



PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

## AWARD

Case No.: PSCB225-9/10  
Date of Award: 22 July 2010  
Panelist: Nina Siele

### In the matter between:

**NNEHAWU obo MOHLOUWA AND OTHERS**

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(Union / Applicant)

**And**

**DEPARTMENT OF HOME AFFAIRS- NATIONAL**

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(Respondent)

### DETAILS OF THE HEARING AND REPRESENTATION

- [1] The arbitration hearing was held on 6 May and 21 June 2010 at the offices of Home Affairs, Mmabatho. At the scheduled time, the Applicants were present and represented by **Mr Kgotso Legwase**, a union official from **NEHAWU**. Mr **Kgalelo Kgomanyane** and **Tumediso Mohloiwa** appeared on behalf of the Respondent. However, they were scheduled to attend another arbitration hearing. According to them, the notice of set down was not served on the Respondent (Home Affairs' head office) but was sent to the regional office.
- [2] After a discussion between the parties an agreement was reached that they will proceed on 21 June 2010.

- [3] On 21 June 2010, the parties were represented by the abovementioned representatives and **Mr Mphela** from Head Office was present to lead the deliberations on the respective formulae and calculation that is commonly and presently applied.
- [4] The arbitration hearing was not recorded as the main issue revolves around the calculations of Sunday payment and Public Holiday payments. The writing board was used in the proceedings.
- [5] The Respondent submitted a bundle of documents that consists of the Determination on working time in the Public Service.

### **ISSUES FOR DETERMINATION**

- [6] The main issue is the interpretation and / or application of collective agreement to wit resolution 1 of 2007.

### **SUBMISSION OF EVIDENCE AND ARGUMENTS**

#### **THE UNION'S SUBMISSIONS**

- [7] Mr Legwase submitted that the immigration officers filed and lodged the grievance pertaining to the non- payment of overtime on Sunday and Public Holidays since March 2009. He conceded that the immigration officers ordinarily do work on Sundays and Public Holidays. He submitted that the calculations in respect of payment should be based on hours worked on a Sunday or Public Holiday and not on the number of days worked. His argument is based on the fact that not all immigration will work the entire Sunday or public holiday. He said that one may work for four hours and others For six hours or and eight hours on a Sunday or public holiday.
- [8] He argued that the immigration officers were not correctly compensated in accordance with the collective agreement that was signed by various unions on 5 July 2007.
- [9] Accordingly, a series of meetings were held in attempt to resolve the issue before any dispute could be declared. It is common cause these

meetings and interventions could not resolve the issues and a dispute. Was was declared.

[10] It was argued on behalf of the Applicants that their calculation subscribe to the collective agreement while the Respondent's calculation are in contravention. On behalf of the Applicants the calculation was summarised as follows on the writing board;

➤ **Notch X Number of hours X 1 X 365**  
**40HOURS**  
**X1, 5**

[11] The union furthermore argued that there was no link between the calculation as presented by the Respondent and resolution 1 of 2007.

## **THE RESPONDENT'S SUBMISSIONS**

[12] Mr Kgomanyane on behalf of the Respondent submitted that it is common cause that a series of meetings were held with an attempt to amicably resolve the issue but all in vain. He said that the main issue is the misinterpretation in regard to the calculation of payment of Sundays and Public Holidays. He mentioned that the immigration officers are aware that their shifts sometimes falls on a Sunday or Public Holiday.

[13] He submitted that it is common cause not only are immigration officers allowed to work on Sundays or Public Holidays but rather there are officers within other Departments too whose' s shifts ordinarily falls on Sundays and Public Holidays. He gave examples of police officers and nursing sisters. His submission is that the manner of calculating payments for people who ordinarily work shifts and are obliged to work during Sundays and Public Holidays, is not similar to people who ordinarily, their shifts does not fall on a Sunday or and Public Holidays. He explained that any change in the manner of the calculating the payments of Sunday and Public Holiday will have an effect on the Department.

[14] Mr Mphela argued that for every collective agreement that is entered into between the union and Public Service, the Minister of Public Service and Administration issues a Determination as an explanatory memorandum. He argued that according to the determination on working time in the Public Service issued during July 2007; the calculation appears on page. 4 of the Determination. It is true that the manner of calculation on the Determination is not similar to the calculation as presented by the union. The difference between the manner of calculation is that the union utilises hours while the Respondent's one is by means of number of days

worked on Sundays and Public Holidays.

[15] Mr Mphela submitted that the applicable calculations should be in accordance with paragraph two of the Determination of working time in the Public Service. Accordingly the explanation is provided from paragraph 2. 1 to 2.3. of the Determination of working time in Public Service. It provides that if a Public Holiday falls on a day which an employee ordinary work the Executing Authority must pay the employee 2 x his or her basic salary, without the option of granting time – off and Sunday should be remunerated 1, 5.

[16] According to Mr Mphela' s calculation on the writing board the employee will receive less than the calculation made by the union.

## **ANALYSIS OF ARGUMENTS AND SUBMISSIONS**

[17] It is common cause that the main contention of the Applicants is that the issues which rise to the present dispute is in regard to Collective Agreement signed between PSA and various registered trade unions on the other hand for the improvement of salaries and other

conditions of service for the financial years 2007/ 2008 to 2010/ 2011 and as such is collective agreement in terms of the Labour Relations Act.(See the definition of 'collective agreements' contained in section 213 of the LRA.

[18] In terms of section 23(1) (c) of the LRA (which deals with the legal effect of collective agreements), a collective agreement binds( inter alia) the members of trade union..... that is/ are party to the agreement- if the collective agreement regulates- ( 1) terms and conditions of employment , or(11) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employer'.

[19] It is common cause the immigration officers are members of NEHAWU who is also a signatory to the Resolution 1 of 2007 (Collective Agreement), that is binding to all members and for the duration of the collective agreement.

[20] The objectives of resolution 1 of 2007on collective agreement in particular clause 1.8 state that ; to provide for alignment of the public service with the requirements of the Basic Conditions of Employment Act, 1997, and matters incidental thereto.

[21] Clause 9 of the Collective Agreement restate the provisions of the Basic Conditions of Employment ( BCEA) , 1997. Paragraph 9. 6 provides that the rate of payment for an employee in the public service who, ordinarily works

on a Sunday shall be 1, 5 x basic salary. On the same breath paragraph 9.7 provides that the rate of payment for an employee who ordinarily works on a public holiday shall be 2 X basic salary, without the option of granting time-off.

- [22] The Provisions of the Determination on Working time in paragraph 1 provides that it must be read and applied in conjunction with BCEA, the current Public Service Regulations, prevailing collective agreements and departmental policies on working time.
- [23] It is common cause that the Determination considered all the relevant applicable policies that relates to the conditions of employment in the public service. It is for this reason that the manner and method of calculation of payment for Sunday and Public holiday should therefore be similar as the one utilised in the BCEA.
- [24] It is given that the calculations of the Sunday and Public Holidays as presented by the Department of Home Affairs and NEHAWU do not differ that much except in regard to the hours that the employees would have worked as opposed to the number of days worked.
- [25] One of the reasons advanced by the union is that some of the employees will prefer to work limited hours on a Sunday hence it is of paramount importance that the number of hours worked should be utilised rather than the number of days worked as Sundays and Public Holidays.
- [26] Given the abovementioned provisions of the Collective Agreement including the Applicable Laws, I am in agreement with **Mr Legwase** that the manner and method of calculating the payment of Sunday and Public holidays should be done in accordance with the hours worked on Sunday or Public holiday.
- [25] The method and manner of calculating the payment of Sunday and Public holiday day as presented by the Respondent's representative is misleading and does not take into consideration an employee who only works three hours or limited hours on a Sunday.
- [26] By the same token, Mr Mphela could not explain the rationale behind his calculations and as to the reasons why the total number of Sundays in a month is used to calculate the payment and not the number of hours worked during the Sundays.
- [27] I have taken judicial cognise of the argument made by Mr Kgomanyane that the change in the manner of calculations will have detrimental effect on the Department. Be that as it may, it is important to note that collective agreements takes precedence and are enforceable.

**AWARD**

[28] In terms of Item 4(2) of Schedule 7 I am empowered to determine the dispute on reasonable terms.

[29] The most reasonable means of bringing about fairness and equality in the abovementioned dispute is to award the union, NEHAWU that the Sunday and Public Holiday's payments be calculated in accordance with the calculations that includes the number of hours worked on a specific Sunday or Public Holiday as provided by the Resolution 1 of 2007.

[30} However, as my award will have tremendous economic impact on the efficient carrying of operations of the Respondent, the award is effective upon the receipt thereof and not retrospective.

[30] The new calculations shall be effective from August 2010.

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Nina Siele  
Panelist