CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI MN2 237/07

In the arbitration matter between:-

Dr. CRESCENT TIBAGAMBIRWA Applicant

And

MINISTRY OF HEALTH AND SOCIAL WELFARE & 2 OTHERS Respondent

CORAM:

Arbitrator : Commissioner M.B. Mkhonta
For Applicant : Sipho Madzinane (Applicant's Representative) –
For Respondent : Khulile P. Sikhondze (Respondent's Representative)

ARBITRATION AWARD

DATE OF ARBITRATION:

5th October 2007, 30th November 2007,
2nd February 2008, 27th March 2008, 15th May 2008, 16th May 2008, 8th August 2008 and 29th September 2009 (date closing statements received)

VENUE: CMAC OFFICES, MANZINI

1. PARTIES AND HEARING:

The Applicant in this matter is Dr. C. K. Tibagambirwa of P.O. Box 2811, Manzini hereinafter referred as the Applicant, Dr. Tibagambirwa or as the employee.

The Respondent is Ministry of Health and Social Welfare & 2 Others of P.O. Box 5, Mbabane hereinafter referred as the Respondent, the company or the employer.

2. REPRESENTATION

The Applicant was represented by Sipho Madzinane of Madzinane Attorneys, The Respondent was represented by Khulile Sikhondze.

3. ISSUES IN DISPUTE

Applicant submitted an unfair labour practice claim totaling E2, 050, 836.86, for the payment of on call allowances per below:

a) Underpayment of on call allowances for period between April -September 2004 amounting to E93, 110.32;
b) Underpayment of on call allowances for period between October 2004 to March 2005, amounting to E132, 330.70;
c) Underpayment of on call allowances for period between April -September 2005, amounting to 135, 645.24;
d) Underpayment of on call allowances for period between October 2005 to March 2006, amounting to E334, 322.20;
e) Underpayment of on call allowances for period between April -September 2006, amounting to E450, 105.49;

f) Payment of on call allowances for period between October 2006 to March 2007, amounting to E272, 372.12;
g) Payment of on call allowances for period between April -September 2007, amounting to E247, 056.27;
h) Payment of on call allowances for period between October 2007 to March 2008, amounting to E241, 314.99; and
i) Payment of on call allowances for period between April -September 2008, amounting to E237, 689.85;

Respondent opposed Applicant's claim on basis:

a) That Applicant was not entitled to claim on call allowance but standby allowance;
b) That the following claims were time barred: o April - September 2004 o October 2004 to March 2005 o April - September 2005

4. BACKGROUND INFORMATION

At the time of reporting the dispute at the Conciliation, Mediation and Arbitration Commission (CMAC) Applicant was employed as a Medical Officer on a fixed term contract initially at the Matsanjeni Clinic but was from the middle of 2001 transferred to the National Psychiatric Hospital in Manzini, in the same capacity i.e. Medical Officer. During his time at Matsanjeni Clinic as well as at the National Psychiatric Hospital, Applicant submitted that he was paid on call allowances although the payment of these claims was delayed. Applicant further submitted that on or about 2004 his claims began to be dishonoured

and/or underpaid by the Ministry of Health and Social Welfare (hereinafter, referred to as the Ministry of Health) on the basis that he was not entitled to be paid on call allowance but could instead claim standby allowance.

Respondent whilst conceding that prior to 2004, Applicant claimed and was actually paid on call allowances, submitted that following the clarification of the payment of on call allowances by government, consultations were held with the employee to clarify the issue of on call/standby allowance claims. Respondent submitted that this clarity was made following queries from the Ministry of Health in respect to Applicant's claims for the period October 2003 to March 2004 which claims had not been endorsed by the Matron and specifically the Hospital Administrator who was the warrant holder for the National Psychiatric Hospital and the person duly authorized to sanction the claims. Finally, Respondent then noted that from the date Applicant was engaged on the processing of his on call allowance claims, he has been submitting stand by allowance claims and that some of his claims were timed barred by the time he reported a dispute to CMAC.

Applicant however averred that the only reason he started submitting standby instead of on call allowance claims is that he was categorically told that his claims would not be processed, a stance that he reluctantly took whilst fully reserving his rights to take this matter further because he viewed the Ministry of Health's actions as a unilateral change in his conditions of service which had the impact of making him worse off.

Applicant then lodged a dispute to CMAC which was unsuccessfully conciliated and a Certificate of Unresolved Dispute No: 471/07 was issued. Both parties consented to arbitration on the 16th July 2007 and I was appointed Arbitrator in September 2007.

5. OVERVIEW AND ANALYSIS OF EVIDENCE

This is an alleged unfair labour practice dispute concerning the unilateral variation of Applicant's terms and conditions of service. Applicant argued that he had a right to claim on call allowances based on his contract of employment and government regulations governing the payment of on call allowances.

The parties agreed amongst themselves that the onus to prove that Respondent had indeed committed an unfair labour practice rested with Applicant and thus Applicant was first to adduce evidence.

Whilst it is not my intention to detail all the evidence that was adduced by the parties, I will however, give a brief account of the evidence that has influenced my ultimate award.

Common cause issues

The following issues were noted as common cause issues:

- That Applicant was employed as a Medical Officer at the National Psychiatric Hospital in Manzini having been previously stationed at Matsanjeni Clinic,

- That since his employment initially at Matsanjeni Clinic and later at the National Psychiatric Hospital in Manzini, he claimed and was paid on call allowance until 2004,

Applicant's Version

Dr. Tibagambirwa testified under oath in his own defence and was the only witness in support of his claim. Applicant submitted that at the Matsanjeni Clinic, he worked overtime which was compensated as on call allowance and that in 2001, he was transferred as a Medical Officer, to the National Psychiatric Hospital in Manzini through a letter dated 26th June 2001 and was signed by W.M. Qwabe on behalf of the Principal Secretary of the Ministry of Health. Dr. Tibagambirwa further testified that at his new work station, he was rostered to work on call and that he continued to claim for such until 2004. In addition, Applicant submitted that payment of on call claims were in line with government regulations which formed a critical part of his conditions of service and in this respect, he submitted as evidence Exhibit 27 being a memo from the Head of the Civil Service dated 2nd May 1983 and Exhibit 28 being Circular No. 7 of 1993 - both of which confirmed the introduction of on call and standby allowances but were distinct from each other.

According to the employee, the events that led to him being 'refused' to claim on call allowance began when the Hospital Administrator accused him of having submitted a claim to the Ministry of Health without her authorisation i.e. claim for period October 2003 to March 2004 of E163, 927.70, which claim she also asserted had been submitted fraudulently. As testified by the employee, the National

Psychiatric Hospital Administrator, Mrs. T.G. Ngubeni, wrote a memo to the Principal Secretary at the Ministry of Health dated 23rd July 2004 (submitted as Exhibit 36), wherein she queried why the Senior Medical Officer (Dr. R. Ndlangamandla) and the Medical Officer (Dr. Tibagambirwa) were paid on call allowance instead of standby allowance. In so far as Applicant was concerned the letter accused him of leaving work "on the hands of the nurses during the night, weekends and on holidays" as well as of not being reachable "as his telephone message box was full and could not accept more messages". The letter went on to infer that "according to our knowledge, as a medical doctor in a psychiatric hospital, he should be on standby" and concluded by requesting the Ministry of Health to "make their own decision on how and what the doctors at the National Psychiatric Hospital are to claim and further to review the doctors' on-call claim form".
Following the submission of this letter to the Ministry, Applicant testified that the Hospital Administrator, Mrs. T.G. Ngubeni then wrote to him a letter dated 16th November 2004 (exhibit 37), accusing him of having submitted the October 2003 to March 2004 on call claim of E163, 927.70 to the Ministry of Health fraudulently, that he had used wrong forms and that the claims had been submitted without being authorized by herself as warrant holder. Applicant testified that this letter specifically requested him to 'furnish her office with information how he wished the E163, 927.70 fraudulent claim would be recovered' from his salary benefits within his contract period and before the Ministry of Health made their own decision on how the amount could be fully recovered'. Based on the tone of the letter and seeing that it was tarnishing his relationship with his employer, Applicant testified

that he felt undone by and under duress, mainly because he had not committed any fraud and that the claim under question, had been authorized by the Senior Medical Officer. Applicant further testified that all his claims following this incident went without being fully paid.

Dr. Tibagambirwa also testified that he then engaged the Hospital Administrator on the non-payment of his claims which engagement culminated in him writing a letter to the Hospital Administrator dated 14th March 2005 wherein he clarified that with regards to the October 2003 to March 2004 on call allowance claim of E163, 927.70, he had been paid E109, 831.56 and not E163, 927.70 as she had indicated in her letter to him dated 16th November 2004. Applicant also submitted that in this letter, he also indicated that he had not committed any fraud by submitting this claim and that because of the sour working relationship that now existed including the non-payment of all subsequent claims, he undertook to repay the E109, 831.56 in full using monthly deductions as well as his 2006 gratuity of E82, 000.00. As evidence of this, the employee submitted Exhibit 8 (being a letter from the Principal Secretary - Ministry of Public Service and Information hereinafter referred to as MOPS to the Principal Secretary Ministry of Health wherein the former granted authority to the Ministry of Health for payment of Applicant's April - September 2004 claim which was now time barred).

In addition, Applicant submitted exhibit 9 (being a payment memo from the Principal Secretary Ministry of Health to the Accountant General dated 14th September 2005 on the payment of the on call allowance claim for Applicant for the period April - September 2004). From then onwards, Applicant testified that he was 'coerced' or forced

to submit his overtime claims as standby instead of on call and that throughout this period, he did so for three main reasons i.e. because; none of the overtime he had undeniably worked was being processed at all if it was not specifically noted as 'standby', that he had to pay back the so called fraudulent October 2003 to March 2004 on call claim of E163, 927.70 (before tax), and that he reserved his rights to still pursue this matter with the Hospital Administrator and his line Ministry being the Ministry of Health. According to Applicant's testimony, the following claims were underpaid because he had been under duress to claim the overtime as standby:

a) On call allowance claim for period between April - September 2004 which was underpaid by E93, 110.32;
b) On call allowances for period between October 2004 to March 2005, which was underpaid by E132, 330.70;
c) On call allowances for period between April - September 2005, which was underpaid by 135, 645.24;
d) On call allowances for period between October 2005 to March 2006, which was underpaid by E334, 322.20;
e) On call allowances for period between April - September 2006, which was underpaid by E450, 105.49;

In addition, Applicant also submitted that his on call claim for the following periods were not paid at all:

a) On call allowances for period between October 2006 to March
b) 2007, amounting to E272, 372.12;
c) On call allowances for period between April - September 2007, amounting to E247, 056.27;
   On call allowances for period between October 2007 to March 2008, amounting to E241, 314.99; and

d) On call allowances for period between April - September 2008, amounting to E237, 689.85
   Applicant additionally testified that during his engagement with his employer, it transpired that the basis they had used in variating payment of his on call claims to

standby claims, was a debate and/or discussion that ensued within the Ministry of Health following a concern expressed by the Principal Secretary (PS) MOPS on the calculation of on call claims (refer to a memo from the PS of the MOPS to the PS Ministry of Health dated 4th May 2001) wherein the former states that:

"Authority is hereby granted for the payment of Standby and On-Call duty allowances for the following officers for the period October 2000 to March 2001. However, note should be made that your Ministry does not seem to comply with the regulations governing the on-call allowance. Could we be furnished with the reasons for this anomaly?"

Dr. Tibagambirwa in his testimony argued that this memo from the PS of the MOPS was written in 2001 on or about the time he had been transferred from Matsanjeni Clinic and that between that time and 2004, no one had questioned his on call claims nor indicated that they had been submitted fraudulently and that in actual fact, his claims had been processed and paid in full, consistent with Circular No. 7 of 1993.

Applicant also testified that in his opinion two events confirmed his suspicion that his terms and conditions of service had been unilaterally changed without him being consulted, namely being:

-10-

a) Firstly that the Hospital Administrator, Mrs. T.G. Ngubeni wrote a memo to the PS Ministry of Health dated 31st March 2005 (exhibit 40) which letter stated that, "as per our discussions yesterday 30th March 2005, with the PS on the above issue, I hereby wish to adhere to the decision made (my emphasis) that our doctors are entitled to claim Standby allowances not on-call allowances, by forwarding to you Dr. C.K. Tibagambirwa Standby allowance claim for April 2004 to September 2004 for your authorisation. We look forward to the official correspondence (my emphasis) from your office on the above subject". This letter was copied to the Ministry of Health's Financial Controller and the Matron; and
b) Secondly, that a minute from the Ministry of Health's Accountant, Mr. Muzi Dladla to the Director of Health Services dated 8th April 2005 and the PS's (Dr. J. M. Kunene) subsequent instruction to the Ministry of Health's Financial Controller dated 31st May 2005, authorizing deductions from Applicant's salary on the so-called fraudulent claim or overpayment (both correspondence submitted as evidence - Exhibit 37), essentially contributed to the Ministry's decision to make him pay back the October 2003 to March 2004 and critically, the unilateral variation of his conditions of service from claiming on call to standby. In the past paragraph of the Director's correspondence to the Financial Controller as alluded to above, it states that, "It should be noted that whilst he is stationed at the National Psychiatric Centre, he may claim Standby Allowance".

-11-

Conversely, Applicant in his testimony, wondered why the Hospital Administrator had written to him on the 16th November 2004 (exhibit 37), yet she had only discussed and obtained clarity from the Ministry of Health the following year (refer to exhibit 37 and 40 as alluded to herein above). Applicant concluded that the Hospital Administrator 16th November 2004 letter to him had been motivated by malevolence and was intended to create fear in him to comply with her arbitrary decision. In addition, Applicant suggested that her subsequent action to seek to condone her actions must therefore be viewed in context of his (Applicant's) decision to submit his claims under standby and not on call.

Applicant furthermore argued that during the time the October 2003 to March 2004 had been challenged by the Hospital Administrator, the Ministry of Health and MOPS officials had actually confirmed that he should be paid on call allowance and not standby allowance (as reflected in Exhibit 8 and 9 both letters which were dated September 2005). Despite these letters, Applicant confirmed that his claims were underpaid i.e. paid as standby not on call - which led him to engage his line ministry directly i.e. Ministry of Health.

According to the employee's testimony, he verbally discussed his concerns on the unilateral variation of his conditions of service with the Ministry of Health officials over a period of time and when this did not bear any fruits, he then resolved to formally engage the Ministry. During this time, Applicant submitted that he had been under duress and/or pressure to submit his claims as standby lest they were not processed at all and given the impact of this on his life i.e. that he had actually worked the overtime, he viewed this as a temporal setback as

he was confident that because he had reserved his rights to pursue this matter, the standby claims would eventually be paid out in full as on call. Moreover, Applicant averred that during this entire time i.e. from 2004 onwards, he was scheduled or rostered to work on call despite not being paid on call (submitted duty rosters being exhibit 6, 7, 26a and 48).

Applicant highlighted the following instances both as confirmation of his engagement with the Ministry of Health's officials as well as proof that much confusion existed within the Ministry of Health itself as well as with the MOPS on the categorisation of who was entitled to on call:

a) Exhibit 18 being a letter dated 10th January 2007 to the PS Ministry of Health (Nomathemba Dlamini) wherein he noted that, "Kindly note that I have written to you on the above subject and visited your office several times and discussed the above subject It is saddening to note that up to date this anomaly has not been rectified- Kindly attend to this anomaly within fourteen (14) days from receipt of this letter, failure of which I have no alternative except to seek legal advice'",

b) Exhibit 19 being a letter dated 27th April 2007 to the PS Ministry of Health through Dr. C. Mabuza (Director of Medical Services) wherein he noted that, "subsequent to a meeting held between me and you, Dr. Mabuza (DMS) and Dr. Magagula (DDMS) on the 24th April 2007 which was held in your office at about 8:30hrs regarding my unpaid on call allowances. I humbly hereby respond as follows:

- I view your changing from on call to standby allowances as a unilateral variation of my terms and conditions of employment.

- Your proposal that I submit these claims as standby allowance instead of on-call will result in my deprivation of a benefit which I have continuously enjoyed since employment and in subsequent contracts. Due to the above reasons, I am reluctant to claim standby allowance.

- I therefore call upon your good office to reconsider your stand in this matter and further engage me for fruitful settlement of the matter. It is my humble submission that my request will receive your utmost prompt consideration".

c) Exhibit 43 being a memo from the PS MOPS directed to the PS Ministry of Health dated 23rd August 2006 wherein claims from a number of employees within the Ministry of Health had been recalculated by the MOPS resulting in 115 claims being approved instead of the originally submitted 161 claims. This memo in the middle paragraph states that, **"It has come** to our attention that staff nurses in other departments also claim on call. This seems abnormal. It is our expectation that all departments have officers on night duty and only Anesthetic Technicians would be on call. You are advised to inform Staff Nurses to claim the time worked as overtime and not on call".

d) Exhibit 44 being a memo from the PS MOPS directed to the PS Ministry of Health dated 22nd December 2006 granting authority for the extension of on call authority for a number of doctors

including the Applicant. According to Applicant, this memo clearly indicated doctors or claimants who "did not meet the requirements' for on call and did not include him as one of these.

At the end of his testimony, Dr. Tibagambirwa requested that the arbitration rules that his underpaid claims as well as those that had not been paid at all, were legally his and that the Ministry of Health be ordered to effect payment as he had been greatly inconvenienced. Applicant also claimed that he was told that his claims from 2007 onwards which had not been processed at all would be resolved after the conclusion of his case at CMAC. In addition, Applicant suggested that he would not be surprised if his contract which terminates in 2008 was not renewed as a result of his ongoing challenges with the Ministry of Health over the payment of these claims.

Respondent's Version

Respondent began his submissions by highlighting the following:

a) That Applicant was not entitled to claim on call allowance;
b) That through the Hospital Administrator, Applicant was engaged on the issue of claiming on call allowance instead of standby;
c) That the Applicant was specifically engaged by the Hospital Administrator in respect to the October 2003 to March 2004 claim after queries were raised by the Ministry of Health on the type of claim forms used and that the forms had not been specifically signed by the Matron as supervisor and by her as warrant holder;
d) That the Hospital Administrator had then resolved to write to the Ministry of Health to make known her position on the claims

submitted by Applicant as well as to seek advice on claims that doctors at the Psychiatric Hospital should sign;

e) That the authority for the categorisation of doctors who should claim on call is sanctioned by the MOPS and that in respect to the payment of on call allowances and standby allowances, Circular No. 7 of 1993 (Exhibit 28) was authoritative;
f) That Respondent conceded that prior to 2005, Applicant claimed and was paid on call allowance and that following 2005, Applicant was fully engaged by the Ministry of Health on the fact that he was not entitled to be paid on call but could claim standby allowance;
g) That Applicant from 2005 submitted his overtime claims as standby, which submissions he confirmed were to the best of his knowledge true and accurate;
h) That because Applicant had willingly submitted claims based on standby and not on call which he had knowingly confirmed to have been 'true and correct', he should be precluded in law based on the 'principle of estoppel' from contesting these claims; and
i) That in any event; the following claims were "time barred and should not be entertained by CMAC as they fall outside its jurisdiction;

- On call allowance claims for period from April to September 2004, which signed for by Applicant were paid on the 24th June 2005 as standby allowance;
- On call allowance claims for period from October 2004 to March 2005 which signed for by Applicant were paid on the 10th November 2005 as standby allowance;

- On call allowance claims for period from April to September 2005 which signed for by Applicant were paid on the 16th December 2005 as standby allowance.

Respondent then proceeded to submit evidence through two witnesses i.e. Dr. Vusi Magagula and Mrs. Thoko Ngubeni.

Testimony of Dr. Vusi Magagula

Dr. Vusi Magagula (hereinafter referred to as Dr. Magagula or the 1st witness) testified under oath that he was employed by the Ministry of Health as the Deputy Director of Health Services responsible for clinical services, which position he assumed on the 1st November 2006. He confirmed to knowing the Applicant as well as the dispute i.e. that Dr. Tibagambirwa had complained that he was not paid on call allowance and that as his line Ministry, they had engaged Applicant on this matter and that the employee's grievance had been discussed up to the level of PS of the Ministry of Health. Dr. Magagula also testified that Applicant initially discussed his grievance with him but that later on the discussions included the Director of Health Services and that at that point it time, it became clear that Applicant wanted to see the PS Ministry of Health as he indicated that he was now tired of the fruitless discussions with the other Ministry officials. In essence, Dr. Magagula explained that they responded to Applicant and advised him that the rules that he claim standby allowance and not on call, had been set by MOPS (which determined the institutions and posts that can claim on call allowance) and that this was not undertaken by the Ministry of Health.

As part of his evidence in chief, Dr. Magagula also confirmed that Applicant then reported a dispute with CMAC and the Ministry could thereafter not address the issue pending completion of the CMAC processes. Critically, Dr. Magagula moreover inveterated that Applicant continued to file his claims up to the time of the arbitration but that he continued not to authorize the claims as he had claimed on call not standby (and that he had specifically told Applicant that until he started signing the claims as standby, he would not authorize them). Dr. Magagula furthermore testified that whilst the Senior Medical Officer was Applicant's supervisor, the warrant officer was the Hospital Administrator i.e. that

the warrant office was the person entitled to authorize any expenditure against the institution's budget.

Under cross-examination and on being asked as to how the Ministry verified that a person worked on call, Dr. Magagula confirmed that they checked the duty roster (which must be signed by warrant holder and the Senior Medical Officer). Dr. Magagula conceded though that at some point in time and after the retirement of the then Senior Medical Officer at the National Psychiatric Hospital Dr. Ndlangamandla, he (Applicant) was the senior person at the hospital. He also confirmed that a person, who is on call, must be available to the institution 24 hours a day and 7 days a week.

Dr. Magagula also confirmed that Applicant works on call but that the key challenge in respect of his claims is that the National Psychiatric Hospital was not designated as an institution where doctors are allowed to claim on call. He indicated that he was also aware that the National Psychiatric Hospital duty roster is written as on call but that the institution cannot claim on call even though they never verified

with the Applicant's supervisor whether he indeed had worked on call. Dr. Magagula could not confirm under cross-examination; whether the Applicant's supervisor knew how hospitals were designated as on call or not, how the designation is done but averred that he himself did not know the criteria followed for designating on call institutions save that the MOPS was responsible for this. Lastly, Dr. Magagula indicated that the only reason he could attribute his earlier claims for on call that were paid, was that he was lucky and that they (Ministry) could start claiming back the payments as he was wrongly paid.

Testimony of Mrs. Thoko Ngubeni

Mrs. Thoko Ngubeni (hereinafter referred to as Mrs. Ngubeni or the 2nd witness) testified under oath that she was currently the Regional Health Administrator for Shiselweni Region having started her new job in February 2008 and that before this position, she worked at the National Psychiatric Hospital in Manzini from September 2001 to mid February 2008. Mrs. Ngubeni testified that she authorized Applicants claim forms for the period before 2004 which were paid as on call, even though there were queries on the forms used to process the claims i.e. that the forms did not have the space for signing by the warrant holder. She indicated that she then wrote to the Ministry of Health to advise them that the claims had not been routed via her as the warrant holder (referring to Exhibit 36) and that the claims were "cooked**"** especially those for Dr. Ndlangamandla.

Mrs. Ngubeni testified that Applicant refused to change his claims from on call to standby and that she was then given "authority from the Financial Controller to cancel on call and the claim form and to

sign for them as standby so that they could proceed to process the forms" - which was then proceeded by the letter submitted as exhibit 36. She furthermore testified that she indeed wrote the letter submitted as exhibit 37 on the instructions of the Director of Health and that it was her testimony that the persons who could claim on call could **"**only be determined by the Director of Health Services" and that the she was "just an administrator[1]'.
Under cross examination, she confirmed that Applicant claimed on call and was paid as on call, even though the forms used i.e. for August 2001- September 2001, did not have a space for the warrant holder but that she had authorized these. She indicated that prior to her letter of the 23rd July 2004, she **"**was not aware that doctors were working on call". Mrs. Ngubeni further conceded that he did sign for the on call claims for the period August to December 2001 although she indicated that "J was not aware what I signed for".

6. CONCLUSIONS

The first issue that I must deal with is whether any of the claims submitted by Applicant were time barred. This will assist in further narrowing down the scope of the claims, leaving me with only those that both parties agree fall outside the time bar category. Once I have dealt with this question, I will

thereafter proceed to address the question of whether, Applicant was entitled to claim on call. If the answer to this is no then the remaining claim naturally falls away, but if the answer is to the affirmative, then I must address the related questions of the 'estoppel principle' as submitted by Respondent, the status of the memo by the Director of Health Services as well as the

-20-

relevance of the evidence submitted by the parties in support of their positions weighed against existing government regulations, applicable law and the relevant case law.
Starting with the issue of whether any of the claims submitted by Applicant are time barred. Section 76 (2) of the Industrial Relations Act (2000) as amended, hereinafter referred to as the IR Act, provides as follows:

"a dispute may not be reported to the commission if more than eighteen (18) months has elapsed since the issue giving rise to the dispute arose"

Respondent averred that the following claims are time barred:

a) On call allowance claim for period from April to September 2004, which signed for by Applicant were paid on the 24th June 2005 as standby allowance;
b) On call allowance claim for period from October 2004 to March 2005 which signed for by Applicant were paid on the 10th November 2005 as standby allowance;
c) On call allowance claim for period from April to September 2005 which signed for by Applicant were paid on the 16th December 2005 as standby allowance.

With regards to the on call claim from April to September 2004, Applicant conceded in his closing submissions that this claim was indeed time barred because it was paid on the 24th June 2005. In terms of the Report of Dispute, the dispute was filed and received by CMAC on the 21st March 2007 not on the 8th March 2007 as was

-21-

claimed by Applicant. Accordingly therefore and consistent with the IR Act, more than eighteen (18) months had lapsed before this dispute was lodged with CMAC hence it is indeed time barred.

In respect to the claim from October 2004 to March 2005 and the claim from April to September 2005 which were paid on the 10th November 2005 and the 16th December 2005 respectively, both these claims were sixteen (16) and fifteen (15) months old respectively when the dispute was lodged with CMAC and therefore cannot be said to be time barred in terms of Section 76 (2) of the IR Act, Both claims fall to be determined under the jurisdiction of CMAC. Indeed and as was correctly observed by Respondent in her closing submissions, the crisp factor to be considered in evaluating whether these claims are time barred is:

"that the issue giving rise to the dispute arose on the date of payment of the claims".

Having noted that two of these claims are not time barred including the rest of the claims that were submitted by Applicant and which were not questioned by Respondent (in terms of their time barred status), let me now proceed to address the question of whether Applicant could correctly claim for on call allowance in terms of his employment contract as well as the applicable regulations governing such claims within government.

It is not in dispute that Applicant was employed on a fixed term renewable contract with the Government of Swaziland (Civil Service Board) through the Principal Secretary, Ministry of Health. At the time of lodging his dispute against the Ministry of Health & 2 Others (being

-22-

the Civil Service Board and the MOPS) with CMAC, Applicant was employed on a two year contract

with the Civil Service Board which began on the 21st August 2006 for a two year period ending 20th August 2008, in the capacity of Medical Officer at Grade E4 and on a annual basic salary of E216, 426.00. In terms of Clause 6 of this contract, it stated that:

"the officer shall be eligible for such allowance and other benefits as are applicable under the laws, regulations and General Orders, for the time being in force".

Applicant argued that the allowance referred to in his contract included payment of on call allowance and/or standby allowance as was defined by government Circular No. 7 of 1993 (exhibit 28). This circular in respect of on call allowances stipulated that:

"Government has approved the payment of 'standby' and 'on call' duty allowances to Professional and Technical Hospital staff rostered to undertake such duties in the Laboratory, X-Ray, and Theatre Departments. On call duty requires an Officer to be present at his/her place of duty (e.g. Hospital) and available to immediately respond to a call to duty. If accommodation is provided at their place of duty this MUST be used; failure to use available duty accommodation will result in an officer being ONLY eligible to claim a Standby Allowance. If accommodation is not available the Head of Department may authorise the use of appropriate alternative accommodation taking due account of the need for the Officer to be able to very quickly attend to the call to duty. Standby duty requires an Officer to make known his/her whereabouts at all

times of standby so that in cases of emergency an early contact and response can be achieved by telephone, beeper, radio telephone or messenger".

In addition Applicant argued that he had always claimed on call allowances in line with Circular No. 7 of 1993 both when he was employed at the Matsanjeni Clinic and later from 2001 when he was transferred to the National Psychiatric Hospital in Manzini. In addition, Applicant averred that he was paid on call allowance exactly as he had claimed it throughout his employment until sometime in 2004 when his claims were rebutted by the Hospital Administrator and later the Ministry of Health on the basis that he was not entitled to claim on call but could claim standby allowance. According to Applicant, when his claims went unpaid, he was initially accused of having claimed using incorrect forms and later the non-payment of his claims was attributable to a decision taken by the Ministry of Health that the National Psychiatric Hospital was not no longer classified amongst the hospitals that could claim on call allowance.

Applicant averred that this change by his line Ministry from paying him on call allowance to standby allowance was unfair, uncalled for and was tantamount to an unfair labour practice in that his terms and conditions of service were unilaterally altered by his employer without consulting or engaging him.

In Archie Sayed vs. Usutu Pulp Company Limited, Case No. 432/06 Dunseith JP clearly explores the concept of consultation, in the context of industrial relations. Dunseith's JP's views were then confirmed on appeal by Mamba JA in Usutu Pulp Company Limited

T/A Sappi Usutu vs. Swaziland Agricultural Plantations Workers Union & Another, Case 16/06 & 17/06, wherein he argues under para 11 that:

"Consultation, on the other hand, involves seeking information or advice on, or a reaction to, a proposed cause of action. It envisages involving the consulted party, an opportunity to express its opinion and make representations, with a view to taking such opinion or representations into account. It certainly does not mean merely affording an opportunity to comment about a decision already made and which is in the process of being implemented".

Respondent conceded that Applicant claimed on call allowance from the time he was first employed at Matsanjeni Clinic to the time he was transferred to the National Psychiatric Hospital particularly between 2001 and 2004. Dr. Magagula and Mrs, Ngubeni both accepted that Applicant had claimed and was paid on call allowance before 2004. Whilst Dr. Magagula insisted that the change to standby allowance was occasioned by the MOPS, Mrs Ngubeni however testified that the change was made at the insistence of the Ministry of Health arguing under oath that the question of which allowance the employee was correctly due could "only be determined by the Director of Health Services" and that the she was "just an administrator".

Dr Magagula went further to assert that in actual fact the payment of on call allowance in the previous years, had been done erroneously and that Applicant was "lucky" that this payment had not been

recalled intimating in his testimony that Applicant could still be requested to pay back the on call allowance that had already been paid - ostensibly from the time Applicant was employed at the Matsanjeni Clinic to about 2004 when the payment was challenged.

Both witnesses i.e. Dr. Magagula and Mrs. Ngubeni offered no plausible explanation as to why Respondent was now of the view that doctors at the National Psychiatric Hospital could no longer claim on call. Dr. Magagula in particular and as the senior official of the two witnesses of Respondent, argued the following:

a) That the responsibility of who was entitled to on call was the responsibility of the MOPS; and
b) That the Ministry of Health had been advised to stop the on call allowance for the doctors at the National Psychiatric Hospital as the institution had not been designated as one of those where doctors could claim on call.

Mrs. Ngubeni however differed with Dr. Magagula's testimony in that she:

a) Indicated that the main reason she challenged Applicants claims was because he had used incorrect forms when filing his October 2003 to March 2004 claim;
b) That he had failed to route it via her as the warrant holder;
c) That in addition, she was instructed to write Applicant a letter about this claim which he did (exhibit 37) on the instructions of the Director of Health Services after she had sought the Ministry advice through exhibit 36;
d) That Applicant refused to change his claims from on call to standby and that she was then given "authority from the

Financial Controller to cancel on call on the claim form and to sign for them as standby so that they could proceed to process the forms"; and
e) That prior to her letter of the exhibit 36, she "was not aware that doctors were working on call" and when questioned as to why she had signed for on call claims prior to this period i.e. in August to December 2001, she indicated that "I was not aware what I signed for".

Apart from the obvious differences in the testimony of Dr. Magagula and Mrs. Ngubeni, both were unable to provide any clarity as to the whereabouts of the instruction from the MOPS re-designating the Psychiatric Hospital as a facility that could not claim on call allowance nor any proof that the Ministry of Health formally consulted Applicant that he may no longer claim on call allowance. Mrs. Ngubeni in this regard, attempted to argue that her letter to Applicant on the non payment of the October 2003 - March 2004 was adequate evidence that Applicant had been consulted. Unfortunately, this letter was not based on an instruction from the MOPS nor was it on the basis of any consultation mandate from the Ministry of Health. Instead this letter specifically noted that direction from the Ministry of Health was going to be sought in respect to the matter of claims.

The overall thrust of Mrs. Ngubeni testimony is quite unreliable in many respects apart from contradicting what Dr. Magagula said. One of the areas that I find her testimony to be very deviant is when she claimed not to be aware that Applicant had worked on call yet she confirmed that she had signed his previous claims i.e. claims before 2004. She also asserted that she was not aware of what she signed for

in respect to the previous on call claims submitted by Applicant. One would ordinarily expect her to be far more judicious in her financial responsibilities as the 'warrant holder'. Because of this, I have no alternative but to conclude that her testimony was misleading and actually sought to only highlight only those issues that could undermine Applicant's case. Moreover I fail to appreciate why if indeed an instrument had been received from the MOPS stopping Applicant from claiming on call, why this was not formally taken up with Applicant and why proof of that consultation was not submitted to the arbitration. As indicated by Dunseith JP, consultation is a deliberate process that must involve ensuring that the consulted party is given:

"An opportunity to express its opinion and make representations, with a view to taking such opinion or representations into account. It certainly does not mean merely affording an opportunity to comment about a decision already made and which is in the process of being implemented".

Applicant was able to show that none of these requirements of consultation were undertaken by Respondent hence I agree with him that because this was not done, the Ministry of Health unilaterally changed his terms and conditions of service to his detriment. This did not require a laborious process but an instrument from the MOPS that the terms had been changed followed by a formal unequivocal engagement with Applicant that the Psychiatric Hospital had been re-designated and that the impact of this decision was that he would no longer be able to claim on call but will now claim standby. Once the employee was able to make representations on the impact of this

change, the Ministry would then have proceeded to implement the decision within a reasonable time frame. The Ministry condoned the payment of on call until from Applicant's employment until 2004. The reference by Mrs. Ngubeni to Applicant's claim being rejected because Applicant had used wrong forms is to me a red herring. It will seem to me that the real reason was the Ministry of Health's decision to stop him from claiming on call, which decision is reflected in Exhibit 37 being a minute from the PS Ministry of Health, Dr. J.M. Kunene to the Ministry of Health's Financial Controller, dated 31st May 2005, which both parties submitted as evidence and referred to in their submissions. In this Dr. J.M. Kunene writes that:
"This officer was overpaid on calculations of on call allowance, from October 2003 to March 2004. The calculations have been made on his hours as Standby Allowance, and that the overpayments have to be recovered from his subsequent payments. This should be reflected as soon as possible, since he is employed on contract. The details of calculations are enclosed in the enclosed minute. <u>It should be noted that whilst he is stationed at the National Psychiatric Centre, he may claim Standby Allowance</u> (my emphasis)".

Clearly therefore, Mrs. Ngubeni's letter (exhibit 36 dated 23rd July 2004), was written to Applicant even before the Ministry of Health PS had taken a firm decision on the first claim that was challenged i.e. the October 2003 to March 2004 claim, yet Respondent wants me to believe that the stopping of Applicant's on call claims, was based on a decision that the Ministry of health took. No evidence was

submitted to

-29-

me that the Ministry had indeed taken this decision before 31st May 2005 as was confirmed by the minute from the PS Ministry of Health, Dr, J.M. Kunene. As already indicated, Mrs. Ngubeni concludes exhibit 36 by indicating that:

"With the above explanation, we request the ministry to make their own decision on how and what the doctors at the National Psychiatric Hospital are to claim and further to review the doctor's on-call claim form".

Both exhibit 36 and 37 calls to question Dr. Magagula's testimony that the responsibility to re-designate who can claim on call allowance, belongs to the MOPS mainly because there is no reference to this in both Mrs. Ngubeni's letter to the Ministry of Health nor Dr. J.M. Kunene's payment instruction to the Ministry of Health's Financial Controller. Mrs. Ngubeni's letter in particular, actually casts aspersions on Applicant's integrity by intimating that they claimed on call under false pretences, were not available for on call duties and generally should not have been allowed to claim on call. Furthermore, Mrs. Ngubeni went on to accuse Applicant directly of having committed fraud (refer to part of Exhibit 37 specifically her letter to Applicant dated 16th November 2004) - well before the Ministry pronounced itself on this matter through Dr. J.M. Kunene, the Ministry of Health's PS on the 31st May 2005. This confirms Applicant's submissions that the Ministry of Health was not only unfair but that their actions were cruel with no intention of giving him an opportunity to amicably address this matter.

-30-

I would at this point proceed to further address the issue of the unilateral variation of Applicant's terms and conditions of service. In this regard, John Grogan: Workplace Law, 8th Edition, (2005)Juta & Co Ltd at Page 272, argues that:

"Under the common law, an employer is not permitted unilaterally to amend the terms of a service contract with an employee. If an employer changes an employee's terms and conditions of service unilaterally, the employee has an election either to resile from the contract or to sue for damages in terms of the contract. The prohibition on variation includes the lowering of the status of employees and a change in the nature of the work they are required to perform".

Applicant argued that his employer had initially condoned and paid his claims for on call for quite some time even after he had been transferred to the National Psychiatric Hospital. This was confirmed by both Respondents' witnesses Dr. Magagula and Mrs. Ngubeni. They did however differ as whose responsibility was it to actually effect the change, Mrs. Ngubeni arguing that it was the Ministry of Health and Dr. Magagula testifying that it was the MOPS. However, neither of them submitted any instrument that justified this variation nor the basis for it. What is more, both could not assist the arbitration understand how the designation of institutions for purposes of claiming on call and standby allowance had been done by the MOPS. Both were content in arguing that the National Psychiatric Hospital was not one of the institutions that could claim on call but did not corroborate their evidence with any documentary proof so that one could evaluate its

-31-

evidentiary value. Ultimately, both were content in leaving this matter to rest on the existence of this 'invincible hand', that was neither subject to scrutiny nor to question. For example and specifically in respect to Dr. Magagula, he was quite comfortable to indicate that whilst he was aware that the National Psychiatric Hospital's duty roster is written as on call, the doctors nonetheless could not "claim on call even though they never verified with the Applicant's supervisor whether he indeed had worked on call".

Furthermore Applicant argued that the change in the treatment of his on call claims started with his October 2003 to March 2004 claim which the Hospital Administrator in a letter to him, indicated that it had been fraudulently submitted and that he had to pay back the amount paid to him which was E163, 927.70. All his subsequent claims up to September 2006, he argued were either unilaterally changed

to standby and paid as standby or were simply underpaid (as standby allowance). In addition, Applicant argued that his October 2006 to September 2008 claims went unpaid

If one were to deduce the thrust of Dr. Magagula's testimony as the most senior Ministry of Health official who testified, it didn't really matter at all that the doctors at the National Psychiatric Hospital worked on call, that they had claimed this before and were paid - all that mattered was that if and when the MOPS said it should stop, it meant just that, regardless of the impact on the employees concerned and despite that this had been a material term of their employment contract.

-32-

What is even more puzzling is the content of Exhibit 40, a letter written by Hospital Administrator, Mrs. Ngubeni to the PS Ministry of Health dated 31st March 2005 which stated that:

"as per our discussions yesterday 30th March 2005, with the PS on the above issue, I hereby wish to adhere to the decision made (my emphasis) that our doctors are entitled to claim Standby allowances not on-call allowances, by forwarding to you Dr. C.K. Tibagambirwa Standby allowance claim for April 2004 to September 2004 for your authorisation. We look forward to the official correspondence (my emphasis) from your office on the above subject".

As already stated herein above, Exhibit 37 is also authoritative in this regard. The Principal Secretary's minute to the Financial Controller dated 31st May 2005 ends with the statement that:

"It should be noted that whilst he is stationed at the National Psychiatric Centre, he may claim Standby Allowance".

Clearly this was not a decision that was taken by the MOPS as no evidence was submitted to confirm this, save for Dr. Magagula's testimony to this effect. From exhibit 37 and 40 per above, it is quite clear who took the decision i.e. the Ministry of Health officials - despite Dr. Magagula's submission that the decision was taken by the MOPS. Granted that the MOPS requested the Ministry of Health to comply with the regulations governing on call allowances (refer to a memo from

-33-

the PS of the MOPS to the PS Ministry of Health dated 4th May 2001) wherein the former states that:

"Authority is hereby granted for the payment of Standby and On-Call duty allowances for the following officers for the period October 2000 to March 2001. However, note should be made that your Ministry does not seem to comply with the regulations governing the on-call allowance. Could we be furnished with the reasons for this anomaly?"

This to me was not an instruction for the Ministry of Health to unilaterally change existing terms and conditions of service of employees within the Ministry but a clear request to address this 'anomaly'. Fully appreciating the magnitude they were faced with did not in any way prevent the Ministry of Health from consulting the employees concerned and properly engaging them with intention of addressing this.

Again no evidence was submitted to the arbitration to confirm that indeed this engagement took place, that it mere instructions were not issued but proper consultation was done with the hope of reaching a win-win outcome. The courts have adequately defined the process of consultation that employers must undertake when faced with such dilemmas, refer to Archie Sayed vs. Usutu Pulp Company Limited T/A Sappi Usutu, Case No. 432/06 and Usutu Pulp Company Limited T/A Sappi Usutu vs. Swaziland Agricultural Plantations Workers Union & Another, Case 16/06 & 17/06.

-34-

Respondent also introduced the point that the non-sanctioning of Applicants' claims was due to the fact that he had submitted the claims using the wrong forms. I have already concluded that this was a

red herring but also want to continue to make the specific point that this argument is very baffling as correcting this would not have resulted in the Applicant's claims being underpaid (as were the claims from April 2004 to September 2006) or not paid at all (i.e. claims from October 2006 to end of contract). In actual fact, the two Respondent's witnesses contradicted themselves with respect to the latter claims i.e. claims from October 2006 to the end of his contract. Whilst Mrs. Ngubeni was adamant that Applicant had not filed these claims at all, Dr. Magagula was very clear that he actually had filed claims up to the date he (Dr. Magagula) testified before the arbitration. Dr. Magagula also confirmed during his testimony that after Applicant reported the matter to CMAC, Ministry of Health had resolved to wait for the outcome first before addressing the issue.

"Most unilateral variations of terms and conditions of employment can be attacked as breaches of contract".

I therefore cannot fault the Applicant in seeking redress in respect to his obvious grief. In Riverview Manor (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2003) 24 ILJ 2196 (LC), Pillay J at para 31**,** makes almost similar conclusions about the lack of consultation with regards to unilateral variation terms of terms and conditions of employment i.e. unilateral reduction in salary and demotion, concluding that in the absence of full

consultation, employee was entitled to reject unilateral changes, arguing that:

"Apart from the absence of any forewarning that his position was in jeopardy or any consultation about it, it was common cause that the employer's decision about the reduction in the employee's salary was immutable. That was the principal issue that the employee found intolerable and caused him to resign. Having identified the main problem to be the book debts and having found a solution therefore, the employer's recalcitrance about consulting about the remuneration was grossly unfair and inconsiderate ".

Lastly, Respondent argued that at the very least, "Applicant should be precluded in law from contesting these claims, i.e. the claims from April 2004 and September 2006, based on the 'estoppel principle'. Well, Grogan J at Page 206**,** avers that:

"There is no fixed time limit in which estoppel will be applied. The test, essentially one of fairness, is whether employees have been given the impression that the employer has condoned their conduct"

The Oxford Dictionary of Law, 5th Edition, (2003), Oxford University Press, at page 181 defines the principle of estoppel as:

"a rule of evidence or rule of law that prevents a person from denying the truth of a statement he has made or from denying facts that he alleged to exist".

The context therefore that must be borne in mind in respect to Respondent's argument, is specifically what transpired in respect to these claims. Firstly, Applicant noted that whilst he submitted some of these claims as standby, he did so under duress and fully reserving his rights to pursue this matter further. Secondly that Applicant argued that none of his claims were being processed unless they were designated as on call. Having already worked the overtime and not being paid was according to him a far bigger punishment hence the better evil of submitting the standby claims under protest.

Right from the outset, he made it known initially to the Hospital Administrator and later in his numerous meetings held with the Ministry of Health that he considered their actions as unfair labour practice, thereby fully making them aware that he intended taking this matter further and by implication, noting that he had filled the forms as standby on the precise understanding that he reserved his rights to pursue this matter further.

Moreover and as concluded herein above, it is my analysis of this dispute that Respondent unilaterally changed his terms of claiming overtime and that the process Respondent deployed in this respect

was unfair. It therefore is my conclusion that Respondent has failed to meet the criteria of fairness in respect to this issue for them (Respondent) to 'cry four based on the 'estoppel principle'.

-37-

Respondent has put simply, approached arbitration in this matter with 'dirty hands' and must therefore live with the consequences.

What is thus left for me is to address the question of payment of the claims due as requested by Applicant. In terms of Applicant's particulars of claim, he had requested for an award totaling E2 050 836.86. Let me therefore proceed to analyse the claims step-by-step for each of the period in dispute, per below:

a) Claim for period between April - September 2004 which was underpaid by E93, 110.32. I have already concluded that this claim is time barred and hence falls away;

b) Claim for period from October 2004 to March 2005, which was underpaid by E132, 330.70. This claim is not time barred as indicated elsewhere above. An amount of E276, 065.70 had been originally claimed by Applicant of which E143, 735.00 was paid as standby. An amount of E132, 330.70 is therefore due to Applicant, being his underpayment for on call;

c) Claim for period from April - September 2005, which was underpaid by E135, 645.24. Again this claim is not time barred as indicated elsewhere above. An amount of E279, 370.53 had been originally claimed by Applicant of which E140, 570,40 was paid as standby. An amount of E138, 800.13 is therefore due to Applicant, being his underpayment for on call;

d) Claim for period from October 2005 to March 2006, which was underpaid by E334, 322.20. An amount of E354, 722.40 had been originally claimed by Applicant of which E20, 322.20 was paid as standby. An amount of E334, 400.20 is therefore due to Applicant, being his underpayment for on call;

-38-

e) Claim for period from April - September 2006, which was underpaid by E450, 105.49. An amount of E461, 528.44 had been originally claimed by Applicant of which Ell, 422.95 was paid as standby. An amount of E450, 105.49 is therefore due to Applicant, being his underpayment for on call;
f) Claim for period from October 2006 to March 2007, amounting to E272, 372.12, which was filed and not paid at all. Therefore an amount of E272, 372.12 is therefore due to Applicant, being his total claim for on call;
e) Claim for period from April to September 2007, amounting to E247, 056.27, which was filed and not paid at all. Therefore an amount of E247, 056.27 is therefore due to Applicant, being his total claim for on call;
f) Claim for period from October 2007 to March 2008, amounting to E241, 314.99, was filed when the dispute had already been reported to CMAC and was at the arbitration stage. It is therefore highly unlikely that this claim was properly ventilated at conciliation and therefore included in the Certificate of Unresolved Dispute. It is my finding that this claim is prematurely before arbitration and must be dealt with properly by Applicant in terms of the accepted rules of CMAC; and
g) Claim for period from April to September 2008, amounting to E237, 689.85, was also filed when the dispute had already been reported to CMAC and was at the arbitration stage. Again, it is highly unlikely that this claim was properly ventilated at conciliation and therefore included in the Certificate of Unresolved Dispute. It is my finding that this claim is prematurely before arbitration and must be dealt with properly by Applicant in terms of the accepted rules of CMAC.

7. AWARD

It is my finding that Applicant's claim for unfair labour practice succeeds therefore make the following order and award:

a) That Respondent must pay the amount of El, 442, 734.21 (one million four hundred and fourty two thousand, seven hundred and thirty four Emalangeni, twenty one cents) being his on call allowance for the period October 2004 to September 2007 -which is less what Respondent paid as standby allowance;
b) That Respondent is ordered to pay this amount on or before the 31st March 2009; and
c) That Respondent is also ordered to urgently formalize the basis for the payment of on call and standby allowances and that once this process is through, all employees affected by this change be adequately consulted prior to the implementation of the new and or revised on call payment instrument.

DATED AT MANZINI ON THIS 27th DAY OF FEBRUARY 2009.

MAX B. MKHONITA CMAC ARBITRATOR