



PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

# ARBITRATION AWARD

Case Number: PSCB271-13\_14  
Senior Commission / Panellist: Martinus van Aarde  
Date of Award: 29 March 2014

In the **MATTER** between

NEHAWU obo E Langfoot & 1 Other

(Applicant)

and

Department of Human Settlements

(Respondent)

Applicant's representative: Mr. M Mokhachame  
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## 1. Details of hearing / representation

The case was set down for an arbitration hearing on 28 March 2014 (09h00) at Bloemfontein, NEHAWU's Offices. Mr. M Mokhachame: Official NEHAWU represented the Applicant. Mr UP Rens: Deputy Director HR represented the Respondent (DHS). The proceedings were digitally recorded (CD on file with arbitrator's notes).

## 2. Issue(s) to be decided

This is an application in terms of the **Labour Relations Act 66/1995, section 24(2)(5)** re the interpretation/application of a collective agreement, with specific reference to Resolution 1/2007, Clause 9.1: re the Respondent's alleged failure to pay the Applicants their overtime worked for the period 27 June 2011 to 31 July 2011.

## 3. Background to dispute

3.1 The Applicants in this matter are—

3.1.1 **Mr EM Langfoot** (First Applicant): He is in the employment of the Respondent since 1 February 1992 in the capacity of Admin Clerk, job level 4.

3.1.2 **Mr JM Badirwang** (Second Applicant): He is in the employment of the Respondent since 10 July 1995 in the capacity of Land Tenor Officer, job level 8.

3.2 The Applicants were verbally requested/instructed by the HOD (Mr Mokoena) to work overtime for the period 27 June 2011 to 31 July 2011. Mr Mokoena was since replaced by Mr Mokhesi. The Respondent failed to pay their claims. The Applicants lodged a grievance in 2012 – The Respondent failed to respond to the said grievance within the prescribed time limits (30 days). Subsequently, the Applicants lodged a formal dispute (LRA 7.11) on 24 July 2013 in terms of **section 24(2)/(5)/LRA '95**. The conciliation hearing was held on 2 October 2013. The dispute was declared unresolved in terms of **section 135(5)/LRA '95**. The Applicants then filed a Request for Arbitration (LRA 7.13) on 21 October 2013.

## 4. Survey of evidence / argument

I will address the material issues separately.

4.1 Point in limine: jurisdiction

- 4.1.1 During the proceedings, the Respondent raised a point *in limine* challenging the jurisdiction of the arbitrator/Council to arbitrate the dispute. Mr Rens furthermore argued that the real dispute has little (if any) relevance to Resolution 1/2007, Clause 9.1) as the resolution only describes the tariffs to be paid for overtime-/Sunday-work (*sic*).
- 4.1.2 I do not intend to dwell into the issue in detail save to point out that this case is now long overdue (originated in 2012). As pointed out, the case was set down for a conciliation hearing on 2 March 2013 before myself. Both parties attended the hearing but they however failed to solve the dispute. Having regard to the dicta in **Fidelity Guard Holdings (Pty) Ltd. v Epstein (2000) 21 ILJ 2382 (LAC)** our case law is clear in such circumstances. The LAC held that if a party challenges the jurisdiction of the Council (or CCMA for that matter) in circumstances alike, they need to approach the Labour Court to set aside the certificate. As long as the certificate is standing, the Council has jurisdiction to (continue to) arbitrate the dispute.
- 4.1.3 Respondent's point is thus dismissed for the reasons mentioned above – the case is properly before the Council for arbitration. Be that as it may, I am of the opinion that the Respondent misguided himself in this regard.

## 4.2 The merits

4.2.1 I have heard arguments from both parties (also to be read with Annexure A & B respectively), the main issue more of a legal nature.

### 4.2.2 Applicants' case

4.2.2.1 Applicants' arguments in essence boil down to the following—

- (a) the Applicants were instructed by the (then) HOD (Mr Mokoena) to perform certain overtime work during the period 27 June 2011 to 31 July 2011. Mr Mokoena was soon thereafter replaced as HOD by Mr N Mokhesi;
- (b) the itinerary (*reisplan*) and authorisation for the use of an official vehicle was duly approved by the Head of Directorate dated 2 August 2011;
- (c) the Applicants performed the required overtime as instructed to do (Annexure A.p.14-15) and subsequently lodged an application for payment of the overtime on 14 November 2011. This application was submitted/signed by

the Director: Informal Settlements and Land Tenor on 14 November 2011. The document was recommended by the Chief Director (C Tlali) on 18 November 2011 and approved by the Chief Financial Officer (D Hattingh) on 30 January 2012 and finally approved by the new HOD (Mr Mokhesi) on 7 February 2012 (Annexure A.pp.11-21);

- (d) for reasons unknown to them, the Respondent refused to pay the Applicants the said overtime. It is argued that the new HOD (Mr Mokhesi) withdrew his approval (per Annexure A.pp.1-21) the next day (8 February 2012). Respondent is however not in a position to submit the 'written withdrawal-letter' as it since went missing.

#### 4.2.3 Respondent's case

- (a) As pointed out, the Respondent firstly relied on/argued that the applicants failed to observe the governing policy in the sense that the right to perform overtime was not formally approved by the (then) HOD (Mr Mokoena) in writing. In this regard the Respondent relied on the Overtime Policy, clause 3.4.1 (Annexure B) to be read with the Public Service Regulations, clause D2(b)(c) (Annexure B).
- (b) Secondly, as pointed out, the Respondent argued that the HOD (Mr Mokhesi) withdrew his initial (written) approval on 8 February 2012; however they could not substantiate same because "the documentation went missing".

## 5. **Analysis of Evidence / Argument**

I will address the material issues separately.

5.1 The relevant provisions read as follows.

### 5.1.1 Overtime Policy

*3.4 Conditions for Remunerated Overtime*

*3.4.1 An employee may not perform remunerated overtime before the Executing Authority, or a delegate, has granted the necessary approval. Compensation for overtime will be with effect from date of approval by the Executing Authority, or delegate."*

### 5.1.2 Public Service Regulations

“D. Overtime

D.2 An executing authority may compensate an employee for overtime work if—

(a) ...

(b) the department has a written policy on overtime;

(c) the executing authority has provided written authorisation in advance for the work.”

### 5.1.3 Resolution 1/2007

#### Agreement on improvement in salaries and other conditions of service

9. BASIC CONDITIONS OF EMPLOYMENT ACT (BCEA), 1997

9.1 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. The provision excludes employees on commuted overtime.”

5.2 From the outset I must point out that the said overtime policy cannot be seen or interpreted separate from Resolution 1/2007 to be read with Resolution 3/1999 the **Basic Conditions of Employment Act 75/1997**, and the Public Service Regulations. As such the documents/provisions rather support each other. Generally speaking, the Act/Resolution contains the rights (obligations) of the parties whilst the departmental policies also focus on the procedural aspects. The Resolution, being a collective agreement in terms of the **Labour Relations Act 66/1995, section 23**, can be regarded as subordinate legislation and as such overrides internal policies.

5.3 Having regard to the documentation before me (Annexure A.pp.10-15) it appears that the (then) HOD (Mr. Mokoena) indeed instructed the Applicants to execute the functions (go on a road-trip and perform duties on overtime-basis). The Applicants did not obtain prior written approval for this instruction (also considering that if they fail to (or even question) perform the duties, it would have created a negative impression of subordination or even disciplinary action. From the documentation it is clear that the applicants indeed performed the required duties and their application for payment of the overtime worked was duly recommended by the Director, Chief Director, Chief Financial Officer and formally approved by the new HOD: Human Settlements (Mr Mokhesi) – Annexure A.pp.16-21. Any procedural irregularities (if any) appear thus to be condoned by the HOD by approving the application.

5.4 On my questioning why the HOD (who did not testify at this hearing) withdrew his initial approval, Mr Rens stated that the Respondent wishes “to be granted a further opportunity to investigate whether the overtime had been necessary and the Department received value for the money” (*sic*). Having regard

to all the signatures on the application form, the time lapse since, etc. the reasons tendered are to say the least, questionable. Of more importance however, is that there is not a shred of real evidence before me that the HOD indeed withdrew his approval. Mr Rens' argument is purely based on hearsay evidence. Even if one accepts that the HOD is a busy official, one would at least expect that the Respondent submit a sworn statement to substantiate its stance. There is simply no evidence before me in this regard. The Respondent also could have called a number of witnesses to shed more light on this issue.

## 6. Award

In case PSCB271-13\_14 the following award is rendered—

- 6.1 The Council (PSCBC) has the necessary jurisdiction to arbitrate the dispute.
- 6.2 The Respondent (Department of Human Settlement) failed to comply with the provisions set out in Resolution 1/2007 (clause 9.1) to be read with the **Basic Conditions of Employment Act 75/1997**, Resolution 3/1999 and the Overtime Policy.
- 6.3 The application for remunerative overtime was properly approved by the HOD: Human Settlement on 7 February 2012 certifying that the Applicants indeed performed the said overtime.
- 5.3 The Respondent is hereby ordered to pay the Applicants for overtime worked during the period 27 June 2011 to 31 July 2011 in terms of the governing policy.
- 5.4 Said payments to be made by the Respondent to the Applicants on/before 30 April 2014, if not, the Respondent is also ordered to pay interest on the outstanding amount calculated at a rate of 1,5% per month until final date of payment.
- 5.5 No order as to cost is made.

Signature:



Senior Arbitrator: **Martinus van Aarde**