

IN THE ESSENTIAL SERVICES COMMITTEE
HELD AT JOHANNESBURG

Case No.: ES562

In re: Investigation in terms of Section 71 of the Labour Relations Act, 66 of 1995:
Whether the medical aid scheme processing, consideration and approval of
ratifications and ex gratia payment consents is an essential service

Designation

Introduction

1. The Essential Services Committee ("the ESC") on its own initiative decided to conduct an investigation in terms of section 70B (1) (d) of the Labour Relations Act, 66 of 1995 ("the LRA") on whether the medical aid scheme processing, consideration and approval of ratifications and ex gratia payment consents is an essential service.
2. The gazetted terms of reference for the investigation were published in Government Gazette No 48660, dated 26 May 2023.

Details of Hearings

3. Public hearings were held at the follow venues:

- (a) 27 June 2023: CCMA Cape Town and Kimberly
- (b) 28 June 2023: CCMA Port Elizabeth and Polokwane
- (c) 29 June 2023: CCMA Durban and Mpumalanga
- (d) 4 July 2023: CCMA National Office and Rustenburg
- (e) 7 July 2023: CCMA Bloemfontein

Background

- 4. On the 23rd of September 2022 the Government Employees Medical Aid Scheme (GEMS) made an application in terms of Section 70B(1)(d) for the ESC to investigate the whole of some parts of services rendered by GEMS.
- 5. On the 15th of November 2022 a meeting was held with the parties in order to explain the process of a Section 71 application. Written motivations were received from GEMS on the 23rd of November 2022 and responding submissions were received from NEHAWU on the 1st of December 2022. NEHAWU's Reply was received on the 6th of December 2022.
- 6. The matter was the scheduled for a hearing to determine whether the request is reasonable on the 28th of March 2023.
- 7. On 3 April 2023, the ESC rendered a ruling that there is a reasonable request to

institute an investigation only of the processing, consideration and approval of ratifications and ex-gratia payment consents.

Submissions by interested parties

8. Dr. Morwesi Mahlangu from GEMS submitted that an ex-gratia payment as defined by the Council for Medical Scheme's is defined as a discretionary benefit which a medical aid scheme may consider to fund, in addition to the benefits as per the registered rules of the medical scheme. It should be noted that ex-gratia amounts are not obligatory requirements of medical schemes. Ex Gratia means grace,
9. These payments fall outside of minimum benefits. There are rules that govern medical aids and each benefit category.
10. The ex gratia payments is additional to what the patient / member qualifies for. For an example, a member might require a wheelchair that costs R100 000,00 although the member's benefits for a wheelchair are R60 000,00. In this case the member would apply for the ex gratia payment for the medical aid to consider paying the full R100 000,00 .
11. GEMS has 2 categories of ex gratia, routine and ratifications (emergency). Routine ex gratia payments are reviewed every 6 weeks. A committee looks at the applications. You also have an ex gratia committee that look at the request for prosthesis, legs, its normally things that can wait for six weeks.
12. Ratifications are urgent emergency cases, this is a situation that requires urgent approval, eg cancer treatments, or where the person appeal we use the urgent ratifications. The turnaround time for ratifications is 48-72 hours. During covid

GEMS had people who required advanced treatments and there was a delay in getting the treatment, and this caused serious problems for the medical aid scheme. Urgent operations also fall under this category.

13. Ratifications are done by chief healthcare officer, clinical health policy manager, medical advisory services, etc. Emergencies are there to preserve life, hence urgent approval is required. GEMS is the second largest scheme in the country with over 800 000 members and over 1 million beneficiaries
14. NEHAWU argued that if a member goes to the doctor or hospital and is diagnosed with an illness which requires the member to be on expensive medication, the process of approving such is done automatically on the background.
15. GEMS argued that ratifications and ex gratia are not out sourced. Pre authorisation is outsourced and they cannot decide on these things as they are not clinicians. GEMS submitted their ex gratia standard operating procedure, to substantiate their case.
16. The standard operating procedure merely outlines the process for the approval of the ex gratia payments as well the process where there is a negative outcome.
17. GEMS in their closing arguments argued that the ESC should designate the functions of the following employees as essential: Medical advisory service: Associate; Clinical Health Policy Manager; Senior Manager: Medical advisory services; Chief Healthcare; Services; Chief Operations Officer; and the Principal Officer.

18. Discovery Health (Pty) Ltd made written submissions supporting the designation of ex gratia payments but did not attend the hearings. Their submissions have been duly considered by the committee.

Applicable Legal Principles

12. In determining whether a particular service should be designated as an essential service the ESC is guided by the legal principles as indicated herein below.

13. 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."

14. The right to strike is a fundamental right and just like any other constitutional right it is not absolute. 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".

15. The legislature has enacted the Labour Relations Act 66 of 1995 in order to give effect to the rights contained in the Constitution. 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".

16. 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".

17. 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]).

18. 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.

19. 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.

20. This was confirmed by the constitutional Court in *South African Police Service v Police and Prisons Civil Rights Union and Another [2011] 9 BLLR 831 (CC)* said the following: -

"In order to ascertain the meaning of essential service, regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the LRA is to give effect to the right to strike entrenched

in section 23(2)(c) of the Constitution. The interpretative process must give effect to this purpose within the other purposes of the LRA as set out in Section 1(a). The provisions in question must thus not be construed in isolation, but in the context of the other provisions in the LRA. For this reason, a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike (footnotes excluded)”

21. 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:

- It is the service, which is essential, not the industry or the institution within which the service falls.
- Only those employees who are truly performing an essential service, may be prohibited from striking; and
- Essential and non-essential service workers may be found working side by side in the same institution.

22. Before the ESC can designate any service as essential, it must be satisfied that the interruption of the said service is likely to endanger life, personal safety or health of the whole or part of the population.

23. It is further trite that in view of the fact that the right that would be affected by such a designation limits or takes away a fundamental right, such designation must be reasonable and justifiable. Thus if the ESC finds that parts of the service are not essential the Committee is obliged not to designate such services, as such a designation would be unreasonable and unjustifiable

Analysis of Evidence

24. GEMS has 2 categories of ex gratia, routine and ratifications (emergency). Routine ex gratia payments are reviewed every 6 weeks. A committee looks at the applications. You also have an ex gratia committee that look at the request for prosthesis, legs, its normally things that can wait for six weeks.
25. NEHAWU initially argued that all ex gratia payments are all subjected to the committee that sits every six weeks to review applications, but they couldn't sustain this argument when Dr. Morwesi Mahlangu defined the two types of ex gratia payments that are made.
26. The panel accepts NEHAWU's argument that a request subjected to the review committee every six weeks does not meet the standard that if such service is interrupted there would be an endangerment to life or health. This means that the service of approval of routine ex gratia payments cannot be an essential service.
27. The question that remains is whether the consideration and approval of Ex- gratia ratifications which go through the Medical Advisory Services Associate the CHO and Senior Manager Medical Advisory, the Chief Healthcare management, the Chief of Operations Officer and Principal Officer should be designated as an essential service. It must be noted that, as stated above, the ESC designates services and not employees.
28. It was not disputed that the above ex- gratia ratifications are done daily and they need to be made within 48/72 hours. The functionaries that handle ratifications are required to be on call 24/7 in order to ensure that all requests are received,

processed and consideration at various levels of the request as well as where there is an appeal by a member.

29. Having considered the written and oral submissions of the parties, the panel makes the following designation.

Designation

30. The service of consideration and approval of Ex- gratia ratifications is designated as an essential service.

31. The parties are ordered to negotiate and conclude a Minimum Service Agreement by 31 March 2024.

Adv. L Bono



ESC Panel Chairperson

29 September 2023