ARBITRATION AWARD

Panellist/s: **Nkosinathi Maseko**
Case No.: **PSHS12-10/11**
Date of Award: **12-Aug-2010**

In the ARBITRATION between:

Grosskpf Att & POPCRU obo Mbokane, I.V. and 11 others
(Union / Applicant)

and

Department of Correctional Services - Gauteng
(Respondent)

ARBITRATION AWARD

1.

PREAMBLE

The compulsory arbitration hearing ("the hearing") in terms of **Section 74 of the Labour Relations Act 66 of 1995 (as amended**), and in the matter between the parties as set forth above was held under the auspices of the **Public Health and Social Development Bargaining Council** ("the Council'). The date of the hearing was 23 July 2010, and the hearing was held at the premises of the respondent. Advocate Basson represented the applicants. He is from the Pretoria Bar Council. Mrs Dladla on the other hand represented the respondent. The proceedings of the hearing were mechanically recorded. Hereinafter is the summation of evidence, its analysis and the arbitration award.

2.

ISSUE TO BE DETERMINED

I am enjoined to determine whether the respondent has changed terms and conditions of employment without consulting with the applicants.

3.

The applicants began with their case, and presented both *viva voce* and documentary evidence. The disputants introduced two sets of bundles, and were accepted for what they purport to be. Each party called one (1) witness.

4.

EVIDENCE

Mr Mbokani took the stand, and testified that he is a **Clinical Nurse Practitioner** in the employ of the respondent. He is registered with the **Nursing Council**. His colleagues who are party to this matter are likewise employed as Nurse Practitioners and are likewise registered with the Nursing Council. It has been a term and condition of employment to work eight (8) hours a week from Monday to Friday. He worked forty (40) hours a week. He testified that working on weekends and public holidays was regarded as overtime. Payment was therefore in accordance with overtime.

The collective agreement between the employer and its employees, this being **Resolution 2 of 2009** (hereinafter "Resolution 2'), does not apply to nurses. Instead, he testified, it finds application to correctional officers. Nursing practitioners have their own collective agreement, the **Occupational Specific Dispensation for Nurses in terms of Resolution 3 2007** (hereinafter "OSD'). The respondent has used Resolution 2 and to change terms and conditions of employment. He introduced "7 days work week". This led to all days being regarded as normal and the overtime pay was replaced by an allowance.

6.

Mr Mbokani testified further that the respondent has, with effect from 1 July 2009, purportedly implemented the provision of Resolution 2. This resulted in terms and conditions of employment being unilaterally changed. He virulently denied that by making unilateral changes the respondent had acted within the ambit of Resolution 2. He challenged the proposition that it was within the employer's prerogative to regulate working hours.

7.

The respondent called its only witness, Mr Thabo Chiloane. He testified that he is the **Deputy Director–Remuneration Control**. He was responsible for the implementation of the OSD. He was mandated to identify nurses and translate them accordingly. There were no changes to working hours. The costs of overtime were excessive, and therefore Cabinet took a decision and gave the employer a mandate to introduce a "7 days establishment". This was incorporated into the **OSD**.

8.

During cross examination he testified that **Resolution 2** does not find application to the applicants. Instead, he testified, the applicants have their own OSD. The "7 days work week" was however introduced by Resolution 2. The applicants had initially worked a five days establishment, but that was changed. All officials under centres were affected by **Resolution 2**, he testified. Mr Chiloane testified that employees covered by their own **OSD** are excluded from the provision of **Resolution 2**. Therefore, he testified, the applicants did not fall within the realm of the "7 days establishment".

9.

ANALYSIS OF EVIDENCE

I am called upon to make a determination on whether the respondent has unilaterally changed terms and conditions of employment. It is therefore important at this stage to point out that terms and conditions of employment may be created *ex lege*, *ex contractu* and by a collective agreement. In *casu*, it became common cause that the applicants have been working a "5 days work week". Saturdays, Sundays and Public Holidays were regarded as over time and paid accordingly. The *status qou* was later changed and the "7 days work week" was introduced. As a result thereof the applicants were paid an allowance instead of overtime for working on weekends and public holidays. It was neither denied nor disputed that these changes were not preceded by a consultation process. Alternatively, no evidence was led to the effect that the applicants were consulted. I must therefore determine whether the respondent has unilaterally changed terms and conditions of employment.

10.

Resolution 2 does not find application to the applicants, it must be recorded. The scope of the resolution is unequivocally clear, and the applicants are expressly excluded. The scope thereof reads "subject to clause 4.2 this agreement binds - 4.1.1 the employer

4.1.2 ---

4.1.3 ---

4.2 The agreement is not applicable to the following categories of officials employed by the department –

4.2.1---

4.2.2 Employees covered by other OSD referred in PSCBC Resolution 1 of 2007,

4.2.3 --- "

11.

The applicants are covered by their own **OSD**, **Resolutions 3 of 2007 (supra).** The resolution does not make provision for the "7 days work week". Therefore, I am at pains to comprehend what informed the decision to unilaterally change terms and conditions of employment. Alternatively, in my view, where there are compelling reasons to change

terms and conditions of employment - the respondent would be obliged to consult with its employees. The hearing was referred to the **Public Service Regulations, 2001 B.** It was therefore contended that a head of department has the prerogative to determine the work week and daily hours of work for employees. This must be rejected as it is only somewhat peripheral to the issue in dispute. The issue before me is whether the respondent has unilateral changed terms and conditions of employment. I am constrained, in view of the above, to conclude that changes were effected, and were not preceded by consultation.

12.

Evidence led by the applicants through Mr Mbokani was clear and consistent. He was able to demonstrate that the applicants use to work a 5 days week, and were paid overtime for working on weekends and public holidays. He impressed as a witness. He asserted that the provision of **Resolution 2** did not find application, as they are covered by their own **OSD**. The employer, without consultation, made changes. The latter's evidence was characterised by contradictions.

13.

Chiloane testified that there were no changes. He later testified that there were changes which were made in keeping with **Resolution 2,** and the said resolution does not find application to the applicants. He made reference to the **Public Service Regulations 2001**, and concluded that the head of the department has the prerogative to regulate the work week and daily hours. That may be the case, but it must be understood that no employer has the right to change terms and conditions of employment without consulting its employees. Therefore, I must conclude, the respondent has made changes, and that these changes were not preceded by consultation.

14.

AWARD

The respondent, the Department of Correctional Services, is hereby directed to restore the status as it was prior to effecting changes.

I make no order as regards costs.

PER, NKOSINATHI MASEKO

COMMISSIONER

THUS DONE AND SIGNED AT JHB ON THIS 4TH DAY OF AUGUST 2010.