IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

HELD AT CAPE TOWN

CASE NO: PSCB376-16/17

PSA obo Maritz and 5 others **APPLICANTS**

and

Department of Home Affairs **FIRST RESPONDENT**

Department of Public Service & Administration **SECOND RESPONDENT**

AWARD

DATE OF ARBITRATION	:	22 January, 9 April and 13 August 2019
CLOSING ARGUMENTS	:	20 August 2019
DATE OF AWARD	:	29 August 2019
ARBITRATOR	:	I de Vlieger-Seynhaeve

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The matter was set down for arbitration on 22 January, 9 April and 13 August 2019 at the offices of Home Affairs in Barrack Street in Cape Town. The applicants were represented by Mr Olivier of the PSA. The first respondent was represented by Ms Le Roux and Mr Ramokopelwa. The second respondent was represented by Ms Brink.

1.2 When the matter was heard on 9 April 2019, the parties agreed that nothing factual was in dispute and that arguments would be submitted. The parties made a statement of case on that hearing and closing arguments were submitted a week later. However, the closing arguments mentioned factual inconsistencies which were quite significant. I contacted the parties with these findings and asked them whether they wanted to lead evidence on the factual issues. The parties confirmed this and the matter was set down again on 13 August 2019 where evidence was led.

1.3 At the time of the hearing on 13 August 2019, only three applicants were still part of the group of litigants. Some of them had passed away or had resigned. The matter continued for applicants Ms Maritz, Mr Geldenhuys & Mr Snyders. The proceedings were recorded digitally.

2. ISSUE TO BE DECIDED

2.1 The issue to be determined is whether the respondent was in breach with Resolution 1 of 2007 when it did not pay out the applicants' overtime.

3. SURVEY OF EVIDENCE AND ARGUMENT

3.1 The following issues are common cause: The applicants are employees of the Department of Home Affairs working at IMS Maritime in the Cape Town Harbour. A new shift roster was implemented in 2015 which resulted in the applicants working more than 40 hours in some weeks. The applicants submitted a grievance about this shift roster in October 2015 after it was implemented at the beginning of October 2015. In January 2016, a grievance meeting was held where the unhappiness with the shift roster was discussed and the applicants were advised that they had to submit an application for overtime. The application was submitted but was disapproved. Another grievance was submitted in February 2016 which remained unresolved after which the matter was referred to the PSCBC.

3.2 The applicants submitted evidence and argument:

3.2.1 **Ms Maritz,** one of the applicants testified under oath that they had a grievance meeting in January 2016 with Ms Anker. But even after this meeting, the roster did not change. Some newer staff was easily influenced and did not dare to object to it. Other staff members were intimidated. They lodged a second grievance in February 2016, but no-one acted upon it. She then sent an email to Ms Anker in June 2016 to inform her that nothing had changed but the shift only changed from 1 June 2017.

3.2.2 During cross-examination, it was asked whether her managers could simply change a roster without their superiors' approval. The witness replied that it needs to be approved at a higher level but she has no insight in that. It was then put to her that the email of 2 February 2016 by Ms Hewitson clearly gave the instruction to revert back to the old roster. The witness replied that she cannot change the roster by herself, it is her superiors who need to do so. It was further stated that the DDG had sent an email on 22 March 2016 instructing the staff to revert back to the approved shift roster. The witness replied that she had never seen this email until after the time. It was then put to her that the evidence about staff members being harassed was hearsay evidence and could not be relied on. The witness agreed that she was not party to this but it was included in the grievance.

3.2.3 **Mr Olivier,** the applicants' representative**,** stated in his closing arguments that the applicants were instructed to work a new shift roster which was compiled by the office manager. There was no averaging agreement in place, nor was a proper consultation done with the employees. The applicants had informed the first respondent of what the consequences would be of the new shift roster but the office manager still instructed the applicants to work the roster. Even after the office manager was instructed by her managers to revert back to the old system, she refused and instructed the applicants to continue working the new roster. It is clear that the first respondent was aware that the actions of their manager were wrong and they gave her instructions to revert back to the old system which was refused. The shifts were only changed in June 2017. The respondent is now claiming that the applicants knowingly worked unauthorised overtime as they were aware that the instruction was an unlawful instruction. Although the instruction was unlawful, the applicants alleged that they were bullied and threatened when they grieved and claimed for overtime. The Remunerative Overtime Policy states that each employee is required to work the number of hours per week

he/she is contracted to work. Through the implementation of the new shift roster, the applicants all worked more than the 160 hours per 4 weeks. The applicants were not instructed to work normal overtime but were instructed to work a shift roster. If the applicants would have left the workplace after they had worked 40 hours, it would have resulted in them leaving their place of work without permission or staying away from work without authorisation. The evidence suggests that the respondent agrees that overtime was worked however they refuse to pay for it as there was no approval requested to work overtime. The applicants cannot be disadvantaged by the wrongful actions of a manager who deliberately refused to listen and act on instructions from her superiors.

3.2.4 In his supplementary arguments after the hearing dated 13 August 2019, **Mr Olivier,** submitted the calculations of the applicants' overtime.

3.3 The first respondent submitted evidence and argument:

3.3.1 **Ms Anker,** the Chief Director Port Control, was the only witness and testified under oath that after the grievance meeting in January 2016, she had called management in so Ms Hewitson could draft a submission to the Director-General. The shift roster had to be stopped with immediate effect and they needed to revert back to the previous roster. Unfortunately, they did not do so and continued working the new roster. Even after the DDG's instruction, they continued working the new roster. There were two Circulars issued that are applicable to the applicants' situation: Circular 63 of 2016 dated 16 November 2016 and Circular 28 of 2017 dated 12 April 2017. The officials did not adhere to these Circulars. They would not have been disciplined if they had reverted back to the old roster.

3.3.2 During cross-examination, it was put to her that the shift roster was on the board and the staff had to work it. Furthermore, the second grievance was left unattended. The witness replied that she did not investigate further but escalated the matter to the DDG. It was asked who was responsible for the shift roster. The witness replied that it was Ms Nepfumbada under the supervision of the Port Manager, Ms Hewitson. It was then asked what would happen if members decided their own shift. The witness replied that she would discipline them. But she can only discipline them if it was a lawful instruction. The superiors under Ms Nepfumbada had the responsibility to escalate the matter. It was then put to her that she never did anything after the second grievance was submitted. The witness replied that she asked the Port Manager to deal with it. It was

then asked whether the applicants were supposed to draw up their own shift roster. The witness replied that it had to be done in consultation with their manager.

3.3.3 **Mr Ramokopelwa**, the first respondent's representative, argued that it was common cause that the new shift roster was unilaterally introduced by Ms Nepfumbada without management's approval. Two issues that need to be dealt with are: 1) In terms of the introduction of the shift roster by a junior staff member, not management. Was she empowered to make such decisions which borders on conditions of service? Whether the applicants, by voluntarily adhering to working a new shift roster, knowingly can shift the blame to management when they did so without management's knowledge? 2) Whether the applicants by working the shift system introduced by a shift leader, not management, are entitled to be paid overtime even though they did not work overtime as required ito the Department's Overtime Policy which was known to them at all material times?

3.3.4 When the first respondent became aware of the situation they instructed Ms Nepfumbada to revert back to the old shift system. There is no evidence that the applicants refused to work the new shifts or were being forced to work it. The applicants admitted that the shift roster was not recognised and approved by management. However, they also failed to follow the instruction of management at different levels even-though they knew the shifts were not recognised and continued working as such after the grievance meeting dated January 2016. The first respondent further denies that overtime was worked. There is nowhere in par 9 of Resolution 1 of 2007 an indication that working a shift similar to that worked by the applicants, constitutes overtime and should be remunerated as such. The Remunerative Overtime Policy V.02 states in paragraph 11.2 that: *Only hours worked over-and-above an employee's normal working hours at the request of management, can be considered for remunerative overtime purposes*. Paragraph 11.5 states that *Except for the performance of emergency work, no employee may be requested or permitted to perform remunerative overtime duty in advance of such overtime work being approved by the approving authority and without being informed in writing to perform such overtime duty, after al requirements of this Policy have been fully satisfied.* All other requests for remunerative overtime duty should be submitted to the approving authority prior to the date on which the overtime work is envisaged to commence. Further reference was made to par 11.10; 12.2.2; 13.1; 17.1 &17.7 of that Policy. Furthermore, two circulars in terms of overtime were issued: HRMC63/2016 dated 16 November 2016 and HRMC 28/2017 dated 12 April 2017. The applicants knowingly worked this

overtime while being aware that the instruction was unlawful and did not comply with the policy. The Acting Chief Director: Port Control instructed all applicants and the management team at the Port of Entry in Cape Town in January 2016 to immediately revert back to the old shift roster. Ms Nepfumbada willfully and persistently failed to implement the instruction from her office managers at the time, Ms Hewitson and Ms Anker.

3.3.5 In his supplementary arguments, following the hearing of 13 August 2019, **Mr Ramokopelwa** stated that the applicants did not deny that there were instructions given to revert back to the old shift roster. The instructions were given through an email from the Port Manager, Ms Hewitson, there was a verbal instruction given by Ms Anker on the grievance meeting in January 2016 and there was the DDG's instruction and the DG's instruction. When they were instructed to revert back to the old shift roster, there was no need for management to put up the roster as there was only one legal roster. The DG even gave the applicants permission to refuse to work unlawful shifts and/or unauthorised overtime. Furthermore, the bullying was based on "hearsay" evidence and cannot be taken into account. The applicants' overtime was never approved before they worked it and the matter should be dismissed.

3.4 The representative of the second respondent, **Ms Brink**, argued that the Public Service Regulations are issued as secondary law and cannot be changed by collective agreement. The Resolution does not render authorisation by default to overtime payment. The remunerated overtime is still subject to written authorisation of the Executive Authority.

4. ANALYSIS OF EVIDENCE AND ARGUMENT

Applicable legal principles

4.1 Section 24 of the LRA deals with how disputes about collective agreements should be dealt with. Section 138 (9) LRA provides that *"the Commissioner may make any appropriate award in terms of this Act, including, but not limited to, an award-*

a) That gives effect to any collective agreement;

b) That gives effect to the provisions and primary objects of this Act;

c) That includes, or is in the form, of a declaratory award."

4.2 The scope of an arbitrator in an interpretation/application dispute is to determine whether the respondent failed to apply or interpret the provisions of a particular Collective Agreement. A dispute over the interpretation of a collective agreement arises only when the parties disagree over the meaning of a particular provision of an agreement, whilst a dispute about the application of that agreement pertains to disagreement over whether the agreement applies to a particular set of facts or circumstances, or whether it should be applied in a particular way. (See J. Grogan: Workplace Law 2009 at pp361 to 362).

4.3 In *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others (1997) 18 ILJ 971 (LAC),* Froneman DJP stated that a collective agreement is unlike other ordinary contracts and that the primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements. This, it was stated, was better suited to promote the "effective, fair and speedy resolution of labour disputes". In *NEHAWU v Department of Social Services and Population Development [2005] 11 BALR 1140 (PSCBC),* it was further acknowledged 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 when interpreting collective agreements, evidence outside the written agreement itself is not generally permissible when the words of the memorandum are clear.

4.4 The following documents were relied one: The applicants relied on section 9 of Resolution 1 of 2007, relating to payment of overtime which read as follows:
9.1: Payment for Normal Overtime: 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 1,5 x basic salary of the employee, without the option of granting time-off. This provision excludes employees on commuted overtime.

4.5 The parties further relied on the Remunerative Overtime Policy V.02 of the Department of Home Affairs. This policy stresses in clauses 11, 12 13, and 17 that no overtime can be worked before this is approved by the approving authority. Also reference was made to Circulars HRMC 63/2016 dated 16 November 2016 and HRMC 28/2017 dated 12 April 2017 which states that no employee shall work overtime without prior authorisation and that employees who knowingly work unauthorised overtime will not

be compensated. It also states that employees have the right to refuse to work overtime and that disciplinary action will be taken against employees and supervisors who participate in overtime without prior written approval.

4.6 It was common cause that no prior approval was received to work this overtime. A strict application of the Resolution and the Policies would lead one to assume that therefore the applicants cannot be entitled to the payment of overtime. However, one must take the circumstances into account and understand the process that led up to the applicants' claim. It was common cause that the applicants' supervisor Ms Nepfumbada instructed the staff to work a new shift roster. That shift roster led to the applicants working, occasionally, more than 40 hours per week. The first respondent stated that this did not constitute overtime. I beg to differ. The Remunerative Overtime Policy states in section 11.2 that *only hours worked over-and-above an employee's normal working hours (40 hours per week excluding lunch breaks) at the request of Management, can be considered for remunerative overtime purposes.* Seeing that the applicants were instructed by Ms Nepfumbada to work the shift roster which was over-and-above the 40 hours per week, those extra hours can be considered for payment of overtime. The applicants then informed their supervisor that this roster would result in them working overtime. The supervisor ignored their comments and even threatened them when they submitted an application for payment of overtime. The first respondent tried to convince me that the allegations of harassment or bullying were based on hearsay evidence and should not be taken into account. However, there was an email submitted, written by the supervisor Ms Nepfumbada herself on 13 November 2015, with subject heading: *illegitimate overtime claims.* That email clearly states that *the officials are requested to refrain from claiming overtime as it is a mere act of mutiny.* The email goes on with *the request to refrain from submitting two different claims as such is an act of manipulation. All overtime claims will be considered illegitimated and officials responsible will be liable to mutiny. The illegitimate claims will be returned to the officials and a motivation is required for such a defiance conduct.* I consider this email threatening and it further makes it clear that overtime applications will not be considered at that this allegedly defiant conduct could have consequences. The grievance meeting followed in January 2016 where it was agreed that an application for overtime would be submitted. It was further stated that roster changes needed to be made. The first respondent claimed that this was a direct instruction to the applicants but it was testified that this was not true. I deal with the instructions in the paragraph 4.8. A second grievance was submitted in February 2016 which was received by Ms Anker and forwarded to the DDG. No answer was received to this

grievance and an email with the grievance was sent again to Ms Anker on 7 June 21016. That grievance makes mention of staff being harassed by Ms Nepfumbada when they wanted to submit overtime claims. Although the first respondent felt that the applicants could not testify about this alleged “hearsay evidence” since they were not harassed personally, it is part of the grievance and should have been investigated. Especially, in light of the previous email sent by Ms Nepfumbada describing the overtime claims as an act of mutiny, concerns must have been real that Ms Nepfumbada could be harassing the staff.

4.7 The first respondent stated that Ms Nepfumbada had implemented the shift roster without management’s approval and that the applicants should have refused to work the new roster and should have started working the old roster again. First of all, the applicants are not privy to what happens between their superior and her managers. They therefore did not know, when the roster was implemented, that this was without management’s approval. Secondly, it is quite awkward for an employee to start working a roster that is not on the board and which goes against the instructions of their superior. It is not the employees who are responsible for the change in the roster to be implemented, it is the responsibility of the managers of the supervisor to ensure that she changes the roster. It is very risky for an employee, who is in the weaker position, to refuse an instruction from a supervisor. Ms Anker confirmed that she would discipline an employee who would refuse to work the shift roster. I therefore have no problem with the applicants obeying the instruction of Ms Nepfumbada while they were still trying to rectify the situation with management. The applicants submitted a new grievance in February 2016. They further emailed Ms Anker again in June 2016 but to no avail. It baffles me to see that management did not step in but simply referred the matter to the DDG. It would have been so simple to go down to the office where the applicants work and sort out the situation and reprimand their supervisor. But management left the applicants to their own vices and did nothing to discipline the supervisor who was implementing an illegal roster. Even the claim that they were being harassed was ignored by Ms Anker and referred to the DDG. This behaviour together with blaming the applicants for not standing up against their own supervisor is a perfect example of weak management and needs to be addressed. Managers need to step up and be a manager and not expect the employees to be managers of their own supervisors. Even today, it remains unclear what kind of disciplinary action was taking against Ms Nepfumbada as the respondent wrote in his closing argument that the department is in the process of taking disciplinary action against her. We are now in

2019 and the misconduct stems from 2015. This is totally unacceptable. However, this is not the issue before me.

4.8 The first respondent stated that the applicants were given the instruction to revert back to their old shift roster on several occasions: The **first** time the instruction was given was allegedly at the grievance meeting itself in January 2016. On that meeting, it was agreed that the grievance would be solved if they would revert back to the old shift roster. This instruction to revert back to the old shift roster was given to Ms Nepfumbada and not to the applicants. The applicants were not the ones who had breached the rules as they were the ones opposing the new roster. The solution to the grievance was therefore not something the applicants needed to do but was aimed at their supervisor. It can therefore not be said that the applicants refused to follow the instruction. The **second** instruction came through an email from Ms Hewitson on 2 February 2016. In that email, where one applicant was also copied in, it is stated: "*as per instruction by CD, Ms Anker, you are to comply with the following as of immediate effect: 1) the current roster is to be reduced to 40h/week. This can be done by allowing one person per shift to reduce their hours for the day given an off day until another roster can be implemented. Kindly consult with your respective shifts. Hours must be reduced as no overtime will be paid for extra hours".* This email is a direct instruction to Ms Anker to change the roster. It further indicates what steps need to be taken to address the problem of overtime i.e one person's hours per shift for a day should be reduced. Again, this instruction is not given to the applicants but to Ms Nepfumbada's superior. Ms Hewitson further makes a suggestion as to how they can reduce the hours worked by the staff. The changing of the roster is therefore not as simple as the first respondent submitted. He stated that the applicants should just have reverted back to the old roster. This is not so and this was confirmed by Ms Anker. When she was asked whether the applicants could change the roster themselves she answered that they could, but they had to do it in consultation with their manager. It is exactly that manager that refused to change the roster. The **third** time the applicants were allegedly instructed to work their old roster was when Mr McKay, the DDG sent a letter to all staff at Cape Town Harbour on 22 March 2016. That letter stated that it has come to his attention that the shift roster has been changed without following due process. The letter continues: *all staff is hereby instructed to revert back to the approved shift roster previously worked, with immediate effect.* It is unclear how this letter was communicated to the staff as it is not part of an email. When this letter was put to Ms Maritz under cross-examination, she stated that she had never seen this letter at the time. It was only at a much later stage that she was shown this letter. So although this

letter could have been a direct instruction to the applicants, it was not communicated to them. It was finally argued that the applicants received the above-mentioned Circulars and those Circulars dealt with the regulation of overtime and confirmed that employees who work unauthorised overtime will not be compensated for such overtime duty performed. It also stated that officials had the right to refuse to work overtime. It was not disputed that these Circulars were distributed to the applicants and that they were aware of it. Circular 63/2016 states that *they are aware by abuse by Management in making staff work unapproved overtime. In view thereof, officials must ensure that their managers have an approved SP number, issued by HR as evidence of the approval of the overtime as officials will not be paid overtime without the required written approval received in advance.* Circular 28/2017 states that *where employees perform remunerative overtime duty without compliance to this Circular, the DoHA will not be held accountable.* I agree that these Circulars clarified the applicants' situation and alerted them to the fact that they were working overtime which was unauthorised. If the applicants wished to be remunerated for the extra hours they were working, they needed to have advance approval. So, from 16 November 2016 onwards, it was expressly stated that the officials would not be able to go forward in a situation where they were working overtime and being able to claim for it without express approval.

4.9 A strict interpretation of the clauses would support the version that the applicants would not be entitled to overtime payment as no approval was given before the time. This interpretation would be correct in a perfect world. In that world, employees would be presented with legal shift rosters and grievances would be dealt with expeditiously. Furthermore, employees or managers who break the policies and law would be disciplined without delay. However, as seen above, this was not the case in this matter. The employees were left to fend for their rights over a period of more than one year and a half. Now simply blaming the employees because management failed to do their duty would be an easy way out. I therefore find that it has been established that the applicants worked overtime and that they should be compensated for that overtime. It is true that an application to work overtime should be made before overtime is worked but exceptional circumstances apply in this regard as this work was the result of a normal shift roster which resulted in overtime.

4.10 It was common cause that the old shift roster was re-introduced on 1 June 2017. The question I now need to determine is whether the applicants will be entitled to payment of overtime for the period October 2015 until 31 May 2017. It was clear from the evidence that the applicants grieved and emailed during January 2016, February 2016

and June 2016. After that, it seems that they just accepted their fate and did not grieve anymore. However, when the Circulars were issued and distributed amongst the staff, the contents of those must have alerted the applicants to the fact that they could no longer continue in this situation. But this did not spur them into action. The Circulars made it clear that unauthorised overtime would not be paid and the applicants were aware, from then on, that they could not claim ignorance even if their management was not willing to cooperate. There is nothing that prevented them from contacting the DDG or DG directly and inform them that they are still working an illegal roster. Based on the above, I find that the applicants are entitled to payment of overtime for the period 1 October 2015 until 16 November 2016 when Circular 63/2016 was issued. The applicants submitted a calculation of the overtime hours worked and the corresponding amount that was due. The respondent stated that they did not have time to check whether these calculations were correct. I therefore advise the parties that they will be able to revert the issue back to the PSCBC if there is a dispute about the calculations, only in so far as the calculations are concerned.

5. AWARD

5.1 The Respondent breached Resolution 1 of 2007 when it did not compensate the applicants for overtime worked for the period 1 October 2015 until 16 November 2016. The respondent must pay the applicants their outstanding overtime money on or before 30 September 2019;

5.2 I reserve jurisdiction in terms of the calculations of the overtime money due to the applicants;

5.3 There is no order as to costs.

Signed at Cape Town on this 29th day of August 2019

I De Vlieger-Seynhaeve
PSCBC Panelist