



PANELIST: ADVOCATE J P HANEKOM

CASE NO: PSCB398 -14/15

AWARD DATE: 10 FEBRUARY 2015

In the matter between:

PSA obo FOURIE

Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES - WESTERN CAPE

Respondent

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION:

1. This matter was set down for arbitration on 20 January 2015 concerning a dispute about the interpretation and/or application of a collective agreement (Resolution 1 of 2007 – hereinafter referred to as the “Resolution”). Mr. W. Pool, union representative of PSA represented the Applicant. Mr. K. Lufhondo, of Legal Services within the Department represented the Respondent’s case. Both parties agreed and requested to argue the case on paper and to submit written argument, by 27 January 2015. I would then issue my award on or before 10 February 2015.

ISSUE TO BE DECIDED:

2. I have to decide whether the Respondent correctly applied and/or interpreted the Resolution.

HISTORICAL BACKGROUND:

3. The Applicant is employed as a Correctional Officer by the Respondent at Community Corrections, Swellendam.
4. The Applicant is employed as a shift worker and accordingly works on Public Holidays. The Applicant submitted an overtime claim in the amount of R1 633, 00 for work performed on the following Public Holidays: 9 August 2009; 21 March 2010; 26 December 2010; 1 May 2011; 16 December 2012; 16 June 2013. The Respondent only paid for one days work in respect of 16 June 2013, at the end of October 2014. The Respondent still owes the Applicant the amount of R1 267, 82 for the remainder of the claim in respect of the other 5 days’ work.
5. According to the employer the Applicant was not paid during the respective financial years due to budgetary constraints.

ARGUMENT BY THE APPLICANT:

6. The Applicant submitted documentary evidence and written argument in support of

its case. I have decided to summarise the argument as far as I consider relevant.

7. The Applicant submitted that in terms of clause 9.1 of the Resolution the Applicant is entitled to 2 x basic salary for work performed on Public Holidays. There is no mention of budgetary constraints therefore the Respondent must pay the Applicant the outstanding amount of R1 267, 82.

ARGUMENT BY THE RESPONDENT:

8. The Respondent did not submit written argument before the due date as agreed. The Respondent however made verbal argument during the opening statement, which I will summarise as follows.
9. The Respondent agreed that it was common cause that the Applicant worked on the Public Holidays referred to and that the claim was submitted claim for the amount in question. It was further common cause that the employer only paid the Applicant in respect of one day's work to wit 16 June 2013.
10. The reason why the employer alleged it did not pay the claim in respect of the other 5 days' work in the amount of R1 267, 82, was because of budgetary constraints during that financial years.

ANALYSIS OF THE ARGUMENT:

11. I have decided only to focus on those issues I consider relevant.
12. The facts of the instant case were considered common cause between the parties. The issue in dispute was whether or not the Respondent was entitled not to pay the Applicant during the respective financial years due to budgetary constraints.
13. It is clear from clause 9.1 of the Resolution that deals with the conditions of service that the employer must pay and employee double the employee's basic salary for work performed on a Public Holiday. Clause 9.1 reads as follows: "*Overtime on a Sunday or a Public Holiday shall be 2 x basic salary of the employee, without an option of granting time-off.*" There is nothing uncertain or ambiguous about the

meaning of these words so to require an alternative interpretation other than the normal meaning. In terms of clause 16 of the Resolution the provision of this agreement shall take effect on 1 July 2007. The Determination and Directive on Working Time (hereinafter referred to as the "Determination") that took effect on 1 July 2007 that gives effect to the Resolution must be read and applied in line with the Resolution.

14. I have perused the Resolution and the Determination and nowhere could I find any reference to budgetary restraints. It is my understanding of the case law that Determinations and Departmental Policy should give effect to collective agreements and should not contrary to the provisions of collective agreements.
15. In the instant case the Applicant performed work on Public Holidays on days that he would normally work and therefore he must be paid at the overtime rate as referred to in clause 9.1 above, which is also in line with the Basic Conditions of Employment Act (BCEA). In my view it is not a case where the Applicant voluntarily requested to work overtime for extra income, he was obliged to work on those Public Holidays according to his shift roster. The Respondent in my view therefore cannot claim budgetary constraints as a reason not to pay. That would imply that the provisions of the Resolution and that of the BCEA could be circumvented by any employer at any time, claiming budgetary constraints. That to my mind is not what the parties intended when the Resolution was entered into as clause 9.1 clearly states that "shall be 2 x basic salary ... "without the option of allowing time-off. That clearly means that the employer does not have a choice, but to pay the Applicant in respect of work performed on Public Holidays.
16. Paragraph 3.1 of the Determination confirms the position and reads as follows: *"If a Public Holiday falls on a day on which the employee ordinary works the Executive Authority must pay the employee 2 x his or her basic salary, without an option of granting time-off. In other words, the category of staff concerned is shift workers who in terms of their shift rosters have to perform their ordinary work on a Public Holiday."* The Applicant in the instant case is a shift worker and is therefore entitled to the overtime payment, because he has to work on a Public Holiday.
17. The Respondent did not plea prescription. The fact that prescription was not raised does not mean that I could on own accord decide over prescription. The Prescription Act of 1969 as amended clearly states in section 17 that prescription must be raised by a party during proceedings. Accordingly I find that the Respondent did not

correctly apply and interpret the Resolution and that the Applicant is therefore entitled to the overtime claim of R1 267.82.

AWARD:

18. In the premises I make the following award:

- (1) I find that the Respondent did not correctly interpret and apply the Resolution.
- (2) I order the Respondent to pay the Applicant the amount of R1 267, 82 by no later than **31 March 2015**.



ADV J P HANEKOM