ms. Mpapele stated that even persal blocks the administrator from entering hours that exceed 30% of an employee's basic salary.

Analysis of the evidence and argument

15 The issue is an interpretation and application of resolution 1/ 2007. An interpretation and application dispute examine the words used and meanings attributed to the words as well as whether the clause applies to a person or group of persons. The test has been set out as per National Joint Municipal Pension Find 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".

16 Clause 9 which is headed as follows:*" Basic Conditions of Employment Act (BCEA) 1997, 9.1 Payment Rate for Normal Overtime. Overtime, on a Sunday or public holiday shall be 2 x basic salary of the employee, without the option of granting time off. All other overtime shall be 1.5 x basic salary of the employee, without the option of granting time -off. This provision excludes employees on commuted overtime. "*

17 Overtime as defined in the Basic Conditions of Employment Act is as follows: "'overtime 'means that an employee works during a day or a week in excess of ordinary hours of work.

18 The Public Service Regulations of 2016 in indicates the following in regulation 49:

"49 Overtime, (1) An executive authority shall compensate and 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; and

(c) the monthly compensation for overtime constitutes less than 30% of the employees' monthly salary; or the limitation determined by the Minister, which ever is the lesser.

(2) an overtime policy contemplated in subregulation (1) shall be established by the executive authority in accordance with applicable collective agreements, which shall determine-

(a) categories of employees that may not receive compensation for overtime due to the nature of their duties;

(b) the circumstances under which overtime work for an individual employee may be authorized.

(c) how much overtime an employee may work in a given period

(d) how authorization for overtime is recorded

(e) other control measures which are necessary "

19 The DPSA issued circular 18 of 2017 explaining that compensation for overtime constitutes less than 30% of the employee's monthly salary. That is overtime is limited to 30% of the employee's monthly salary. Point 3.2 "an executive authority no longer had the authority to approve the overtime compensation which may exceed 30 percent of the employee's monthly salary due to exceptional circumstances."

20 It is common cause that Mr. Geldenhuys filled in the requisite form for overtime for the 34 hours which were approved. Further that there was no authorization for the overtime worked in excess of the stipulated 102 hours that were approved for the three-month period. That Mr. Geldenhuys had worked 112 hours overtime that was not paid. Evidence was that he was offered time off in lieu of the overtime worked which reflects that the department was aware that the hours were worked. Mr. Geldenhuys was requested to do so by his supervisor from October through to December. This was not contested and stands.

21 Clause 9 of resolution 1/ 2007 sets out how overtime must be calculated and is in line with the Basic Conditions of Employment. There is no dispute as to the meaning of the words. The clause is silent on any limitations to the amount of overtime worked. It further indicates that time off in lieu of time worked is not an option as per the clause" *...All other overtime shall be 1.5 x basic salary of the employee, without the option of granting time -off."*

22 Regulation 49 sets out limitations, there must be an approved policy on overtime, it must be pre-approved, and not constitute more than 30 % of the employee's salary. Sub regulation 49 (2)(b) provides that there are circumstances where overtime may be approved. The sub regulation specifies that there must be a policy which expands on these issues. This was not placed before me at arbitration. Sub regulation 49 (2) (b) provides an exception to the 34 hours per month and the cap of 30% of an employee's salary. That the department's policy was not placed before me leads to the inference that there is no policy or steps to follow in *"the circumstances under which overtime work for an individual employee may be authorized".* Considering this the circumstances that emerged in the arbitration form the foundation for the authorization of overtime.

23 Circular 18 or 2017 gives guidance on how to apply the resolution, but this is not binding. The DPSA circular indicates that there is no discretion from the executive authority to authorize overtime in excess of 30% of the employee's salary. This is at odds with the sub regulation 49(2)(b) which allows for

circumstances where overtime may be authorized and creates a discretion for the executive authority. The DPSA circular limits the discretion of the executive authority. This creates an 'unbussiness' like result or an absurdity in that it does not take cognizance of circumstances which may occur which are unforeseen or unplanned for and require overtime. To state as Ms. Mpapele, indicated that only the DPSA may grant overtime would also result in chaos in that this would be the only authority within the state to authorize overtime in excess of 30% of an employee's salary, meaning that all claims nationally for overtime would be funneled to the DPSA. This would result in a backlog of claims and overburden the DPSA with claims where the circumstances of working overtime were unknown to them. Although Mr. Mabena indicated that no more than 34 hours of overtime would be worked he did not dispute that the instruction was given by Mr. Geldenhuys's line manager to work. The respondent benefited from the services provided by Mr. Geldenhuys and cannot argue that because there was no prior approval that they cannot pay such. The line manager gave the instruction the subordinate followed it and provided his services and did raise concerns with him about the overtime which were not addressed.

24 Considering the common cause facts, that the private security company had not been appointed and Mr, Geldenhuys's supervisor required him to work, the department was aware of such, and that he worked for a sick colleague, these circumstances create grounds where overtime stands to be authorized in excess of 30% of his salary.

Award

25 The Department of Mineral Resources & Energy has not complied with Resolution 1/2007.

26 Overtime of 112 hours is due to Mr. Geldenhuys.

27 This is payable within 21 days of receipt of this award, failing which the prescribed rate of interest will apply as per the Prescribed Interest Rate Act of 1975.

Signature:

Panellist/s: K Kleinot

IN THE DISCIPLINARY PROCEEDINGS FOR THE VRYBURG HOME AFFAIRS HELD AT VRYBURG

In the matter between:

DEPARTMENT OF HOME AFFAIRS	**EMPLOYER**
And	
PSA obo Ms ELIZE BADENHORST	**EMPLOYEE**

EMPLOYEES HEADS OF ARGUMENT IN MITIGATION

THE EMPLOYEE pled guilty to charge 1 and charge 2. **NOW THEREFORE** it was agreed by all parties concerned that arguments in mitigation of sanction shall be submitted in writing and hereby submit to wit:

1.1 The accused employee has clearly accepted her actions and is remorseful towards the employer. In *Hulett Aluminium Pty Ltd vs Bargaining Council* for the Metal Industry (2008), *the Labour Court held that* "it would be unfair to expect of an employer to take back an employee when the employee has persisted with his or her denials and has not shown any remorse."

1.2 In *De Beers Consolidated Mines Ltd vs CCMA and Others (1998),* the Labour Court held as follows: *"It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgement of wrongdoing is the first step towards rehabilitation"*

1.3 Therefore a plea of guilty is in our law acceptable as an act of remorse and an acknowledgment that his conduct was wrongful.

1.4 The relationship between the parties has not irretrievably broken down because of the conduct of the employee, in fact work relations are intact. She is currently suffering from depression as a result of her actions and the disciplinary consequences that she is currently facing in this matter.

1.5 Subsequently, the accused employee has been employed from the year 2005. She has never been charged neither has she been found guilty of any offence whatsoever let alone any offence of dishonesty. Generally it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable, which in this case the employer-employee relationship is intact. She is a breadwinner with 2 children and all dependent on her, the first born is unemployed and the second born completed grade 12 last year (2021) and intends to study her degree in teaching next year. The employee will naturally be responsible for tuition fees and such financial support that her daughter will require during her

period of studies. The employee is also a breadwinner for her sister who is unemployed and her two children who are also dependent on her due to economic hardships.

1.6 Although we do not expect the Chairperson to treat the employee with velvet gloves in meting out a sanction, however it should be noted that the employee is a loyal official and in the same breath has been awarded achievements in her line of duty by being awarded best performer during the year 2017, has fairly cooperated with the employer, has not maliciously tempered with any evidence that ought to have been adduced as evidence in her hearing. She has since tendered her apologies respectively to the employer whom she has wronged. In his book entitled Dismissal (Juta, 2014) at page 211, Professor John Grogan remarked as follows regarding Mitigating Factors:

"Mitigating factors should be considered after the employee has been found guilty of the offence; whether there are mitigating (or aggravating) factors constitutes a separate inquiry. A variety of considerations may be relevant when considering a plea in mitigation. These include a clean disciplinary record, long service, remorse, the circumstances of the offence, whether the employee confessed to his misdemeanour and any other factors that might serve to reduce the moral culpability of the employee. An employer is not required to take mitigating factors into account merely because they evoke sympathy. The test is whether, taken individually or cumulatively, they serve to indicate that the employee will not repeat the offence".

1.7 Our plea therefore to the Chairperson is to take notice that there is no irreparable harm suffered by the employer but it is so minimal to warrant reasonable Final Written Warning for the actions of the employee.

1.8 **Now therefore** it is our sincere plea that in meting out a suitable sanction the Chairperson should in arriving at a decision impose a sanction in the following manner:

1.8.1 That the employee undergo counselling for a period of a month with a final written warning.

Mr Mogomotsi Mosheshe
PSA Official
22 June 2022
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