RULING ON

JURISDICTION

PUBLIC SECTOR
CO-ORDINATING
BARGAINING COUNCIL

Panelist: S H Christie

Case No.: PSCB 204-09/10

Date of Award: 16 July 2010

In the ARBITRATION between:

Public Servants Association obo Craffert SJ & 23 others (Union / Applicant)

and

The Department of Justice & Constitutional Development - National (Respondent)

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JURISDICTIONAL RULING

DETAILS OF HEARING AND REPRESENTATION

1. The hearing was held at the premises of the Respondent Plein Street. The Applicant union brings this case on behalf of 23 of its members whose names are set forth in annexure "A" hereto, are employees of the Respondent and was represented by Advocate R. Stelzner, SC and the Respondent (the Department) by Advocate A. Schippers SC.

ISSUE TO BE DECIDED

2. The Respondent seeks a ruling on the following questions
    a. Whether the PSCBC has jurisdiction to entertain the dispute;
    b. Whether the term or benefit that Applicant claims runs counter to PSCBC Resolution 7 of 2000 and Res 1 of 2005 both of which are collective agreements (CA) under the Labour Relations Act (LRA); and
    c. Whether the term or benefit sought has any foundation in law.
3. The facts of the case are simple: the Applicants are judges' secretaries. For many years they were permitted to take paid annual leave at times which suited them and the judges for whom they worked. When the High Court is in recess the secretaries were not required to come to work but were on stand-by and would only have to come in if their judges required their attendance. These periods of stand-by did not count as annual leave.
4. The secretaries are employees in terms of the Public Service Act of 1994 (PSA) and the Department has long considered that this 'stand-by' arrangement created inconsistencies and that the secretaries' working time arrangements should be harmonized with those of other staff governed by the Public Service Act read with the collective agreement (CA) concluded in the Public Service Coordinating Bargaining Council (PSCBC) - Resolution 7 of 2000 (Res 7/200).
5. On 5 February 2008 at a meeting of the Judge President of the Western Cape High Court and 16 other judges and the Chief Registrar, Court Manager officials it was agreed that secretaries would continue to be on standby during court recesses, if used they would be on

duty and if not would be required to account and fill in leave forms ex post facto to prevent abuse. This agreement was minuted but not apparently formalised into a policy/procedure document.

6. On 3 December 2008 the Court Manager of the Western Cape High Court issued an instruction that judges' secretaries would be required to come to work during the Christmas recess or to apply for annual leave, i.e. in advance. The secretaries complied under protest.

7. The substantive issues in dispute are whether the secretaries have an implied right to be on standby and if so whether the Court Manager unilaterally changed the terms and conditions of employment of judges' secretaries.

RESPONDENT'S CONTENTIONS

8. Respondent rejects the assertion that if the Applicant's referral documents for conciliation and arbitration set out a cognisable claim the Applicant should be allowed to present evidence in support of that claim. He contended that such an argument would bar any preliminary points being taken.

9. Respondent contends that the term 'stand-by' is a misnomer and that what the Applicants are seeking is additional paid annual leave to which they are not entitled under contract or any applicable collective agreement. Applicants wish to be considered to be on duty although they are not physically tendering to work. The term stand-by is defined in part VIII of PSCBC Resolution 3 of 1999 which provides that if "the employer requires an employee to be available for the performance of duty outside of her or his normal working hours, the employer shall pay a standby allowance." Standby refers to time when employees are not required to work, whereas in this case the Applicants wish to be considered to be at work but not usually required to work.

10. Resolution 7 of 2000 which is binding on the Applicants provides (at clause 7) that employees are entitled (depending on their years of service) to a fixed number of days of paid annual leave, in addition to other kinds of leave.

11. Resolution 1 of 2005 deals with special leave and it specifically covers leave for study, sabbatical, sport, leave when staff are moving home and other special leave arrangements. There is no mention of the dispensation for standby which Applicant seeks.

12. Paragraph 12.3 of Res 1 of 2005 provides for deviation from the policy

> 12.3 Authority for approval of deviation from this policy or granting of special leave for any other circumstances not covered by this policy, will vest with the Director-General. The following will serve as a guideline:

(a) Will the deviation or granting of special leave for any other circumstances not covered by this policy, create precedence for future or revive cases already dealt with?

(b) Will the deviation or granting of special leave for any other circumstances not covered by this policy, be fair, reasonable and were all available alternatives taken into consideration?

(c) Should the deviation or granting of special leave for any other circumstances not covered by this policy, not imply a change to the policy document?

13. The Applicant did not refer to the DG and request the DG to exercise his discretion in terms of the guidelines set forth in clause 12.3 and simply referred a dispute to the PSCBC. The Applicant cannot circumvent clause 12.3 and on that ground alone the PSCBC lacks jurisdiction to entertain the dispute.

14. The Respondent's second contention is that the term or benefit which the Applicant seeks runs counter to the applicable CAs. Res. 7/2000 establishes a clear framework of benefits for the public sector. The purpose of the CA is to establish more equitable arrangements and the agreement is particular and detailed in its provisions relating to leave. Clause 7.8 of Res 7/2000 directs the employer to negotiate special leave arrangements in the relevant sectoral bargaining councils. The outcome of the applicable negotiations is Res 5 / 2005 concluded between the Department and the recognised trade unions in the General Public Service Sectoral Bargaining Council (GPSSBC) whose constitutional scope covers all National Departments and Provincial Administrations not covered by the Scope of the Education Labour Relations Council (ELRC); the Public Health Workers Sectoral Bargaining Council (PHWSBC) and the Safety and Security Sectoral Bargaining Council SSSBC).

15. As general and special leave arrangements are exhaustively dealt with the PSCBC Res 7 of 2000 and GPSSBC Res 1 of 2005 the parties clearly intended these to be the central arrangements to ensure equality in the workplace. Mr Schippers relied in **Ekurhuleni Metropolitan Municipality Germiston / Van Rooyen** (2002) 23 ILJ 1104 (ARB) in which an individual contract provided for terms of employment better than those set forth in the applicable CA. The question was whether the CA was intended to establish minimum or actual conditions of work. The arbitrator confirmed that there are "sound policy reason … why the collective agreement overrides the contract … namely that the employer should not give better benefits to some employees than others …" [1] On this reasoning it could never have been the intention of the parties to these collective agreements that judges secretaries should be privileged over others. Thus even if the secretaries in fact enjoyed these privileges in the past the collective bargaining framework is against it continuing.

[1] At p 1111 B-C.

16. The collective agreements, read with section 23 of the LRA make it clear that the working time arrangements are not minima but actual terms of employment. Schippers added that the principle of equality is reinforced in s 199 of the LRA which provides that contracts of employment may not waive or disregard binding collective agreements or arbitration awards and may not permit an employee to be treated in a matter less favourable than applicable collective agreements or arbitration awards. Although the language of s 199 does not preclude a benefit more favourable than that stipulated in applicable collective agreements or awards, the principle of equality is central to our law and privileging the applicants as they claim would violate the right to equality under section 9 of the Constitution.

17. As the special dispensation claimed for differentiates between the claimants and other employees governed by the PSA and the differentiation "could never be linked to a legitimate government purpose. It would be arbitrary, irrational and constitute unfair discrimination."[2]

18. The Employer claims that the contract term which is sought to be imported into the Applicants' employment has no foundation in law. Counsel contented that if one applies the test applicable to determining tacit terms one must ask whether the term is necessary 'in the business sense to give efficacy to the contract.'[3] There is on the face of it no basis to import such a term.

19. Schippers contented that the Applicants' claim would be at odds with the Employment Equity Act 55 of 1998 (EEA) which, like the constitution promotes equal opportunity and fair treatment. To permit the claim would be a clear violation of section 6(1) of the EEA which proscribes unfair discrimination in 'employment policy or practice'.

20. Whatever the former practice may have been has been altered by the EEA and collective agreements which are clearly incorporated into the contracts of employment of the individual applications. Judges are not authorised to refine collective agreements.

APPLICANTS' CONTENTIONS

21. Mr Stelzner contended that the contentions of the Respondent do not go to jurisdiction but relate to the merits of the matter. The arguments require this tribunal to interpret the collective agreements and how they are or have been applied and to do that in the context of the Applicants' claim that the Respondent departed from its former practice unilaterally and these are substantive questions and not jurisdictional issues.

22. The Applicant also points to certain contentions of the Respondent which are framed as if they are common cause, but they are not. Chief among these is the Respondent's assertion

[2] Respondent's submissions, para 55.
[3] Ibid., paras 62 – 65.

that the Applicant secretaries have 63 days leave per year extrapolated from the 2010 High Court terms. This is not a common cause fact and the contention must be proved.

23. The Applicant also argues[4] that the availability of secretaries 'also formed/forms part of the judges' de facto service conditions for many years.'

24. The Respondent's contention that the claimed for dispensation would amount to a violation of s 195 of the Constitution is also a question that will need to depend on the facts of the matter and the question whether it promotes proper and efficient public service will also depend on the specific exigencies of High court judges and their secretaries and whether standby arrangement is efficient and effective.

25. Put simply the claim is one that is cognisable in law and is arbitrable. Mr Stelzner contends that it is based on an alleged ULP and unilateral change. Although there is no clear provision in the LRA relating to a claim arising from unilateralism and s 64 of the LRA is not clearly applicable to this matter there is inherent in the constitutional right to fair labour practices a rejection of unilateralism.

26. Although the Respondent relies on PSCBC Res 7 of 2000 and GPSSBC Res 5 of 2001 it did not in fact implement them and Applicant points to the fact that on a number of occasions Respondent made some attempt to change but when it met resistance from judges and their secretaries it held back. Mr Stelzner contends that the agreement concluded on 5 February 2008 referred to earlier amounts to a 'refinement'.

27. Early in December 2008 according to the Applicant the Department 'reneged' on the agreement and insisted that the secretaries apply for leave if they were not going to be at work, whether during recess or otherwise.

28. On 10 February 2009 the secretaries lodged a grievance. On 31 March 2009 the regional head of the Respondent wrote to the High Court Manager in Cape Town confirming that the collective agreements concluded in the bargaining councils, read with the Public Service Act

> "…supersede the provisions of any agreement that might be subsequently entered [into] by certain employees and management officials. **In this context, the Department cannot therefore implement anything outside the existing and applicable jurisdictional prerequisites of the Determination on leave of absence in the Public Service and resolutions.**[5] The so-called "Stand-by" leave is not prescribed nor can it be justified. Leave of absence needs to be managed within the prescripts."

29. On 18 May 2009 the secretaries wrote to the area Manager of Western Cape High Court requesting that he forward the unresolved grievance to the office of the Executing Authority.

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[4] Applicant's submissions, para 9.

[5] Emphasis in the original

30. On 16 July 2009 the Regional Head of the Respondent in the Western Cape informed the Area court Manager of the Western Cape High Court that the Minister of Justice Jeff Radebe, the Executing Authority "has, after due consideration of all material facts, dismissed the grievance and confirmed that a Judge's Secretary may only stay away from the workplace if Leave has been approved and that so called standby (for a Judge) outside the workplace without prior approved Leave be dealt with in terms of the Disciplinary process."

31. The Applicants contend that even if the Respondent employer is free to change benefits to which employees are not contractually entitled, it must do so fairly. The leave/standby arrangement was of such long-standing that it is not a concession to be withdrawn at will. Stelzner contends that the collective agreements do not override this arrangement because reference in clause 5.2.3. In PSCBC Res 5/2000 provision is made for 'refinement' based on the 'service delivery requirements of any sector' envisages that the Respondent and the High courts may have particular operational requirements. Applicants cite in support **MISA/SAMWU obo members v Madikor Drie (Pty) Ltd** (2005) 26 ILJ 2374 (LC) where the court held that change to workplace policy may amount to an ULP if there are serious consequences. This would need to be proved on evidence. Also in **Dept of Justice v CCMA & others** (2004) 25 ILJ 248 (LAC) Goldstein J considered that an ULP is not limited to breaches of contractual obligations. Although in a minority judgement there is no indication that the majority rejected this opinion.

32. In **Maritime Industries Trade Union of SA & others v Transnet Ltd & others** (2002) 23 ILJ 2313 (LAC) the LAC held that "a dispute of right is not excluded from the ambit of an ULP" merely because there is no contractual right to the subject of the dispute[6] and that disputes that arise from alleged unilateral change to terms and conditions of work are able to be resolved through arbitration or industrial action.[7]

33. Disputes arising from alleged violation of collective agreements, alleged ULPS relating to the provision of benefits are all arbitrable. As to the Respondent's contention that the claimed for dispensation runs counter to the applicable collective agreements is a point that goes to the merits and cannot be disposed of as a point in limine, at least not without hearing evidence.[8] The argument that the substance of the claim has no basis in law is also a contention that goes to the merits and is not a jurisdictional challenge.

34. Mr Stelzner contended that the arbitrator has a duty under s 138 to deal with the substantial merits of a dispute with a minimum of legal formalities. The claimants have a right to be heard on the merits and the dispute ought not to be disposed of without being heard. The

[6] Para 102.
[7] Ibid., paras 106-107.
[8] Applicant's submissions para 54.

absence of pleadings in arbitration under the LRA is consistent with the policy of encouraging access to the bargaining council to resolve disputes that are referred and that the parties must come to arbitration ready to deal with the substantive issues of disputes.[9]

35. Mr Stelzner contended that there is no contradiction between being on standby i.e. not at work and not on leave. The secretaries are available to work if required, that is they would not be permitted to leave town. Although it is accepted that the claimants are not employed by judges the latter exercise managerial authority over them and 'act qua employer of the secretaries' in relation to their working time arrangements.[10]

36. As to the Respondent's contention that the applicants ought to have applied to the Director General to exercise his discretion in terms of clause 12.3 of Res 1 of 2005 the Applicants are not seeking a special indulgence to be granted some new leave arrangements and therefore the provision does not govern this matter.

37. The Respondent's reliance on s 199(1) is misplaced as this is not an equality provision but one that sets minima below which an employer may not go. As to the broader claim that the claimants would import undue inequality as between themselves and other groups or individuals within the public sector this is a contention that goes to the merits and requires an assessment of all relevant evidence and cannot be disposed of in limine.

CONSIDERATIONS

38. The Respondents seeks to dispose of the claim without it being heard. I think that misunderstands the nature of the dispute resolution proceedings within the PSCBC. The underlying claim relates to the substance of the claimants' working time arrangements and whether these are permissible under the applicable collective agreements, their contracts of employment.

39. The Respondent may be correct that claimants have no substantive right to their underlying claim and that to use the language of Advocate Schippers, 'a cosy arrangement between the judges and their secretaries' is an impermissible attempt to vary the collective agreements. But the way at would relate both to the substantive aspects and due process. It could be possible to confer jurisdiction on a tribunal in such a way as to tie jurisdiction to merits but that is not how our law has been fashioned. Our law does not require a claimant to show that the claim has merit to found jurisdiction. A dispute is defined in the LRA to include an alleged dispute. It is therefore immaterial, when considering jurisdiction, to consider also whether the Respondent has infringed the claimants' rights to fair process or

[9] Ibid., paras 63 – 68.
[10] Ibid., para 79.

to the substantive outcome that they seek as a very low threshold of proof is required under our law to establish jurisdiction.

40. As to the claimants' failure to initiate a claim in terms of clause 12.3 of Res 1/2005 I agree that both parties are bound by the collective agreements but it is not open to the Respondent to ignore the collective agreement. In any event it would appear that on the Respondent's own version the Minister of Justice did not himself request the Applicant to refer to the clause 12.3 procedure. On the face of it the Respondent does not argue that this procedure was a genuine feasible option. Even so the claimants are claiming, rightly or wrongly that the standby working time arrangement is not a leave arrangement. Although Mr Schippers conceded that the Respondent had not raised this question at any time between 16 July 2009 Minister

41. Even if as Respondent contends the claimants' reliance on the February 2008 agreement is misplaced as certain officials have no authority to depart from the applicable collective agreement, the question nevertheless remains whether the process that the Respondent employed to implement the collective agreement(s) was fair. See **Protekon (Pty) Ltd v CCMA & others** [2005] 7 BLLR 703 (LC) where the Labour Court held that the affected employees had no substantive, contractual right to the benefit they had enjoyed, the employer had good cause to remove the benefit but the employee's right to fair process had been violated. This is a merits claim not a jurisdictional question.

42. It is not necessary to consider the representations that both parties made relating to the time that has passed since the collective agreements were enacted and the relevance of failure to implement PSCBC Res 7 of 2000 and GPSSBC Res 5 of 2001 as this relates to merits and not to jurisdiction. The same goes for the argument that s 199 of the LRA bars the kind of arrangement that the PSA seeks for its members.

43. I conclude that the PSCBC has jurisdiction to entertain the claim but the question remains whether the claim can be disposed of on the papers. Stelzner contends that for a proper evaluation of the claim an arbitrator must take cognisance of the surrounding circumstances, the nature of the department, its work and history and if there is any differentiation whether that differentiation is justifiable by reference to the collective instruments and other applicable sources of law. That is not necessarily so and the Respondent may be right that the merits can be determined on the common cause facts; if so the Respondent ought not to have limited its contentions to challenging jurisdiction. It could have but did not seek a merits ruling on the papers.

DETERMINATION

The PSCBC has jurisdiction to arbitrate the claim initiated by the Applicants.

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S H Christie

PSCBC Arbitrator

Case No. PSCB-204-09/10

ANNEXURE 'A'

APPLICANTS

1. Craffert, SJ
2. Sievers, E.
3. Van Heerden, K
4. Cooper, JJE
5. Bawoodien, Z
6. Horstman, K
7. Davids, F
8. Lategan, H
9. Eigelaar, AM
10. Van Schalkwyk JC
11. Kay, GE
12. Venter, E
13. Havemann, AC
14. Potgieter, E
15. Gotsell, N
16. Ely-Hanslo, EJH
17. Terhoeven, AEA

18. Tolken, L
19. Bihl-Pitlele, RL
20. Matthew, M
21. Burger, BY
22. Safodien, F
23. Spiegel, RD
24. Van Biljon, L