

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 580/2015

In the matter between:

HEALTH AND OTHER SERVICES PERSONNEL

TRADE UNION OF SOUTH AFRICA (HOSPERSA)

First Applicant

GERRIT DE VILLIERS AND OTHERS

Second – Further Applicants

and

THE MEC-FREE STATE PROVINCE

First Respondent

THE DEPARTMENT OF HEALTH – FREE STATE

Second Respondent

EVODIA NTSOAKI THOBALA N.O

Third Respondent

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

Fourth Respondent

Delivered: 15 March 2019

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

- [1] The applicants seek an order reviewing and setting aside the arbitration award issued by the third respondent (Arbitrator) under the auspices of the fourth respondent (PHSDSBC) dated 25 February 2015. They further seek that the arbitration award be substituted with an order that the first and second respondents restore the overtime regime which applied to the individual applicants (The Dentists) prior to April 2014, and to be paid the commuted overtime calculated according to that regime retrospectively from April 2014 to the date of this order, and to continue payment on that basis until such time as a new overtime regime is agreed upon after proper consultation with all the relevant parties. In the alternative, the applicants seek an order compelling the parties to engage with one another and negotiate in good faith with a view to reaching agreement on what overtime regime is to be applied to the Dentists.
- [2] The Dentists are employed by the second respondent (Department) in various Hospitals and Clinics in the Free State Province. They are designated as performing essential service under section 71 of the Labour Relations Act. They had referred a dispute to the PHSDSBC alleging unilateral changes to their terms and conditions of employment. The dispute was referred to the PHSDSBC in terms of section 64(4) of the Labour Relations Act (LRA)¹. When conciliation failed, the matter came before the Arbitrator for arbitration.
- [3] At the arbitration proceedings, the applicants' case was as follows;

¹ Section 64(4) of the LRA reads:

“Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (a) may, in the referral, and for the period referred to in subsection (1)(a) –

(a) require the employer not to implement unilaterally the change to the term and condition of employment; or

(b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.”

- 3.1 In terms of their contracts of employment, the Dentists' normal working hours were stipulated as 40 hours per week. Thus, any hours worked over and above were to be compensated by way of overtime pay.
- 3.2 Since July 1996, the Dentists together with other medical practitioners were paid what was referred to as 'commuted overtime', which was based on payment for a fixed number of hours of overtime each month as distinct from payment of an amount for overtime pay calculated on actual number of hours worked.
- 3.3 The system effectively involved payments of a fixed amount monthly, over and above their normal remuneration, calculated on the basis of their normal hourly remuneration rate times 1.3 for 16 hours per week, irrespective of the actual number of overtime hours performed by an employee.
- 3.4 The logic behind the system or arrangements according to the applicants was that it saved the Department the administrative burden of processing monthly claims submitted by individual Dentists. They contend that the arrangements of paying commuted overtime became a term of their contracts of employment, even though they were at times required to sign written contracts which was parallel to the ordinary contracts of their employment dealing specifically with overtime. In the end however, whether the Dentists signed such contracts on an annual basis or not was immaterial, as they were still paid commuted overtime.
- 3.5 The above arrangements were justified as the work that the Dentists performed and the functions of their posts required of them to be available outside of the normal working hours, and to make themselves

available to deal with emergency cases after hours, including having to work in clinics on Saturdays according to a roster.

3.6 In March 2014, the Department issued a circular stating that with effect from 1 April 2014, the commuted overtime would no longer be paid to the Dentists without valid contracts for such payments². The applicants contend that this amounted to a unilateral change to the terms and conditions of employment, as it was a drastic change which had the effect of suddenly reducing the amount of pay the Dentists had been used to receiving by 34.21%. They further contend that this was done without any consultation with Organised Labour representing the Dentists to negotiate a new overtime regime.

3.7 They further contended that despite the withdrawal of commuted overtime, the Dentists still continued to work the same hours as before, whilst being paid just short of two thirds of what they were paid before April 2014.

[4] The MEC and the Department had not called any witnesses at the arbitration proceedings. Their case however by way of submissions was that;

4.1 There was no unilateral change to the Dentists' terms and conditions of employment, but that all that was done was to act in good faith and correct an error that was committed by the Department in the implementation of the National Policy on Commuted Overtime for Medical & Dental Personnel.

² The Circular reads:

'Approval has been granted to phase out commuted overtime with Dentists. All Dentists must be informed that as from 1 April 2014, they do not have a valid contract for the payment of commuted overtime anymore'

- 4.2 The Policy was meant to regulate the management of the commuted overtime for medical personnel, and in accordance with its provisions, the Dentists were required to enter into contracts or agreement to work commuted overtime, which contracts were granted annually *albeit* not automatically.
- 4.3 The Auditor-General had in that financial year raised concerns that the payment of overtime to the Dentists in the previous years was not in accordance with the provisions of the National Policy as they were paid for overtime that they had not claimed. To that end, the payments as were done in the past were viewed as irregular, constituting fruitless and wasteful expenditure.
- 4.4 The Dentists were not at all prevented from performing overtime and to be compensated, but that a *proviso* was that they were required to enter into contracts with the Department as envisaged in the provisions of the Policy. A copy of the Policy³ was presented to the Arbitrator during proceedings, and the specific provisions relied upon were;
- 4.4.1 Clause 4.2, which provided that it would be necessary for all participants in the commuted overtime remuneration system to complete commuted overtime contracts;
- 4.4.2 In terms of clause 4.4.7, all commuted overtime contracts of medical personnel would be reviewed annually on an individual basis by the responsible Chief Directors in collaboration with the Heads of Clinical Departments, in terms of the operational need for such overtime work, and that all renewed contracts would be authorised by the Head of Department of Health or his/her delegate.

³ Annexure 'AS2' Vol 3 of the Index bundle

4.4.3 Clause 5.4 provided that employees were expected to work in excess of normal working hours in exceptional circumstances such as in emergency, and not due to factors such as personnel turnover, and that the employer was not in a position to compel employees to perform overtime duties in the absence of an agreement.

4.4.4 Clause 6.4 provides that medical personnel wishing to participate in the commuted overtime in specific groups were required to complete overtime contracts to be verified by the Heads of Clinical Departments as measured against the need for overtime services in the clinical departments. Effectively, the Heads of Departments were responsible for the approval of individual contracts and were also accountable to the Auditor-General for the effective control of the overtime system.

4.4.5 Clause 7.4.3 provided that actual time worked was to be recorded in the register every time a Dentist was called to the hospital for clinical work.

4.4.6 Clause 7.4.4 provided that Dentists were to be compensated at applicable overtime hourly rate for actual hours worked.

4.5 The Department and MEC submitted that none of the Dentists were compelled to enter into a contract on the commuted overtime.

4.6 Following concerns arising from the Auditor-General's report, the Department had consulted with the Dentists with a view of implementing the Policy correctly. They had been requested to enter into contracts but had however refused to do so.

- 4.7 The Dentists could therefore not claim a right to be paid commuted overtime as they had not complied with the provisions of the Policy, and had further not demonstrated that they had actually worked overtime, which overtime was to be recorded in the register.

The award and grounds of review:

- [5] Having heard the evidence of Doctors Henro Burger and Christo van der Merwe, and further having accepted that central to the determination of the dispute were the provisions of the National Policy on Commuted Overtime for Medical and Dental Personnel which governed commuted overtime, the nub of the Arbitrator's conclusions was that;

5.1 The applicants failed to prove that their terms and conditions of employment were unilaterally changed on the basis that participation by the Dentists in the system (of overtime) was voluntary;

5.2 The Dentists were required to conclude separate contracts with the Department which were to be reviewed annually.

5.3 The Dentists were requested to apply for the new commuted overtime contracts, but had declined to do so.

- [6] The applicants contend that the arbitration award is reviewable as the Arbitrator should have made an award directing the parties to engage with each other and to negotiate in good faith with a view of reaching agreement on the issue. This was in circumstances where it was further submitted that the Arbitrator ignored or failed to take into account;

- 6.1 The fact that the Dentists were over the years paid commuted overtime without being required to conclude any separate contracts, and thus a tacit term to their original contracts of services was established.
- 6.2 The adoption of the Policy did not automatically affect the Dentists' contracts of employment or amend their terms, nor did it justify a unilateral change to their terms and conditions of their employment.
- 6.3 Since the Policy was to impact on the terms and conditions of the contracts of employment, it was supposed to have been discussed with organised labour before its implementation.
- 6.4 There was no evidence of what the exact status of the Policy was (*i.e.*, whether a draft or a directive issued by the Minister for the Public Service and Administration in terms of section 3(2) of the Public Service Act (Proclamation 103).
- 6.5 There was no evidence that the Department had requested the Dentists to apply for new commuted overtime contracts but had refused to do so.
- 6.6 A proper reading of the Auditor-General's report relied upon by the Department did not reveal a finding that by paying the Dentists commuted overtime as was done until March 2014, those payments were irregular, which constituted fruitless and wasteful expenditure. In this regard, it was argued that the Auditor-General had merely stated that 'it might' be deemed irregular expenditure.
- 6.7 Following the Auditor-General's report, the Department had not adduced any evidence to establish that it had followed the

recommendations made therein, including management assessment, or obtained legal opinion on the matter.

[7] In response to the grounds of review, the submissions made on behalf of the MEC and the Department were that;

7.1 The Arbitrator understood the nature of the dispute that was before her, and there was no basis for any conclusion to be reached that she had misconceived the nature of the enquiry;

7.2 There was a Policy in place which governed commuted overtime and that participation in the scheme was voluntary;

7.3 The Dentists who participated in the scheme were required to enter into contracts which were reviewed annually, and that payments were made for actual overtime work performed in terms of the policy. They had failed to produce proof that they had indeed performed actual overtime.

7.4 To the extent that the Department had omitted to review and enter into new commuted overtime contracts with the Dentists, that omission was picked up by the Auditor-General, and the Department had to act.

7.5 Since the Dentists could still be paid overtime provided that they entered into contracts with the Department and had rendered actual overtime work in accordance with the Policy, it could not be said that there was any unilateral change to their terms and conditions of employment.

The legal framework and evaluation:

- [8] Central to any determination of a dispute under section 64(4) and (5) of the LRA is whether the applicants have demonstrated that unilateral changes were effected to the Dentists' terms and conditions of their employment contracts, and secondly, that there was no consent to the changes⁴. It follows that if it is found that no changes were effected to the terms and conditions of the employment contract, that should be the end of the matter.
- [9] Aligned to the above enquiry however is whether what is alleged to have been changed falls squarely within the ambit of part and parcel of the terms and conditions of employment of the Dentists' contract of employment⁵. In determining this issue, the Courts have further drawn caution that a distinction ought to be drawn between a work practice as it exists and a term and condition of employment⁶. This is premised on the basic principle that whilst the terms and conditions of employment cannot merely be changed at the whim of the employer, work practices on the other hand are by their nature subject to the employer's prerogative⁷.
- [10] Thus, the issue is whether there was a contractual right, based either on the employment contract or collective agreement, providing a right to the Dentists, expressly, tacitly or impliedly, against unilateral change to working terms and conditions.
- [11] For the purposes of the facts of this case therefore, the issue is whether the applicants or the individual Dentists have demonstrated any term/condition

⁴ *Staff Association for the Motor & Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd* (1997) 18 ILJ 374 (LC) at p379A-B:

⁵ *Unitrans Supply Chain Solutions (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2014) 35 ILJ 265 (LC) at para 13

⁶ See *Ram Transport SA (Pty) Ltd v SATAWU and Another* [2011] JOL 26805 (LC); *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU and Others* [2011] 3 BLLR 231 (LC);

⁷ See *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA* [1995] 4 BLLR 11 (LAC); *Apollo Tyres South Africa (Pty) Ltd v National Union of Metalworkers of South Africa ('NUMSA') and Others* [2012] 6 BLLR 544 (LC)

contained in their contracts of employment that accords them a vested right to work and be entitled to commuted overtime pay as was the position before 1 April 2014.

- [12] The applicants' case was that commuted overtime had resulted in a tacit term to their contracts of employment, which could not be overridden by the Department's Policy as implemented from 1 April 2014. As I understood the argument, the applicants rely on a tacit term based on a long-standing practice in regards to commuted overtime. In *CEPPWAWU obo Konstable & others v Safco*⁸ the Court held that a long-standing practice and yearly custom did not form an employment condition, unless the parties' intention was to create a contractual right.
- [13] As I further understood the evidence before the Arbitrator, the Department's National Policy on Commuted Overtime for Medical & Dental Personnel has always been applicable. The evidence of both Doctors Burger and Van der Merwe was to acknowledge that they had entered into individual commuted contracts which were approved in the past, and further that this was in accordance with the Policy. It follows that any rights to commuted overtime and pay accordingly accrued in accordance with the provisions of that Policy.
- [14] The arrangement or system of paying the Dentists commuted overtime as was the position before 1 April 2014 came about purely for the purposes of convenience. It might as well be added that this came about as a result of some officials in the Department failing to do what was required of them insofar as the administrative functions regarding the implementation of the Policy was concerned. These officials with a view of avoiding additional administrative payroll burden of calculating and paying overtime for actual hours of overtime performed, had then adopted a system to pay employees a

⁸ [2003] 3 BLLR 250 (LC). See also *Edcon Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2017] 4 BLLR 391 (LC); (2017) 38 ILJ 1660 (LC)

flat rate on the basis of 16 hours of overtime per week. In the course of so doing, none of the prescripts of the applicable Policy were implemented.

[15] The above lapses and omissions to comply with the provisions of the Policy in my view could not have created a tacit term in the contracts of employment of the Dentists for a variety of reasons, including that the Department is enjoined to manage public finances in accordance with the provisions of the PFMA and other strict Treasury Regulations. That much is clear from clause 4.1 of the Policy which provides that the Head of the Department as Accounting Officer must ensure that he/she must implement and maintain effective and efficient systems of financial and risk management and internal control measures. To that end, the commuted overtime system as part of a remuneration system was subject to periodic review in order to reduce the risk of irregular expenditure and/or financial misconduct. In accordance with that aim, under clause 4.2 of the Policy, all participants in the commuted overtime remuneration system were required to complete commuted overtime contracts. The Department had obviously failed in that regard, but it cannot be read from those lapses and omissions that the common intention of the parties was to make the arrangements in regards to commuted overtime as they were prior to April 2014, terms and conditions of the Dentists' employment.

[16] When the Auditor-General raised alarm bells about the manner with which commuted overtime was managed, and upon a realisation that an amount of R8.5m was declared as overpayment to the Dentists as a result of these lapses, surely the MEC and the Department were compelled to take action and ensure compliance with the provisions of the Policy when implementing and making payments for commuted overtime.

[17] The applicants' contentions that a proper reading of the Auditor-General's report relied upon by the Department did not reveal a finding that by paying

the Dentists commuted overtime as was done until March 2014, those payments were irregular, which constituted fruitless and wasteful expenditure, or that the Auditor-General had merely stated that 'it might' be deemed irregular expenditure are misplaced. The Auditor-General's audit finding was that the R8.5m was deemed to be an overpayment, which finding on its own was sufficient for the Department and the MEC to take action. Any red lights highlighted in the Auditor-General's report ought to be acted upon.

- [18] Whether the Department had equally not followed the recommendations made in the audit report, including management assessment, or obtained legal opinion on the matter is equally inconsequential in that the source of any concerns regarding the overpayments was basically the non-compliance with the provisions of the Policy. Any legal opinion sourced would in any event have resulted in the invariable conclusion that the provisions of the Policy ought to be implemented in full. In the end, it did not assist the applicants to now challenge the status of either the Policy or the Auditor-General's report or how the MEC and the Department had reacted to that report.
- [19] In conclusion, there is no basis for any finding to be made that the Arbitrator's award is reviewable on the basis that she had either misconstrued the nature of the enquiry or had arrived at a finding that is not sustainable or reasonable on the facts and material placed before her. The contention that the Department or the MEC ought to have engaged or consulted Organised Labour before implementing the spirit and letter of the Policy is equally misplaced, as all that the Department had done was to implement the provisions of the Policy, which had always been in place, and which is something it had failed to do in the past. Thus, any disputes surrounding whether the applicants were invited for consultations on the matter and had declined the invitation does not take the matter any further, specifically since on the facts, there was no basis to conclude that unilateral changes to terms and conditions of employment had been effected.

[20] In the end, the applicants had not been able to point to any term contained in a collective agreement or in the Dentists' contracts of employment that accorded them a vested right to a payments of overtime pay as done prior to 1 April 2014. They had vested rights with regard to maximum working hours, and the basis of any rights in respect of any commuted overtime or pay could only have been if there was compliance with the provisions of the Policy, which meant that they were required to enter into contracts with the Department in that regard. That right had not been changed or infringed, as the practice of non-compliance with the Policy as was the case prior to April 2014 could not have been converted into a contractual right. Ultimately, requiring the Dentists to enter into contracts in order to participate in the commuted overtime scheme did not amount to a unilateral change in their terms and conditions of employment.

[21] In the light of the above conclusions, it follows that the review application ought to fail. I have further had regard to the requirements of law and fairness in regards to the issue of costs. The MEC and the Department did not strenuously argue for costs, and in the light of a continuing relationship between the parties, any costs order is deemed to be inappropriate in the circumstances.

[22] Accordingly, the following order is made;

Order:

1. The applicants' application to review and set aside the arbitration award issued by the third respondent under case number PSHS79-14/14 dated 25 February 2015 is dismissed.
2. There is no order is to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:

P.J Blomkamp SC

Instructed by:

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For the First and Second Respondents:

B.S Mene

Instructed by:

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LABOUR COURT