



DEFAULT AWARD

Panellist/s: Karen Kleinot _____
Case No.: PSCBC22-19/20 _____
Date of Award: 5 August 2020 _____

In the ARBITRATION between:

NPSWU obo J Michaels _____
(Union / Applicant)

and

Department of Health-Gauteng _____
(Respondent)

Union/Applicant's representative: Mr. S Dlamini _____
Union/Applicant's address: _____

Telephone: _____
Telefax/email: dlamini@npswu.org _____

Respondent's representative: Mr. L Mashiangako _____
Respondent's address: _____

Telephone: _____
Telefax/email: Lesley.mashiangako@gauteng.gov.za _____

DETAILS OF THE ARBITRATION

1. The matter was heard on 30 July 2020 via a virtual platform, zoom. Both parties were notified of the set down on 22 June 2020. Parties were sent the zoom link on 14 July 2020 as well as on 27 July 2020 and 31 July 2020. Despite proper notice and emails containing the zoom link, the respondent did not attend. The matter proceeded in the absence of the respondent as per S138 (5) (b) of the Labour Relations Act as amended.

ISSUE TO BE DECIDED

2. The issue to be decided is the interpretation and application of resolution 1 of 2007, relating to ordinary working hours and meal intervals/ overtime.

SURVEY OF THE EVIDENCE AND ARGUMENT

Applicant's submissions

3. Ms. Michaels an EMS practitioner testified as follows; that she works four days during a week, two day shifts and two- night shifts, and four days off. Ms. Michaels stated that she worked a 12 -hour shift and worked 48 hours per week. The 8 hours are not recorded as overtime or meal intervals on the claim form. In a month such as the example provided, February 2018 she worked 16 days x 12 hours = 192 hours per month. According to Ms. Michaels she was only contracted to work 40 hours per week and 160 hours per month. She was working in excess of such and the 32 hours difference was not paid as overtime.
4. Personnel Circular of 5 of 2019 indicates with reference to S11 of the BCEA, that an employee can by written agreement work 12 hours a day inclusive of the meal interval without being paid for overtime. Ms. Michaels stated that due to this circular she is not paid for her meal intervals nor is overtime claimed. The circular goes on to state that managers must ensure that employees work 40 hours per week and 160 hours per month as per the shift roster. This is not the practice within EMS as they work 192 hours per month. The newsletter issued by the Gauteng Head of Health also reflects that the ordinary hours of work are 40 hours per week.
5. In an addendum to Personnel Circular Minute 12 of 2009 which was also addressed to EMS. Under the heading Meal Intervals it states as follows; "According to resolution 3 of 1999 with regard to meal breaks the following shall apply: Overtime shall generally include periods-(a) provided for rest and meals and-(b) When an employee must stay at his or her place of work but cannot actually work due to circumstances beyond his her control" Ms. Michaels made the point that a meal interval was regarded as overtime. In terms of the Basic Conditions of Employment Act this meal intervals are remunerated. This circular also states that any hours worked in excess of 160 or 40 hours is regarded as overtime and must be paid. Ms. Michaels stated that no overtime has been paid for the 32 hours worked in excess of the monthly core hours, 160 hours.

6. The DPSA issued a document on the implementation of resolution 1 of 2007. The Determination of Working Hours defines overtime as “works in excess of the hours of work per day/week/month that the employee is contracted to perform.” This “Determination on Working Time must be read in conjunction with BCEA, the current Public Service Regulations, prevailing collective agreements and departmental policies on working time.” It was argued that this was 40 hours and 160 hours monthly.
7. There was no collective agreement that specified an employee had to work more than 40 hours per week. Ms. Michaels stated that by virtue of the practice she was working 48 hours per week and this was contrary to the policies. There was no sectoral determination or resolution issued by a Bargaining Council pertaining to the average number of working hours.
8. The BCEA requires that an employer may not require an employee to work more than 45 hours per week. Ms. Michaels stated that she worked 48 hours per week which was not in line with the BCEA. In S9(3) the BCEA states that the maximum hours per week is 40 hours. Meal intervals dealt with in S14 indicate that these are provided after five hours of work for an hour and must be remunerated. It was argued as Ms. Michaels worked 12 hours, she was entitled to two, one- hour meal intervals. These are regarded as overtime as per the circular and stand to be paid as such. Ms. Michaels maintained that she was not being paid for the meal intervals. Ms. Michaels stated that as an EMS practitioner she is not able to take fixed meal intervals.
9. S11 of the BCEA did not apply as there was no written agreement in place. Ms. Michael then led evidence that in KZN and the Eastern Cape, EMS practitioners worked 160 hours monthly and were paid overtime if their working hours exceeded these core hours.
10. It was argued that the Department of Health was not aligned with the BCEA and that the respondent was not applying the resolution correctly. There is no written agreement to introduce 48 hours as ordinary working hours.

ANALYSIS OF EVIDENCE AND ARGUMENT

11. The issue is an interpretation and application dispute pertaining to Resolution 1 of 2007. The Collective Agreement states as follows:

Clause 1.8 to provide for the alignment of the Public Service with the requirements of the Basic Conditions of Employment 1997 and matters incidental thereto.

Clause 9.4 Compensation for official duties performed during meal intervals

Compensation for employees who are due to the nature of their work, required to remain on duty during their meal intervals shall, where required, be determined in the respective sectoral Bargaining Councils.

Clause 9.5 Averaging Working Hours

The mechanisms and conditions for the averaging of working hours shall where required be determined in the respective Bargaining Councils.”

12. The Basic Conditions of Employment Act states as follows: in S9 dealing with, “ordinary hours of work, an employer may not require or permit an employee to work more than 45 hours per week S9(3) Schedule 1 establishes procedure for the progressive reduction of the maximum ordinary hours of work to a maximum of 40 ordinary hours of work per week and eight ordinary hours of work per day.” S12 that an employer may not permit or require an employee bound by a Collective Agreement to work more than 45 hours per week. S 14(1) of the BCEA addresses meal intervals and states an employer “must give an employee who works continuously for more than five hours a meal interval or at least one continuous hour.” S14(3) states that “an employee must be remunerated –(a) for a meal interval in which the employee is required to work or is required to be available for work.”
13. A collective agreement has the status of a statute. In this case the Collective Agreement is being brought in line with the Basic Conditions of Employment Act. The DPSA implementation of the resolution is binding in that this directs the application of the Collective Agreement. The circulars submitted show how the resolution is to be implemented. These show that the core hours are 40 hours per week and 160 per month.
14. There is no evidence of an agreement between the parties to work a compressed working week as per S11 of the BCEA which may require an employee to work up to 12 hours a day, inclusive of a meal interval. Although the circular states such it is not an agreement between the parties which is contrary to the BCEA. There was no contract of employment submitted as evidence or sectoral Bargaining Council agreement and in light of such reliance is placed on the BCEA. Further from the evidence led it appears that this is not the practice within other provinces.
15. Accordingly the respondent is not in compliance with the Collective Agreement 1 of 2007 in that Ms. Michaels is working in excess of 45 hours and the meal intervals are not paid.

AWARD

16. The respondent has not complied with resolution 1 of 2007.
17. The respondent is directed to adhere to the Basic Conditions of Employment Act as regards payment of the meal interval and core hours of work as specified in Circular 5 of 2019.

This signed on 5 August 2020.

Panelist/s: Karen Kleinot Sector: Public Sector

Handwritten signature in black ink, appearing to be 'K Kleinot'.