

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 117/2002

In the matter between;

HYSON MKHATSHWA & 16 OTHERS

APPLICANT

and

PRINCIPAL SECRETARY -HEALTH &

SOCIAL WELFARE

1st RESPONDENT

PRINCIPAL SECRETARY - PUBLIC

SERVICE & INFORMATION

2nd RESPONDENT

ATTORNEY GENERAL

3rd RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

FOR APPLICANT

: P. R. DUNSEITH

FOR RESPONDENT

: MS. Z. MATSE

JUDGEMENT

10/04/03

The Applicants, all of whom comprise cadre in the pharmacy department in various hospitals in the kingdom of Swaziland seek to have a dispute between them and their employer, the Government of Swaziland determined.

The suit is brought pursuant to Section 85 of the Industrial Relations Act No. 1 of 2000 and the Industrial Court Rules of 1984.

According to the particulars of claim, the Applicants allege that in the month of July 1993, the 2nd Respondent, Principal Secretary Ministry of Public Service and Information signed Establishment Circular No.7 of 1993 which approved payment of 'on call' or 'standby' allowances to employees in the

1

Ministry of Health and Social Welfare. The circular is annexure 'A' to the application.

The circular was silent on payment of 'on call' or standby allowances to the pharmacy department wherein the Applicants are employed.

The pharmacy staff nevertheless were instructed to perform 'on call' duties from 1993. They commenced such duties in 1993 and were duly paid for such services until March 1995 when the government through

the 2nd Respondent, Principal Secretary Ministry of Public Service and Information stopped such payments purporting that the same were unauthorized by Circular No. 7 of 1993.

That notwithstanding and after a series of consultative meetings with the relevant authorities, it was agreed that the pharmacy cadre, that comprise the Applicants were erroneously omitted from the Establishment Circular No. 7 of 1993.

As a consequence thereof, an addendum to Establishment Circular No. 7 of 1993 was made authorizing payment of 'on call' or standby allowances to the Applicants effective from the 1st May 1998. A copy of the said addendum is annexed hereto and marked 'B'.

The nub of the dispute is that the addendum according to the Applicants ought to have been effective from the 1st April 1995, the date when the Respondent had stopped paying for the 'on call' service. Notwithstanding the stoppage of payment, the Applicants were not only asked to perform such duties, but were encouraged and cajoled to continue doing so by various senior officers including the Director of Medical Services, the Principal Secretary Ministry of Health and the Minister of Health and Social Welfare.

The basis of their claim is simple; the 1st Respondent must pay for services rendered at her behest and cannot rely on technicalities and/or documentary shortfalls not the doing of the Applicants but that of a sister department the 2nd Respondent, both of which are part of the Government of Swaziland, the ultimate employer of the Applicants.

2

The Applicants thus claim payment of 'on call' duty allowances as particularized in paragraph 12 of the statement of claim, subject to computation and confirmation of actual amounts due to each Applicant in the event the court determines the merits of the case in their favour.

In the Reply to the particulars of claim, the Respondents admit the contents of paragraphs 1 to 8 of the particulars of claim.

Of most significance is admission to the contents of paragraph 7 which reads as follows:

"7 Several meetings were held between the Applicants and the Respondents wherein it was held that the Applicants were erroneously omitted from the Establishment Circular No. 7 of 1993." Furthermore, the Respondent did not deny the contents of paragraph 9 but states that the contents thereof are unknown to her.

Paragraph 9 reads as follows:

"9 The Applicants have rendered 'on call' duties from the 1st April 1995 till to date and 'on call' duty claim for the Applicants from the 1st April 1995 to the 30th April 1998 were excluded by the said addendum to Establishment Circular No. 7 of 1993."

In other words, the Respondent simply avoided this issue and did not put the Applicant to strict proof thereof.

The evidence of AW1 Hyson Mkhathswa, a dispenser employed by the 1st Respondent on the 3rd June 1993, was to the effect that he and his colleagues performed 'on call' duties from 1993. He explained that part of their job description was to take calls at night, weekends, and during holidays.

That indeed they were specifically instructed by the Pharmacist at the time Mr. Vincent Kapasa to start working 'on call'. He drew up a roster so that on each day, one or more of the dispensers would remain 'on call' in a duty

3

room or at home but be ready and accessible to respond as and when called to go to the hospital to dispense medicine to patients.

The arrangement was that the officers would fill 'on call' duty forms which would be signed by the doctor on duty and counter signed by the senior medical officer for each day worked.

Payment of 'on call' allowance was however done every six months. The duty roster was also counter signed by the senior medical officer upon preparation by the pharmacist.

That he only became aware of Circular No. 7/93 when the payment was questioned and stopped after a period of two (2) years since they had started doing 'on call' duties. This was the genesis of the dispute.

Notwithstanding the query by the Ministry of Public Service and Information they were instructed to continue doing 'on call' duties and were assured that the matter would be resolved in their favour. It therefore was an unpleasant surprise to them that the addendum to Circular No. 7/93 did not cover the period 1st April 1995 to 30th April 1998 yet the Respondents were aware at all times that the Applicants had rendered on call service and were entitled to payment.

The witness was candid and steadfast inspite of very close cross examination by M/s Matse for the Respondent.

He denied that the Applicants had performed any other form of overtime but the 'on call' duty for the period in question and added, they had continued to render similar service in the same manner following same procedures todate. The checks and balances built into the 'on call' system were not at anytime questioned by the Respondents and same have not changed todate.

That though there now exists a call room at the hospital, they continue to be picked from their homesteads by hospital drivers as and when required for 'on call' duties.

The testimony of "AW1" was corroborated in all material respects by "AW2" Charles Bamidele who told the court that he was currently self employed at Lomahasha but was employed by the 1st Respondent as a pharmacist in March 1995. He worked continually up to 2001.

4

As the pharmacist he was in charge of Mbabane Government Hospital from 1996. He became familiar with Circular No. 7/93 then. From the time he was employed, he was required to perform 'on call' duties and prepared a duty roster for the dispensers from 1996 when he took over from Mr. Vincent Kapasa. While 'on call', the Applicants remained at home, readily available when contacted to provide pharmaceutical services during call hours.

He told the court that the procedure was full proof, in that if an officer 'on call' for any reason failed to respond to a call, the nurse who made the call would report to the matron. The matron would make a report to the senior medical officer. A query would then be made by the senior medical officer (S. M. O) to the pharmacist who would in turn get a report from the officer concerned and disciplinary action if necessary would be taken including non payment of 'on call' allowance for the particular night/weekend or holiday.

The pharmacist also counter checked the claim forms to ensure that they tallied with the roster and same were forwarded to the senior medical officer.

It would then not be possible for a pharmacist to claim 'on call' allowance if he did not perform such duties. This system is not peculiar to Swaziland but in his experience in hospitals in other countries e.g. Nigeria, the same system was in place. He refuted any allegations of non accountability regarding 'on call' duties.

The witness recalled the meetings where the Director of Medical Services and the then Principal

Secretary of Health encouraged and cajoled them to continue rendering 'on call' duties until the issue of payment was resolved. When the Applicants threatened to stop doing 'on call' duties due to non payment, the Principal Secretary threatened them with sanctions.

As a result all the Applicants rendered 'on call' duties as per the instructions and deserve to be paid for the period 1st April 1995 to 30th April 1998. He withstood a well sustained cross examination by Ms. Matse.

The Respondent called two witnesses "RW1" Armstrong Dlamini from the Ministry of Public Service and Information and "RW2" Almon Mbingo the then Principal Secretary for Health at the time.

5

Both were not in a position to refute the evidence of the Applicants to the effect that they rendered 'on call' duty for the period 1st April 1995 to 30th April 1998 and were thus entitled to payment.

They both lacked personal knowledge of the issues at hand and their evidence was more or less speculative in nature. "RW1" was in difficulties especially because he was employed in February 1996 after the dispute had commenced and had not personally dealt with the matter. All he could say was that he presumed there was no proper authority to perform 'on call' duty for the period 1st April 1995 to 30th April 1998. That is why the Applicants were not paid.

The then Principal Secretary for Health "AW2" could not convincingly deny that he asked the Applicants to continue rendering 'on call' duties and that they would be paid for their services once the dispute was resolved. He agreed that the same system used then was still in place. That officers were still called from their homes inspite that there now exists 'on call' rooms at Mbabane government hospital in particular.

He was very skeptical of the 'on call' duty system suggesting that it had many loopholes and susceptible to abuse. He however did not provide a better system while he was Principal Secretary at the time nor has anyone done so todate.

The Applicants have clearly established on a balance of probabilities that they rendered 'on call' service for the period 1st April 1995 to 30th April 1998. that the addendum to Circular No. 7 of 1993 was erroneously backdated to 1st May 1998 and same should be extended to cover the period 1st April 1995 to 30th April 1998.

The document did not represent the actual agreement of the parties namely, that the Applicants were by agreement to continue to render 'on call' service from 1st April 1995 and that they would be paid effective from that date.

This was the real intention of the parties and the court will give effect to the intention of the parties by ordering rectification of the omission in the addendum to Circular No.7/93 to cover the period 1st April 1995 to 1st May 1998. See the case of Venter V Liebenberg 1954 (4) SA 333J. at 338 A.

6

In any event, the Applicants are entitled to be paid for work done by way of 'on call' duty. Ruling otherwise would be contrary to the doctrine of unjust enrichment. The Applicants acted in good faith and rendered service to save lives at various hospitals throughout the country. A defect in a contract or circular for that matter is besides the point that the Respondents did accept the benefit of work done by the Applicants and cannot be allowed to reap that benefit without compensating the Applicant pharmacists.

It is a recognized principle of Dutch Roman Law that no one shall be unjustly enriched at the expense of another.

See Hannah v Nortje 1914 AD 293 at 298; LAWSA Vol. 9 paragraph 98 and Collin Shongwe v Swaziland

Government (Industrial Court judgement Case No. 77/2000 per Kenneth Nkambule J).
In the result the court orders as follows:

1. The Applicants be compensated for all 'on call' duties performed during the period 1st April 1995 - 30th April 1998.
2. That per the agreement of the parties, the quantum of compensation be proved.
3. No order as to costs.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT