

**IN THE ESSENTIAL SERVICES COMMITTEE
HELD AT JOHANNESBURG**

Case No.: ES 99

In re: Investigation in terms of Section 71 of the Labour Relations Act, 66 of 1995:

Whether certain services provided by institutions that care for persons suffering from cerebral palsy should be designated as essential services

Designation

1. Introduction

- 1.1 The Essential Services Committee (“the ESC”) received a referral from the United Cerebral Palsy Association of South Africa (“the UCPA”) in terms of section 71 of the Labour Relations Act, 66 of 1995 (*“the LRA”*) on 24 October 2016.
- 1.2 In its referral, the UCPA cited FEDCRAW as the Respondent party. FEDCRAW is the recognised trade union that organises employees at the UCPA.
- 1.3 In its referral, the UCPA sought a designation that *“its entire organisation be covered as an essential service for the sake of its residence (sic)”*.

- 1.4 A preliminary meeting between the ESC and the parties, referred to in paragraph 1.1 above, was held on 23 November 2016. At this meeting the UCPA submitted a written document in support of its application. It was agreed during this meeting that an inspection *in loco* be held at the premises of the UCPA.
- 1.5 The inspection *in loco* was held on 16 January 2017 at the premises of the UCPA, situated at the Harry Kessler Centre, 8 North Street (Corner Main Street), Townsvew, Johannesburg. Notes of the inspection *in loco* were prepared and circulated to the parties.
- 1.6 After consideration of the referral and the inspection *in loco* notes, the ESC decided to conduct an investigation in terms of section 71 of the LRA.
- 1.7 The gazetted terms of reference for the investigation in terms of section 71 are “...*whether the following services are essential...nursing (including sisters), care giving (including house mothers), catering and laundry at homes/institutions caring for patients suffering from cerebral palsy*” (see Government Gazette No 40673, Volume 621, dated 10 March 2017).

2. Details of Hearings

- 2.1 A number of written submissions were received and a number of interested parties also made oral representations to the ESC (these submissions are dealt with in detail in paragraphs 4 and 5 below).
- 2.2 Public hearings were held at the follow venues:
- (a) CCMA National Office (Johannesburg) – 31 March 2017;
 - (b) CCMA Durban – 7 April 2017;
 - (c) CCMA Cape Town – 13 April 2017;

- (d) CCMA Port Elizabeth – 18 April 2017;
- (e) CCMA Nelspruit – 20 April 2017;
- (f) CCMA Polokwane – 21 April 2017; and
- (g) CCMA Kimberley – 24 April 2017.

3. Cerebral Palsy

3.1 Cerebral palsy is defined as *"a group of permanent disorders of the development of movement and posture, causing activity limitation, that are attributed to non-progressive disturbances that occurred in the developing fetal or infant brain."* While the central feature of cerebral palsy is a disorder with movement, difficulties with thinking, learning, feeling, communication and behavior often occur along with cerebral palsy. Of those with cerebral palsy, 28% have epilepsy, 58% have difficulties with communication, at least 42% have problems with their vision, and 23–56% have learning disabilities.

3.2 Cerebral palsy is characterized by abnormal muscle tone, reflexes, or motor development and coordination. There can be joint and bone deformities and contractures (permanently fixed, tight muscles and joints). The classical symptoms are spasticity, spasms, other involuntary movements (e.g., facial gestures), unsteady walk, problems with balance, and/or soft tissue findings consisting largely of decreased muscle mass. Scissor walking (where the knees come in and cross) and toe walking (which can contribute to a walk reminiscent of a marionette) are common among people with cerebral palsy who are able to walk, but taken as a whole, cerebral palsy symptomatology is very diverse. The effects of cerebral palsy fall on a range of motor dysfunction, which may range from slight clumsiness at the mild end of the spectrum to impairments so severe that they render coordinated movement virtually impossible at the other end of the spectrum.

- 3.3 Cerebral palsy is a group of permanent movement disorders that appear in early childhood. Signs and symptoms vary among people. Often, symptoms include poor coordination, stiff muscles, weak muscles, and tremors. There may be problems with sensation, vision, hearing, swallowing and speaking. Often babies with cerebral palsy do not roll over, sit, crawl, or walk as early as other children of their age. Difficulty with the ability to think or reason and seizures each occurs in about one third of people with cerebral palsy.
- 3.4 Cerebral palsy is caused by abnormal development or damage to the parts of the brain that control movement, balance, and posture. A number of sub-types are classified based on the specific problems present. For example, those with stiff muscles have spastic cerebral palsy, those with poor coordination have ataxic cerebral palsy, and those with writhing movements have athetoid cerebral palsy. Diagnosis is based on the child's development over time.
- 3.5 There is no cure for cerebral palsy, however, supportive treatments, medications and surgery may help many individuals. This may include physical therapy, occupational therapy, and speech therapy. Medications may help relax stiff muscles. Surgery may include lengthening muscles and cutting overly active nerves. Often external braces and other assistive technology are helpful. Some affected children can achieve near normal adult lives with appropriate treatment.
- 3.6 Drooling is common among children with cerebral palsy, which can have a variety of impacts including social rejection, impaired speaking, damage to clothing and books, and mouth infections.
- 3.7 Speech and language disorders are common in people with cerebral palsy. Around a quarter of people with cerebral palsy are non-verbal. Speech problems are associated with poor respiratory control, laryngeal and velopharyngeal dysfunction, and oral articulation disorders that are due to restricted movement in the oral-facial muscles.

- 3.8 Pain is common and may result from the inherent deficits associated with the condition, along with the numerous procedures children typically face. Pain is associated with tight or shortened muscles, abnormal posture, stiff joints, unsuitable orthosis, etc. There is also a high likelihood of chronic sleep disorders secondary to both physical and environmental factors. Children with cerebral palsy have significantly higher rates of sleep disturbance than typically developing children. Babies with cerebral palsy who have stiffness issues might cry more and be harder to put to sleep than non-disabled babies. Chronic pain is under-recognized in children with cerebral palsy, even though 3 out of 4 children with cerebral palsy experience pain.
- 3.9 Those with cerebral palsy may have difficulty preparing food, holding utensils, or chewing and swallowing due to sensory and motor impairments. An infant with cerebral palsy may not be able to suck, swallow or chew. Children with cerebral palsy may have too little or too much sensitivity around and in the mouth. Fine finger dexterity, like that needed for picking up a utensil, is more frequently impaired than gross manual dexterity, like that needed for spooning food onto a plate. Children with severe cerebral palsy, particularly with oropharyngeal issues are at risk of undernutrition.
- 3.10 Associated disorders include intellectual disabilities, seizures, muscle contractures, abnormal walk, osteoporosis, communication disorders, malnutrition, sleep disorders, and mental health disorders, such as depression and anxiety. In addition to these, functional gastrointestinal abnormalities contributing to bowel obstruction, vomiting, and constipation may also arise. Adults with cerebral palsy may suffer from ischemic heart disease, cerebrovascular disease, cancer, and trauma more so than the non-affected population. Seizure management is more difficult in people with cerebral palsy as seizures often last longer.

- 3.11 Spastic cerebral palsy, or cerebral palsy where spasticity (muscle tightness) is the exclusive or almost exclusive impairment present, is by far the most common type of overall cerebral palsy, occurring in upwards of 70% of all cases.
- 3.12 Ataxic cerebral palsy is caused by damage to cerebellar structures. Because of the damage to the cerebellum, which is essential for coordinating muscle movements and balance, patients with ataxic cerebral palsy experience problems in coordination, specifically in their arms, legs, and trunk. Ataxic cerebral palsy is known to decrease muscle tone. The most common manifestation of ataxic cerebral palsy is intention (action) tremor, which is especially apparent when carrying out precise movements, such as tying shoe laces or writing with a pencil. This symptom gets progressively worse as the movement persists, causing the hand to shake. As the hand gets closer to accomplishing the intended task, the trembling intensifies which makes it even more difficult to complete.
- 3.13 Athetoid cerebral palsy is primarily associated with damage to the basal ganglia in the form of lesions that occur during brain development due to bilirubin encephalopathy and hypoxic-ischemic brain injury. Athetoid cerebral palsy is a non-spastic, extrapyramidal form of cerebral palsy.
- 3.14 As cerebral palsy has varying severity and complexity across the lifespan, a multidisciplinary approach for cerebral palsy management is recommended, focusing on maximising individual function, choice and independence.
- 3.15 The management team may include a pediatrician, a nurse, a social worker, a physiotherapist, an orthotist, a speech and language therapist, an occupational therapist, a teacher specialising in helping children with visual impairment, an educational psychologist, an orthopedic surgeon, a neurologist and a neurosurgeon.

- 3.16 Various forms of therapy are available to people living with cerebral palsy as well as caregivers and parents. Treatment may include one or more of the following: physical therapy; occupational therapy; speech therapy; water therapy; medicine to control seizures, alleviate pain, or relax muscle spasms; surgery to correct anatomical abnormalities or release tight muscles; braces and other orthotic devices; rolling walkers; and communication aids.
- 3.17 Cerebral palsy is not a progressive disorder (meaning the brain damage does not worsen), but the symptoms can become more severe over time. A person with the disorder may improve somewhat during childhood if he or she receives extensive care, but once bones and musculature become more established, orthopedic surgery may be required.
- 3.18 The ability to live independently with cerebral palsy varies widely, depending partly on the severity of each person's impairment and partly on the capability of each person to self-manage the logistics of life. Some individuals require personal assistant services for all activities of daily living. Others only need assistance with certain activities, and still others do not require any physical assistance. But regardless of the severity of a person's physical impairment, a person's ability to live independently often depends primarily on the person's capacity to manage the physical realities of his or her life autonomously.
- 3.19 Cerebral palsy can significantly reduce a person's life expectancy, depending on the severity of their condition and the quality of care with which they are provided. 5-10% of children with cerebral palsy die in childhood, particularly where seizures and intellectual disability also affect the child. The ability to move around, roll, and self-feed has been associated with increased life expectancy.

4. Written and Oral Representations made to the ESC

A Representations by Employers and Employer's Associations

4.1 The United Cerebral Palsy Association of South Africa ("the UCPA")

The UCPA filed written submissions, which submissions were amplified by oral submissions made by its Chairperson, Mr. Lello Incendiario.

The submissions of the UCPA were as follows:

General Remarks

- (a) The United Cerebral Palsy Association was first established in 1952. The founder, Harry Kessler had a daughter, Barbara, who also suffered from cerebral palsy. From a small beginning in a fairly primitive environment the Home has grown to a facility capable of housing 50 residents. The UCPA takes care of children who suffer from severe/ profound cerebral palsy.
- (b) The UCPA is registered as a Non-Profit Organization with the Department of Social Development. Each year they have to submit their financial statements, together with an Annual Narrative report, to ensure that they remain registered. The UCPA is also licensed by the Department of Health. Annual Financial Audits are carried out by D. Kalmin and Company. Monthly financial reports are submitted to the Department of Health and the Department also carries out scheduled and unscheduled visits and audits to the Home on a regular basis.
- (c) There are 62 employees employed at the UCPA, as follows:

Administration	:	7
Fundraisers	:	7
Stimulation Facilitator	:	1
Maintenance	:	2
Driver	:	1
Senior Sister	:	1
Staff Nurse	:	3
Housemother	:	2
Supervisor	:	1
Care-givers	:	22
Kitchen	:	4
Cleaners	:	4
Laundry	:	4
Security	:	3
Total staff compliment	:	62

- (d) Of the aforesaid 62 employees, 19 are unionised, which constitutes 30% of total employees.
- (e) There are ± 30 licensed NGO's in the Gauteng area. The other NGO's admit persons suffering from cerebral palsy as well as those suffering from other illnesses such as Down's syndrome. The UCPA is only licensed to admit patients who suffer from severe/profound cerebral palsy.
- (f) The UCPA has to comply with the terms of a Memorandum of Agreement, which is entered into annually with the Department of Health. They also comply with various legislation including the Children's Act, Nursing Act, etc.

- (g) Currently there are 41 residents at Home, 37 are permanent (residential) and 4 who use the day care facility. Males and females are accommodated separately in the hostel. Most of the residents have been abandoned by their families at a very young age, thus making the UCPA the only home they will ever know.
- (h) Of the 37 residential users, 28 have been abandoned. They are totally dependent on the care workers and staff for their basic daily needs such as eating, toileting, bathing, moving, etc. Most of the residents cannot walk, are wheel chair bound and are incontinent.

Cerebral Palsy – the Condition

- (i) Cerebral palsy is a condition that affects movement, posture and coordination. These problems may be seen at or around the time of birth. If a child has cerebral palsy it means that part of their brain is either not working properly or has not developed normally. It may be the result of a problem occurring during the first weeks of the baby's development in the womb (such as an infection) or in a number of cases can be the result of a difficult or premature birth. Sometimes there simply is no obvious cause.
- (j) Children with cerebral palsy cannot control their muscles very well. This means that their muscles are stiff or go into spasm, which means they move in a jerky and un-coordinated way. Some children with cerebral palsy are only mildly affected, and the effects of cerebral palsy will be minimal. Other children are more severely affected.
- (k) Some children can talk, sit up and walk – though they may take longer to develop these skills. Other children may require a high level of support in many areas of their lives. Some children with cerebral palsy may have other difficulties, such as sight problems or epilepsy (seizures). Some may have learning difficulties, though many children with cerebral palsy are of normal or above average intelligence.

- (l) Cerebral palsy is not contagious. No two children are affected by cerebral palsy in exactly the same way. Cerebral palsy cannot be cured although early support and therapeutic intervention can help children's development.
- (m) Cerebral Palsy is frequently categorized into three main types, although it is often difficult to classify exactly what type of cerebral palsy a child may have. It is not unusual for a child to have a combination of any of the following:

Spastic cerebral palsy

This is the most common form of cerebral palsy. Children with spasticity will have muscle stiffness that may affect the range of movements in their joints. The following terms are frequently used to describe the part of body most affected:

- Hemiplegia – either the left or right half of the body is affected.
- Diplegia – both legs are affected, the arms are either slightly affected or not at all
- Quadriplegia – both legs and arms are equally affected.

Athetoid cerebral palsy

Children with athetoid cerebral palsy tend to make involuntary movements because their muscles change from floppy to tense in a way that is difficult for them to control. This may also affect the child's speech and hearing.

Ataxic cerebral palsy

Children with ataxic cerebral palsy often find balance difficult and generally have un-coordinated movements. Ataxia affects the whole body. Usually children are able to walk but

may be unsteady, and have shaky hand movements and irregular speech. Whilst certain conditions do occur more frequently in children with cerebral palsy, every child is different and will not necessarily have any of the following:

- Children with cerebral palsy may have difficulties with sleeping or toileting.
 - Cerebral palsy can affect children's speech and / or chewing and swallowing.
 - Some children with cerebral palsy may develop epilepsy. Medication is often used to control this.
 - Some children with cerebral palsy have difficulty processing information about shapes, speed and space.
 - Some children with cerebral palsy may have learning difficulties or a specific learning difficulty.
- (n) A physiotherapist can offer support and advice with movement and positioning for the child. An occupational therapist can offer support and advice on equipment, play and adaptations. A speech and language therapist can offer support and advice about feeding and communication skills.
- (o) The patients at the UCPA suffer from profound/severe cerebral palsy. 50% of the residents are incontinent, the remainder require assistance when going to the toilet. 77% are wheelchair bound and are totally dependent on care-givers for movement and all areas of daily living, they all require 24-hour care and attention. Level of care is equal for males/females/children/adults, as a 10-year-old may be on a higher functioning level than a 30-year-old, although they all require a high level of care in different aspects. The younger children are easier to handle/lift, as the older ones are heavier and require 2 to 3 care workers to lift them during bathing, etc.

Finances

- (p) The UCPA receives the following monthly financial contributions: R 3 413 per residential (stay in) resident and R 1 041 per day care resident from the Department of Health as well as a grant of R 1 500 per resident from the Department of Social Development. The UCPA uses fund raising activities to bolster its income. The relevant persons doing the fundraising are not paid by the UCPA but they receive a commission from these fundraising activities.
- (q) The UCPA sets out its sources of income and expenses as follows:

Department of Health Subsidy

37 Residential – R 3 413.00/month	R 126 281.00
4 Day Care – R 1 041.00/month	R 4 164.00

Social Development Grant

23 Patients only – R 1500.00/month	R 34 500.00
Parents who contribute financially	R 45 000.00

The total amount raised monthly, excluding fundraising, is approximately R 209 945.00. Fundraising activities could raise anything up to R 50 000.00/month, although fundraising proceeds are not guaranteed as one can never tell with fundraising. The total monthly income is approximately R 259 945.

It costs the Home ± R 7 500.00 per child per month to care and provide for them. The total expenses are therefore approximately R 307 500.00. The UCPA states that their financial status over the past three years have really been challenging, 2014/2015

being particularly worse than last year. The UCPA sometimes waits up to 5 months for the Government to pay their subsidy and with no financial reserves in the bank, they literally live from day to day.

The Services

Laundry

- (r) Laundry that is washed comprises linen, nappies, towels, blankets, clothes, etc. There are 5 Speed Queen (heavy duty but not industrial) washing machines that are used and the washing is tumble dried (rather than ironed). Laundry is washed twice a day. Two employees are responsible for the washing.
- (s) If a washing machine breaks, then it is fixed by the maintenance department. There is a full-time handyman that does maintenance work. If the handyman can't fix the problem, then the washing machine will be fixed off site.
- (t) The Laundry staff ensure that the patients have clean clothing and clean nappies. There is an average of 200 nappies that must be washed and dried daily. An interruption in this service would have a huge impact, not only in the care of the children but also for hygienic reasons.
- (u) Laundry is a specific function which cannot have any absenteeism as this would result in the most basic hygienic necessity being disrupted. Outsourcing would be unaffordable.

Kitchen/Cooking

- (v) The kitchen staff cook and prepare all meals for the residents. They know what the children are allowed to eat.
- (w) The staff ensures that the kitchen stays clean for hygienic reasons. Two employees per shift work in the kitchen. The working hours for kitchen staff are from 06h00 to 18h00. The employees work two days on and two days off followed by three days on and three days off over a two-week shift system.
- (x) The two employees that work in the kitchen are responsible for the cooking of the food as well as the cleaning of the kitchen and all related activities that goes with it. The residents follow a special diet that has been specifically developed for them. For example, the residents may not eat rice due to a risk of choking. Residents are not allowed to eat or drink any substance that contains sugar, as it may lead to fits (seizures).
- (y) If an employee, working in the kitchen, is off from work due to illness or annual leave, then other employees will merely assist in performing those duties. For example, the House Mother or the Supervisor will assist in performing the duties of the kitchen staff.
- (z) Without the kitchen staff the children would not have any meals to eat. In the past, a cleaner or laundry worker would be asked to help out at meal times, but in doing so it just backlogs the cleaning and laundry services.

Caregiving and House Mother

- (aa) Portion control in relation to food is done by the House Mother. She has knowledge of the individual needs of the residents and if, for example, the food of a resident has to be liquidised, she will see to it that it is done. Residents will drink from plastic cups.
- (bb) Most of the residents require feeding and this is done by the caregivers as well as the staff nurse and sister.
- (cc) The House Mother performs administrative duties (not medical or nursing). There are two employees employed in this position and they too, work on a shift system over a two-week period. These employees only work day shift.
- (dd) Most residents require assistance when getting into and out of the bath. There are separate bathrooms for the males and females. Many of the residents require assistance when using the toilet and many use bed pans – their bodies are twisted (due to the nature of the disease) and bathing and using the toilet is extremely difficult.
- (ee) During the day, there is 1 caregiver per 6 residents on duty. During the night, the ratio is 1 caregiver per 10 residents. The working hours of the caregivers are from 06h30 to 18h30 (day shift). The night shift is from 18h30 to 06h30. The caregivers also work a shift system over a two-week period.
- (ff) The care-givers are allocated to specific residents and if the caregivers change, it will lead to fights between the residents.
- (gg) Caregivers are seen as the patient's mother. Each care giver has between 3 and 6 children which are allocated to them for them to take care of. The caregivers need to feed, bathe, clothe, brush teeth, cut nails and ensure for their hygiene throughout the day. The majority of the children are totally dependent on the caregivers for their daily

needs. These children are unable to care for themselves, hence 2 shifts with constant vigilance is required.

- (hh) Any disruption in caregiving will result in severe neglect and place the children in a life-threatening position.
- (ii) The housemother runs the kitchen and controls all the clothing, nappies, and laundry allocation of the Hostel. The housemother places food orders from the operations department for the week ahead or for the weekend.
- (jj) Due to the fact that the Home relies heavily on donations for clothes, careful attention needs to be taken regarding the patients clothing as they do not have many clothes and have to be salvaged, where possible.
- (kk) The House Mother allocates food to the kitchen staff for cooking and she oversees the dishing up for the residents, as she knows exactly who eats what and how much they eat. She also oversees the allocation of laundry and cleaning detergents to staff.
- (ll) It is necessary to have a House Mother. Not every individual can perform the duties of a House Mother as this employee has intimate knowledge, which is gained over many years, of the operations and interaction with the patients. The Home is under staffed and should the House Mother be absent from work, it would result in total chaos.
- (mm) Cerebral palsy children are totally dependent on the caregivers. The caregiver is the “family” of the patient, who provides for their daily needs. This support system that exists at the UCPA has been developed over many years through refining, educating and commissioning the skills required to care for the most profoundly affected cerebral palsy children and would collapse in the event of a breakdown in the caregiving.

Stimulation Therapy

- (nn) The residents receive stimulation (therapy), which is administered by a Facilitator. The Facilitator is a full-time employee, and she performs her duties during weekday mornings. This is because the residents cannot be exposed to too strenuous therapy for too long.

- (oo) Normally the facilitation will take place over a two-hour period. The activities are very similar to that used in nursery schools (e.g. building puzzles, playing with clay, colouring in, etc.). If residents don't get adequate stimulation, they become irritable.

- (pp) After the stimulation sessions, the residents will eat lunch. After lunch, they will be bathed and then they watch television. The caregivers will assist with these duties, including assisting the residents when they eat.

Cleaning

- (qq) Cleaners are responsible for the general cleaning of the facility.

Nurses/Sisters

- (rr) The staff nurse may only perform limited functions. She may, for example, not insert and/or apply IV's or drips. She may, however, apply oxygen. The nurse will observe a resident in the observation room and if he/she continues to feel ill, the resident will be taken to a clinic or the hospital. Residents contract lung diseases very easily.

- (ss) The nurse will also write daily reports on each resident. Furthermore, she will also allocate and hand out each resident's medicine on a daily basis (the caregivers assist the residents by ensuring that they take their daily prescribed medicine). The medicine controls *inter alia* fits/seizures. Medicine is received once a month from a depot in Hillbrow (there is not a pharmacy on site).
- (tt) The Sister oversees the daily running of the Hostel, also assists care workers. The Sister orders medication from Hillbrow Hospital for the residents, she also allocates the medicine to the patients. Ensures the wellbeing and makes sure the residents are comfortable at all times. Evaluates sick patients and takes the decision if they need to be hospitalised or if they can be treated at the Home.
- (uu) Staff Nurse allocates the medicine to the patients. Ensures the wellbeing and makes sure the residents are comfortable at all times. Evaluates sick patients and takes the decision if they need to be hospitalised or if they can be treated at the Home.
- (vv) It is absolutely imperative that a Sister / Staff Nurse be on duty all times. Allocation of medication is vital to the health of the children as any absence or delay in administration of medication is life threatening to these children.

Fundraising

Fundraising is one of the essential services at the Home. The fundraisers raise the much-needed funds every month we need to get by and survive. Without the Fundraising Department, the UCPA would not meet its monthly expenses. Funds are raised from Monday to Friday via telephone. Although this income is not a guaranteed, it brings great relief to the financial challenges every month.

4.2 National Association for Persons with Cerebral Palsy (“NAPCP”)

- (a) The Association filed a written submission. The Association represents a number of affiliated Provincial Associations and other institutions caring for persons suffering from cerebral palsy.
- (b) The Association indicated that it strongly supports the designation of the listed services (in the Gazette) as essential services.
- (c) The Association stated that many persons with cerebral palsy require total assistance for their activities of daily living. The majority require medication, which has to be given to them. Consequently, they are at great risk if the staff that provide these services go on strike. In the case of striking care-givers, it could lead to the deaths of the persons suffering from cerebral palsy.

5. Representations by Trade Unions

5.1 Federal Council of Retail and Allied Workers (“FEDCRAW”)

FEDCRAW made oral representations and indicated that it may wish to supplement its oral submissions with written submissions. They were afforded until 24 April 2017 to submit further written submissions. This has, however, not happened.

The submissions of FEDCRAW were as follows:

- (a) FEDCRAW conceded that nursing services should be designated as an essential service.

- (b) In respect of caregiving the Union was less clear. The two representatives attending the public hearing had different views on the matter (the one indicating that it should be an essential service and the other representative disputing that it should be designated as such).
- (c) Initially the submission was that caregiving is a very general service and comprises tasks such as making up beds, feeding the children and escorting the children. It is not a specialised service. If there is a change in staff (i.e. when someone resigns, then the children simply have to get used to a new caregiver
- (d) FEDCRAW disputed that any of the other services being investigated are essential. The services can be performed by anyone. It requires no special skills to wash laundry or to cook food.
- (e) In respect of fundraising, the Union indicated that it has requested the financial statements of the UCPA but these have not been forthcoming. As a general proposition, the Union stated that the employer can do forward planning or make alternative arrangements to continue with this service. The fundraisers normally contact the same donors and these donors are a matter of record. Anyone in management will be able to perform fundraising.

5.2 National Education Health and Allied Workers Union (“NEHAWU”)

NEHAWU made oral representations. The representation made on behalf of NEHAWU were as follows:

- (a) NEHAWU's submitted that an 'essential service' is defined in section 213 of the LRA as a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population.
- (b) Section 23(2) of the Constitution of the Republic of South Africa states that every worker has the right to strike.
- (c) In terms of Section 36 (1) of the Constitution, the rights set out in the Bill of Rights may be limited in terms of law of general application. The Labour Relations Act is such an act of general application.
- (d) Section 64 of the LRA guarantees employees the right to strike.
- (e) NEHAWU argues that the right to strike of workers is being eroded. The designation of essential services is weakening the collective power of workers. The Union submitted that if all the services that are currently being investigated were to be designated as essential, it would be a matter of time before other institutions, dealing with are illnesses such as HIV and TB would jump on the bandwagon and erode the right of workers to strike.
- (f) Furthermore, at a number of institutions the services have been outsourced and this is a further indication that the services should not be designated as essential.
- (g) NEHAWU conceded that nursing should be designated as an essential service. These employees are health workers. These workers deal with life threatening scenarios. Their services have a direct impact on the well-being of patients.
- (h) NEHAWU disputed that any of the other services being investigated by the ESC is essential.

- (i) The Union submitted that the ESC should also consider the degree of risk if a service stops or is terminated.
- (j) Caregivers only render support services. The termination of their services would, at most, have an indirect impact on the services. House Mothers are the same as caregivers. They only deliver an indirect service. Caregivers work like volunteers, are poorly remunerated and they don't belong to any professional body (no registration is required).
- (k) Fund raising should also not be designated as an essential service. The Union submitted that the majority of South Africans live in poverty and many live until they are 95. Society ensures that they don't starve to death.
- (l) Laundry and cooking staff cannot be essential as they too deliver an indirect service and anyone can perform these duties.

6. Applicable Legal Principles

- 6.1 The law and legal principles that apply to investigations in terms of section 71 of the LRA is well established and trite (see in this regard amongst others the designations of the ESC in the matters of the *RTMC and Others versus POPCRU and Others* and the ESC investigation into *Privately Owned Old Age Homes (ES 31)*).
- 6.2 Section 23(2) of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*) states that... *"Every worker has the right ... (c) to strike."*
- 6.3 Section 36 (1) of the Constitution states inter alia that... *"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is*

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.

6.4 Section 65 (1) (d) (i) of the LRA states that ... “*No person may take part in a strike ... if that person is engaged ... in an essential service*”.

6.5 An ‘essential service’ is defined in section 213 of the Act as:

- (a) *a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;*
- (b) *the Parliamentary service;*
- (c) *the South African Police Service”.*

6.6 The Constitutional Court has approved that essential services must be restrictively defined (See ***Chirwa v. Transnet Ltd and Others 2008 (4) SA 367 (CC)*** at paragraph [101]).

6.7 Furthermore, strike action is the primary mechanism through which workers exercise collective power (See ***Ex-Part Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA744 (CC)*** at paragraph [66]).

6.8 Strike action is also an important element underlying our collective bargaining system (See ***National Union of Metal Workers of SA and Others v Bader Bop (Pty) Ltd and another, 2003(3) SA 513(CC)*** at paragraph [13]).

6.9 Chaskalson *et al* (in *Constitutional Law of South Africa, Volume 4, Second Edition, Juta*) point out that having regard to the definition of essential service in the LRA, the prohibition on strikes in essential services operates only in very restricted circumstances.

- 6.10 Similarly, Brassey (in *Commentary on the Labour Relations Act, Volume 3, Juta*) notes that an essential service is narrowly defined in our law; that the emphasis is on threats to safety and security, and that considerations of mere expense and inconvenience fall beyond the ambit of the definition of an essential service.
- 6.11 The Labour Court endorsed this view of Brassey in *SA Police Service v Police & Prisons Civil Rights Union & Others* (2007) 28 ILJ 2611 (LC), when it ruled that not all employees of the South African Police Service render an essential service which prohibits them from embarking on strike action. The Labour Court held that it is the service that is essential, not the industry. The suggestion that finance administrators, human resource personnel, tea ladies and cleaners render an essential service by reason only of being employed by the SAPS was, in the Court's view, difficult to comprehend. It could not be argued, on the definition of essential service in the Act, that the interruption of the service of the above workers would "*endanger the life, personnel safety or health of the whole or part of the population*".
- 6.12 The above judgment was confirmed on appeal by the Labour Appeal Court. Waglay JA held that while employees employed under the Public Service Act Proclamation 103 of 1994 provide important support and complementary functions to the SAPS, they do not form part of the SAPS that is designated as an essential service by the Act. Such employees were accordingly not prohibited from striking in terms of section 65(1) (d) of the Act. Waglay JA held that giving effect to the interpretation sought by the SAPS, to the effect that all persons employed by SAPS rendered an essential service, would unjustifiably restrict the fundamental right to strike enshrined in the Constitution.
- 6.13 The Labour Appeal Court judgment was confirmed on appeal by the Constitutional Court. A unanimous Constitutional Court held that the Labour Appeal Court could not be faulted in holding that not all SAPS employees are engaged in an essential service, and that the wide interpretation sought by the SAPS was incorrect. The Constitutional Court held that "a

restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike”.

6.14 Having regard to the above, it is clear that our law requires essential services to be restrictively interpreted, and that this means, *inter alia*, the following:

6.14.1 It is the service which is essential, not the industry or the institution within which the service falls;

6.14.2 Only those employees who are truly performing an essential service, may be prohibited from striking; and

6.14.3 Essential and non-essential service workers may be found working side by side in the same institution.

6.15 Before the ESC can designate any service as essential, it must be satisfied that:

6.15.1 It is a service, or part thereof, that is essential. It is not employees, or a business or industry that is essential (see **SAPS v. POPCRU and Others** supra);

6.15.2 There must be an interruption, irrespective of whether it is partial or complete. If industrial action is unlikely to interrupt the service, or if the interruption can be avoided (for example by using replacement labour), the service will not be designated as an essential service;

6.15.3 The interruption of the service must endanger life, personal safety or health. Endanger means “putting at risk”, “imperil” or “jeopardise”. This implies that the conditions prevailing at the time that the designation is made, must be considered, and not the circumstances that may occur at some future stage; and

6.15.4 The endangerment must impact on the population, being human beings (see D Pillay “*Essential Services under the new LRA*” (2001) 22 ILJ 1 and the ESC designation in the matter of the *Road Traffic Management Corporation and Others vs. NEHAWU and Others*).

7. Other considerations - similar designations

7.1 The ESC has in the past designated the following similar services as essential:

- (a) Nursing services in the public sector;
- (b) Nursing services provided by the public sector and which are funded by the public sector;
- (c) Nursing services provided at nursing homes;
- (d) Nursing and caregiving services provided at privately owned old age homes.

8. Determination

8.1 Having considered the written and oral submissions of the parties, as well as the applicable law referred to in paragraph 6 above, the Panel is of the view that the following services should be designated as essential:

8.1.1 Nursing (includes sisters and senior sisters)

- (a) The Unions that participated in the hearings conceded that this service should be designated as essential. Furthermore, this service has in the in the past, in

similar circumstances, in other related operations been designated as an essential service.

- (b) The submissions made by the employers also support such a designation. Even if the Unions did not concede the designation of nursing services as essential, then the evidence clearly supports such a designation. It is clear that persons suffering from cerebral palsy require continued nursing services to be rendered to them. Any interruption to this service will clearly endanger the life, personal safety or health of those suffering from the condition.
- (c) As stated in paragraph 3.3 above, cerebral palsy is a group of permanent movement disorders that appear in early childhood. Often, symptoms include poor coordination, stiff muscles, weak muscles, and tremors. There may be problems with sensation, vision, hearing, swallowing and speaking. Difficulty with the ability to think or reason and seizures each occurs in about one third of people with cerebral palsy.
- (d) It is the occurrence of seizures that is especially dangerous for cerebral palsy sufferers. Without continued care, it is foreseeable that harm will come to such a person.

8.1.2 **Caregiving (including the service rendered by House Mother's)**

- (a) The evidence of the employer parties as well as the observations made during the inspection *in loco* supports a designation of this service as an essential service.

- (b) The relationship between patient and caregiver is of such a personal nature that any interruption of the service could be life threatening. An untrained replacement would not know how to deal with a patient that has a seizure.
- (c) The needs of these patients are very specific when it comes to eating, etc. If caregivers were to be replaced by inexperienced or replacement, it is foreseeable that patients could be harmed.

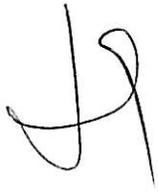
8.2 The Panel is of the view that the remainder of the services under investigation (laundry, cooking and fundraising) should not be designated as essential services. Laundry and cooking can be performed by any person. Although an interruption of the service would create inconvenience, even on the employer's submission, these services can be performed by any other employee and any potential risk would be mitigated by either a manager, nursing sister or caregiver overseeing the performance of these duties. In respect of fundraising, the Unions are correct that if sufficient planning is done and if adequate systems are in place, these services would not be interrupted to the detriment of the patients.

9. Designation

The ESC Panel therefore makes the following designation:

The following services provided to persons suffering from cerebral palsy as essential services:

- (a) Nursing services (which includes the services rendered by sisters and senior sisters)
- (b) Caregiving (including the service rendered by House Mother's)

A handwritten signature in black ink, appearing to be the initials 'JN' with a stylized flourish.

Ms. Joyce Nkopane
ESC Panel Chairperson
2 August 2017