



## ADVISORY AWARD

Case Number: KNPM2384-13  
Commissioner: G.JENKIN  
Date of Award: 11 February 2014

In the **CONCILIATION** between

**NUPSAW obo ZWANE Z.S. & 2500 OTHERS**  
(Union/Applicant)

and

**THE DEPARTMENT OF HEALTH (KWAZULU-NATAL)**  
(Respondent)

**Union/Applicant's  
Representative:** S MATAITSANE  
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## DETAILS OF HEARING AND REPRESENTATION

[1] In this case the trade union NUPSAW sought an advisory award, in terms of Section 200A (3) of the Labour Relations Act (*the Act*), as to whether its 2500 community caregiver members – engaged by the Department of Health (KZN) in its home and community based care programme – are “employees”. The matter was set down for conciliation on 13 January 2014 in Pietermaritzburg. Mr S Mataitsane represented NUPSAW while Mr I M Khumalo represented the Department.

## BACKGROUND

[2] It is common cause that:

- 2.1 The Department contracts the services of thousands of Community Caregivers in the Province of KwaZulu-Natal on 12 month fixed-term contracts (as does the Department of Health nationally) as part of its Home and Community Based Care Programme – to provide accessible health care to all communities in the Province.
- 2.2 Each Caregiver enters into a written agreement with the Department, in which the terms and conditions of the fixed-term contractual relationship under which the Caregiver, as a volunteer, will render services for and on behalf of the Department, are set out. This agreement regulates *inter alia* the Caregivers’ duties and responsibilities, vacation leave, sick leave, maternity leave and monthly stipend.
- 2.3 The Caregivers are also employed within the ambit of Ministerial Determination 4 : Expanded Public Works Programmes (22 October 2010).
- 2.4 Prior to August 2013, the Caregivers were paid through the State’s PERSEL payroll system with trade union and bargaining council levies being deducted from their remuneration. In August 2013, the Department migrated Caregivers to another payroll system named GAS (or similar acronym) and ceased making trade union and bargaining council levy deductions from their remuneration. This has resulted in the loss of millions of rands of revenue for certain public service trade unions and NUPSAW in particular.
- 2.5 Caregivers’ levels of remuneration and conditions of service are not regulated by any collective agreement between the trade unions of which they are members and the Department, or by the Public Service Bargaining Council.
- 2.6 NUPSAW’s main contention was that it seeks an advisory award declaring its 2500 odd members as employees – in terms of the presumptions contained in Section 200A(1) of *the Act* – and is not particularly interested in what it termed the “peripheral” issues raised by the Department.
- 2.7 The Department’s main contentions were that:
  - The Caregivers are “abnormal employees” in that, unlike State employees, they are not appointed as public servants in the normal course; they are not paid through PERSEL (State employees’ payroll system); no Bargaining Council agency fee, trade union subscriptions, medical aid/pension contributions are deducted from their stipends; they are not included in any Bargaining Council structures.
  - The Caregivers were being exploited by the Bargaining Council and the public service trade unions, as relatively large amounts of money were being deducted from their meager stipends (R1500.00 per month) for no service at all and that the Department will not be party to this type of “pick pocketing”. Further, the GAS payroll system through which the Caregivers



are paid is not geared to make trade union and bargaining council deductions from their remuneration.

#### ANALYSIS

- [3] On a conspectus of the Caregiver Agreement; Section 200A(1) of *the Act* and Ministerial Determination 4 – in particular the definition of “employer” at para 1.2(b) therein – together with the Department’s admission that the Caregivers are employees (albeit in an atypical sense), I am satisfied that the Zwane ZS and the other 2500 members of NUPSAW are employees of the Department for the purposes of the Basic Conditions of Employment Act (where Ministerial Determination 4 is silent) and for the purposes of the Labour Relations Act.
- [4] At the same time, the magnitude of the deductions of old, made from Caregivers’ meager remuneration (as shown on the example payslip handed up by NUPSAW) should be of grave concern to both parties and does indeed smack of exploitation on the part of the unions and bargaining councils involved. On the example provided, the Caregiver’s deductions from a (monthly) “basic salary” of R1500.00 were:
- NUPSAW - R40.00
  - PSA - R60.00
  - PSCBC - R 0.50
  - PHWSBC - R 2.00
- The total amount of the deductions (R102.50) represents 6.8% of the Caregiver’s salary, for little or no benefit.
- [5] While it can be argued (and it was) that the remuneration paid to the Caregivers is far too low, it must also be borne in mind that the Expanded Public Works Programmes are a form of poverty alleviation initiated by Government and funded from public resources.

#### ADVISORY AWARD

- [6] While the Caregivers are employed by the Department in an atypical fashion, in my view Zwane ZS and 2500 others are employees of the Department for the purposes of *inter alia*, the Labour Relations Act, Ministerial Determination 4 and the Basic Conditions of Employment Act on which the Ministerial Determination is silent.
- [7] My advice to the parties is that they meet in an endeavour to resolve the issues in dispute between them ie. the quantum of trade union subscriptions and levels of remuneration of Caregivers.

**Commissioner's note:**

*An advisory award is a recommendation and is not binding on the parties. Either party is at liberty to reject the advice and follow the procedures set out in the Act for resolving disputes of organizational rights and mutual interests.*

A handwritten signature in black ink, appearing to be 'G Jenkin', written over a circular stamp or mark.

G JENKIN  
COMMISSIONER  
11 February 2014.