CASE NO. LCA 6/98

MUNICIPALITY OF WINDHOEK -vs- WALTER JOHN VAN WYK AND OTHERS.

1999/09/17

Teek: President

Appeal: - From **District Labour Court.**
On agreed and stated facts

issue: - considered and discussed whether or not standby duty constitutes work as contemplated by the Labour Act.

Held: - The devised platoon system does not mean that the non-active standby duty performed by the respondents and other firemen becomes work "on the instructions of the employee".

- The requirements to perform on standby duty is part and parcel of the conditions of service to which the respondents agreed, even if duty rosters are determined by the appellant pursuant to those conditions of service. It does not define the nature of that duty and certainly does not elevate it to the performance of work.

Held: - Complainant should have failed.

- Appeal upheld.

CASE NO. LCA 6/98

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

MUNICIPALITY OF WINDHOEK **APPELLANT**

versus

WALTER JOHN VAN WYK & OTHERS **RESPONDENT**

CORAM: TEEK, PRESIDENT

Heard on: 1999.02.15

Delivered on: 1999.09.17

JUDGMENT:

TEEK, PRESIDENT: The appellant has appealed against the whole of the judgment handed down on 29 April 1998 in the District Labour Court for the district of Windhoek by the learned Mr L Simasiku.

The judgment is assailed by the appellant on various grounds namely that:

1. Important aspects of evidence before the court are not reflected in the judgment or are not accorded sufficient weight;

2. the court over emphasized some aspects of the evidence in disregard of important aspects to the prejudice of the Applicant;

3.1 more in particular, the Honourable Court misdirected itself by considering only one aspect of the application viz, "whether the Respondent's are on duty on the instructions of the employer or a self claimed or imposed instruction;"

3.2 misdirected itself in failing to consider pertinently whether the non-active stand-by duty of the Respondent's constitute work for the purposes of qualifying for overtime remuneration in terms of the Labour Act;

4.1 the Court further misdirected itself in giving little and/or no consideration to the fact that Complainants were paid in full in respect of active periods for work actually performed and that;

4.2 stand-by allowance is granted in respect of non active stand-by duties;

5. the Court gave insufficient and/or no consideration to the existence of a contract of employment between the parties and the consequence which flows from such relationship; and

6. the Appellant reserved the right to add or to rectify the grounds of appeal once the record of the hearing of the Complain has been transmitted to the Registrar of the Labour Court in accordance with Rule 19(3).

The respondents in turn cross appealed against part of the order on the following points of law:

1. The learned Chairperson erred in not ordering Appellant to discontinue contravening section 32(3) of the Labour Act, Act No. 6 of 1992;

2. The learned Chairperson erred in not ordering Appellant to remunerate Respondents, with effect from 1 February 1996, in respect of all hours worked on a Sunday or on a public holiday at the rate of not less than double their hourly rate of remuneration: provided that Appellant may deduct any amounts already paid to Respondents in respect of all outs;

3. The learned Chairperson erred in not ordering Appellant to remunerate Respondents, with effect from 1 February 1996, in respect of all hours worked between the hours of 20h00 to 07h00, calculated at the rate of 6 per cent of the hourly rate of remuneration payable on a weekday: provided the Appellant may deduct any amounts already paid to Respondents in respect of all outs.

As the parties agreed to a statement of agreed facts no evidence was led at the hearing. This statement also contained the appellant's as well as the respondent's contentions and the relief sought by the respondents (complainants) and reads as follows:

AGREED FACTS

1. Complainants are employed as firemen by the Respondent. There are two fire stations, one in Guthenberg Street, Windhoek and the other in Sheffield Street, Northern Industrial area, Windhoek.

2. As firemen Complainants are on duty for on average 84 of hours per week. Complainant are divided into two platoons or groups.

3. During week one, the platoon is on shift duty on Tuesday and Thursday of 24 hours each (two shifts) i.e. a total of 48 hours. During week two, the platoon is on duty for five shifts of 24 hours duration each on Monday, Wednesday, Friday, Saturday and Sunday (five shifts). This is a total of 120 hours. During a fortnight therefore a platoon is on duty for 168 hours, which is an average of 84 hours per week.

4. A copy of the duty sheet for firemen is attached marked "A". The day shift is a 9 hour shift, from 07h30 until 16h30. The night shift is a 15 hour shift from **1**6h30 until 07h30, the following day. The weekend shift is a three day shift from 07h30 on Friday until 07h30 on Monday, each day being a 24 hour shift. On any weekday (i.e. from Monday to Friday) Complainants are given a one hour meal interval from 13h00 until 14h00, during which period the Complainants are required to remain at the fire station or at their residences at the fire station as if on non-active duty (see the following paragraph).

The shifts are further broken up into "active" and "non-active" periods. The "active" periods are as follows:

Weekdays	07h30-13h00; 14h00-18h00;
Weekdays	07h00-07h30 - this is at the end of a shift;
Saturdays	07h30-10h30;
Saturdays	16h30-17h30;
Sundays and public holidays	07h30-08h30;
Sundays and public holidays	16h30-17h30.

The "non-active" periods are as follows:

Weekdays	13h00-14h00;
Weekdays	18hOO-07hOO;
Saturdays	07h00-07h30, 10h30-16h30 and 17h30-24h00;
Sundays and public holidays	00h00-07h30, 08h30-16h30 and 17h30-07h00;

During week one, a member of a platoon is on duty during the active hours for 20 hours and during the non-active hours for 28 hours. During week two, a member of a platoon is on duty during the active hours for 36 hours and during the non-active hours for 92 hours.

8. Complainants are paid by Respondent monthly and are required to work seven days per week. Their remuneration is calculated with reference to the active hours. Complainants each receive a standby allowance of N$341,24 per month as recognition for the non-active hours.

9. During the non-active periods:

9.1 Complainants are on standby duty at the Respondent's fire stations in order to be ready to go out on a call at very short notice;

9.2 Complainants are required to remain on the premises of Respondent's fire stations at all times;

9.3 Complainants may engage in any activities on the Respondent's fire station premises, except Complainants are not allowed to consume alcohol;

9.4 Complainants may sleep or engage in leisure activities;

9.5 Save for those required to perform control room duty Complainants are not required to wear their uniforms until they go to bed at 23h00;

9.6 At all times i.e. during non-active and active times; including when Complainants go to bed, they are required to respond to a call and be

ready to leave the fire station on a fire engine or in an ambulance within 60 seconds;

9.7 Some of the married Complainants live on the premises with their families in flats, while all the others have their own rooms on the premises. This latter category includes unmarried employees who live in rooms on the premises and married employees who do not live on the premises but have rooms allocated to them for non-active standby duty.

10. Complainants are remunerated in accordance with the Labour Act, Act No. 6 of 1992 ("the Labour Act"), for being called out during any "non-active" period, from the time of leaving the fire station until their return.

11. There always has to be one fireman on duty at any time in the control room. This is where incoming calls are answered and dealt with by the person on duty. Complainants who work in the control room are on duty from 16h30 until 07h30. There is a supper break from 17h30 until 18h30. Another fireman relieves him during this time. A complainant who is on duty in the control room is not paid overtime for this time, except on a Sunday or a public holiday, when the normal hourly rate is paid for this period.

12. Complainants on control room duty may sleep on a bed provided for this purpose in the control room after 23h00. Complainants on control room duty receive the night work allowance referred to in section 34(2) of the Labour Act

for the period 20h00 until 07h00.

13. The approach generally adopted in South Africa is reflected in an industrial council agreement between certain local authorities and their employees' representatives and is to the following effect:

(a) a 56 hour working week for firemen is regarded as fair and just;

(b) where local authorities are unable to implement a 56 hour week by way of a 3 platoon system, the following alternatives are available with a 2 platoon system:

(i) an 84 hour week (2 platoon system) with a 24% shift allowance to a maximum of R412 per month;

(ii) a 72 hour week (2 platoon system) with a 16% shift allowance to a maximum of R344 per month.

(c) The 2 platoon system involves similar active duty and non-active standby duty along the lines applicable with the Respondent.

(d) The choice of implementation of a 56, 72 or 84 hour working week is for a local authority council, depending upon its size and requirements.

13.2 The Respondent has a 2 platoon system. The size of the Respondent local authority does not justify a 3 platoon system.

13.3 The Respondent is prepared to negotiate the size of the shift allowance but the Complainants decline to do so, persisting with this complaint.

COMPLAINANTS' CONTENTIONS

14. Complainants contend that they are on duty including "non-active" periods and therefore working for the whole shift i.e. for twenty-four hours.

15. Complainants contend that Respondent's distinction between "active" and "non-active" hours, and its consequent refusal to remunerate Complainants for the "non-active" hours during which they are on duty (unless out on a call) is contrary to the Labour Act.

16. Complainants contend that their working hours are not restricted to the times when they are actually working, but include all the hours during which they have to be on duty at Respondent's premises, including the hours on standby or the "non-active" hours.

17. Complainants therefore contend that:

17.1 All time worked in excess of a nine hour shift (Complainants work a maximum of five shifts per week) be remunerated as overtime at the rate of one and one-half time the hourly remuneration (section 28(l)(c)(i), read with section 32(3) of the Labour Act);

17.2 All time worked in excess of a nine hours shift on a Sunday or on a public holiday be remunerated as overtime at the rate of twice the normal hourly rate (section 28(1)(c)(i), read with section 32(3)(b) of the Labour Act);

17.3 All time worked on a Sunday or on a public holiday be remunerated at the rate of not less than twice the rate of remuneration (section 33(3)(a) of the Labour Act);

17.4 A night work allowance be paid for all hours worked between the hours of 20h00 to 07h00, calculated at the rate of 6 per cent of the remuneration payable on a weekday (section 34(2), read with the definition of "night work" in section 1 of the Labour Act).

RESPONDENTS CONTENTIONS

18. The Respondents contends that the Complainants have been paid in full in respect of all active periods of their shifts during which they actually work.

19. During the non-active period of shifts, the Complainants are merely on standby, awaiting an emergency call. They do not work and are not required to do so in the absence of such an emergency call. In recognition for this, they receive a standby allowance in the sum of N$341,24 per month.

20. If anyone of the Complainants were to be called out to do active work during the non-active period, such as going out on an emergency call, such a Complainant would be paid overtime for the work thus performed.

21. The Respondent therefore denies that the period on non-active standby duty constitutes work for the purpose of qualifying for remuneration for overtime.

22. The Respondent accordingly respectfully asks that the complaint be dismissed.

RELIEF

23. In the event of the above Honourable Court finding that the above facts indicate that the Respondent has contravened or failed to comply with any provision of the Labour Act, then Complainants pry or an order in the following terms:

23.1 The Respondent be ordered to discontinue contravening sections 28(l)(c)(i); 32(3) and 34(2) of the Labour Act;

23.2 That Respondent be ordered to remunerate Complainants, with effect from 1 February 1996, in respect of all hours worked on a weekday or on a Saturday in excess of a nine hour shift as overtime, at the rate of one and one-half times their hourly rate of remuneration: provided that Respondent may deduct any amounts already paid to Complainants in respect of call outs;

23.3 That Respondent be ordered to remunerate Complainants, with effect from 1 February 1996, in respect of all hours worked on a Sunday or on a public holiday at the rate of not less than double their hourly rate of remuneration: provided that Respondent may deduct any amounts already paid to Complainants in respect of all outs;

23.4 That Respondent be ordered to remunerate Complaints, with effect from 1 February 1996, in respect of all hours worked between the hours of 20h00 to 07h00, calculated at the rate of 6 per cent of the hourly rate of remuneration payable on a weekday: provided that Respondent may deduct any amounts already paid to Complainants in respect of call outs;

23.5 Alternative and/or further relief.

24. It will be argued on behalf of the Respondent at the hearing of this matter, that in the event of an order being granted in favour of Complainants, the amounts already paid to Complainants in respect of standby allowances also be deducted from any amounts that Respondent is ordered to pay."

The essence of respondent's case is that they are working for the entire period that they are required to be on duty and to remain at one of appellant's firestations, i.e. that they work both during what is termed by the appellant as the "active" hours and during the "non-active" hours. While the respondents are remunerated for the former, they are not remunerated for the latter. The appellant's contention on the other hand is that the

respondents do not work during the non-active periods and are merely on standby awaiting an emergency call.

The success of the appeal and cross appeal therefore turns on the meaning of "work" and its application to the agreed facts, in the absence of a definition of the term "work" in the Labour Act.

The respondents claim that during the periods of non-active duty they are on standby and that constitute work for the purposes of qualifying for overtime payment or some sort of remuneration.

The Court *a quo* found in favour of the respondents.

The conditions relating to hours of service for the respondents are set out in the aforementioned agreed facts and I shall only highlight some:

1) They work in a two platoon system, being divided into two groups;
2) they are on duty for different hours during a period of two weeks - in the first week they are on duty for a total of 48 hours and in the following week they are on duty for 120 hours;
3) their duty is essentially made up by two components, namely active and non-active standby duty;
4) during the first week firemen serve 20 hours of active duty and 28 hours of non-active duty, whilst during the second week, 36 hours is spent on active duty and

84 on non-active duty;

5) firemen are paid monthly and their remuneration is calculated with reference to the active hours of duty;

6) by agreement between the parties, they receive a standby allowance of N$341,24 per month as recognition for non active hours on standby duty which the respondents and other firemen have accepted and continue to accept. The respondents have not tendered this sum for the period spanning their claim;

7) the non-active period is essentially standby duty where firemen are required to be at the appellant's premises where they either live or are provided with rooms where they can stay over;

8) whilst on standby duty firemen may engage in leisure activities, sleep but are not permitted to consume alcohol;

9) if the firemen are called out during non-active period of standby duty, they are paid overtime in accordance with the Act for such work performed - which payments the respondents have accepted; and

10) firemen on duty in the control room have to date not been paid overtime in respect of those duties which had, prior to the complaint, been regarded as non-active by the appellant. The appellant however accepts that overtime should be paid in respect of this period and tendered to do so in the Court *a quo.*

At the heart of this dispute lies the proper construction to be placed upon the relevant sections and within the context of the Namibian Labour Act as a whole taking into account the essential background facts *inter alia* that the appellant, as a local authority, provides emergency services of which firemen provide one such service. The

respondents are employed by the appellant to provide that service. By the very nature of the emergencies they are required to deal with and be available to do so, their conditions of service are extraordinary. As firemen they are engaged in essential emergency work which requires an instant response and for firemen to be available to this respond when the need arises and when required to do so. That is the very essence of the occupation of a fireman in the context of the respondents' employment with the appellant. It is common cause between the parties that the employees (respondents) are on duty while they are at the fire station on standby.

In the circumstances the respondent's position is similar to other emergency service occupations such as medical practitioners engaged in casualty work. They too may be required to be on call and to respond rapidly when their services are required whilst on standby. It is for that reason that the respondents are prohibited to consume alcohol when on duty which would otherwise impair their ability to render their professional services efficiently when called upon to do so when an emergency occurs. Other occupations which would be similarly affected would be those involving emergency related work, for example water; sewerage and electrical engineers and technicians employed by local authorities and/or state controlled utility operations.

The two platoon systems and the condition of service have been operative since 1979 and were accepted by the respondents up to the time the complaint was lodged that they were not being remunerated in accordance with section 28, 32 and 34 of the Labour Act for the entire period of non-active duty and not just those periods when they actually perform services and actually work and for which they are in fact paid overtime.

In the circumstances in order to succeed with such a complaint the respondents must establish that their standby duty constitutes work as contemplated by the Labour Act in the relevant sections. Statutory overtime is only payable in respect of employees who work overtime in accordance with section 32(3) of the Act.

The court *a quo* in its terse and scanty judgment found that the standby duty constitutes work and ordered the appellant to stop violating section 28 and 32 of the Labour Act. It ordered the respondents to be remunerated with effect from 1 February 1996 in respect of hours worked on a week day or Saturdays in excess of a 9 hour shift as overtime less amounts already paid to them in respect of "call outs." The court *a quo* did not give supplementary reasons for the finding. The primary reason which was provided by the court *a quo* was summarily stated as the fact that firemen, whilst on standby, are not allowed to consume alcohol and that the non-active duty is upon the instructions of the appellant. It is against this finding that the appeal is directed.

It appears from the stated facts that the respondents have agreed to their conditions of employment providing for active working hours and non-active standby duty in respect of which they received (and have for years received) a standby allowance. They have for years accepted terms of their employment contract which clearly contemplates that there is a distinct difference between active and non-active standby duties. These conditions of service contemplate that non-active standby duty is not regarded as work for the purposes of remuneration and that overtime payment would however be made in respect of any work performed during standby. By agreeing to these terms, the respondents accepted this basis of their employment and remuneration therefor and that

their conditions of employment would be interpreted and operate in this manner. In interpreting the contract of employment between the parties, the conduct of the parties is an important tool of interpreting in interpreting the parties' intentions as expressed in their agreements.

By their conduct the respondents accepted the mode of payment adopted by the appellant and also that their work, for the purpose of overtime remuneration, would not include non-active standby duty, especially when regard is had to the fact that overtime is contemplated and is and has been accepted for any work actually done during non-active standby duty.

See in this regard *Kruger* v *Municipality of Windhoek and Another,* (unreported 5.11.1996 and *Consolidated Diamond Mines v Administrator, SWA* 1958 (4) S.A. 572 (A).

The contractual rights between parties, namely the acceptance and agreement to employment in terms of the terms of employment is in accordance with the common law right of parties to contract on such terms as are determined and negotiated between them. These rights are protected in the sense that there is a presumption against the deprivation of or interference with common law rights and in the case of ambiguity an interpretation which preserves those rights will be favoured. See Steyn, Die Uitleg van Wette (5ed) at 103 - 105 and the authorities collected there, and *S.A Breweries Ltd* v *Food and Allied Workers Union & Others,* (1989) 10 LJ 844 (A) at 850 in the context of Labour Legislation.

As the parties clearly distinguished between active and non-active standby duties for purposes of qualification for overtime remuneration, the real question to be decided is merely whether there is any provision (specific or implied) in the Labour Act which prevents parties from determining in a *bona fide* agreement (which is not *in fraudem legis)* what kind of activities are of such a nature that they qualify for overtime remuneration and which do not. In other words whether the parties can agree upon the type of activity which constitutes the performance as work for purpose of qualifying for overtime remuneration or not. If this question is then to be answered in the negative, there is no basis (or any reason) whatsoever for a court to interfere with the terms of employment agreement.

The answer in my view to this question is that the agreement that was entered into between the parties is plainly not in conflict with any of the provisions contained in Part V of the Labour Act because an agreement along those lines is not proscribed in any sense in the Act; and having due regard to the presumption against interference with common law rights (when interpreting a statute), there is no basis to contend for an implied prohibition to that effect in the Act. The definition of overtime as contained in section 1 of the Labour Act puts the issue beyond doubt. It clearly contemplates that an employee will only qualify to be remunerated for overtime if he or she does substantially the same kind of work during those hours in respect of which he or she receives a basic remuneration and those hours in respect of which he or she qualifies for overtime.

The definition of overtime in the Labour Act which provides:

> **"overtime: means that portion of the time which an employee works for his or her employer which is in excess of the ordinary working hours applicable to such an employee."**

The active verb **"works",** as interpreted in accordance with the canons of construction of statute means that the work performed by an employee in excess of the ordinary working hours is contemplated as being of the same kind or nature, as the work performed in ordinary working hours, in order for the employee to qualify for overtime remuneration.

Therefore when the respondents joined the appellant's services, they accepted that employment in accordance with the applicable conditions of employment would contemplate active and non-active duty and the payment in the above terms for those duties. They thus knew that the work of a firemen would require unusual hours and considerable and extended periods of non-active duty when they would be on standby and available to instantly respond to an emergency. Such conditions are inherent in the exigencies of the work of a fireman.

Rene v Gordons & Others 88(1) S.A. 1 p.22E-H.

These conditions are not however entirely unique but are also experienced by other occupations where availability to attend to emergency situations is inherently part of those occupations. An example would be a doctor working in casualty who not only has hours of work but also has periods of time when he or she would be on standby duty and

be available to respond rapidly to an emergency.

Although not directly in point, the English case of *Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293 (CA) involved litigation concerning a doctor's hours of service. Although the legal issues involved in the matter are not in point in relation to the issue in dispute in this matter, the conditions of service of the doctor required him to work a basic 40 hours per week for which he was paid and that he was also required to be available, on call, for a further 48 hours on average per week. Hours actually worked over 40 were not paid at a high rate but at only one third of the usual rate. The case concerned a complaint as to whether the conditions of service in which a doctor worked 88 hours a week were injurious to him. Whilst it was not decided in the case, it was accepted by the parties that the doctor actually only worked for those hours for which he was called out and required to work and for which he was paid. It was accepted that he was not paid and did not work for all 88 hours for which he contracted himself to be available.

The respondents are free to contract either individually or through an association or union for more favourable terms in the form of greater payment for a standby allowance. The appellant has indicated that it is willing and prepared to negotiate this aspect.

If cognisance is had to the fact of the Johnstone-matter *supra* then it can be concluded that the non-active standby duty of the firemen does not constitute "work" for the purpose of sections 1, 28, 32 and 33 of the Labour Act.

It is clear that the overtime worked, when the respondents engage in actual work on standby duty, is in terms of an agreement, as is contemplated by section 32(2). The agreement concerned is embodied in the conditions of employment setting out the basis upon which they are employed and are remunerated and the appellant complies with its obligation to pay the respondents "who work overtime". This is done at the rates provided by section 32 in respect of actual work performed during standby duty. Overtime is thus paid and the work constituting overtime is accordingly paid for in full. The appellant has accordingly no further obligation in relation to the payment of work constituting overtime by virtue of the provisions of section 32. As far as section 34 is concerned, it deals with and refers to night work. It clearly contemplates work performed at night. It cannot and does not contemplate payment for persons who are merely on standby or on call whether they are medical practitioners or firemen and who could be called out at night in the case of emergency. Such persons are able to sleep or engage in leisure activities at night whilst on standby. Such activities including sleeping at night without there necessarily being any actual interruption for an emergency call, cannot be brought within the definition of night work as is contemplated by section 34. The same considerations apply in respect of the interpretation of section 32(3) which requires an employer to pay overtime to an employee who works overtime. Section 28 as well contemplates people working on shift and not merely being on standby who could then conceivably be called out to work.

In interpreting the term "work", regard must be had to the ordinary grammatical meaning to be used in accordance with the generally accepted canons of construction of statutes. The ordinary grammatical meaning of work in this action means

"purpose of action involving effort or exertion, especially as a means of making one's living; labour, toil; a thing to be done or do; what person (or thing) has to do; a task, a function".

See: The New Shorter Oxford English Dictionary (1993) Vol II 3717.

The verb "work" has a corresponding meaning in its ordinary grammatical sense. It means

"perform, produce, do (a task, deed process etc) produce (as) by labour or exertion, make, construct..."

See: The New Shorter Oxford English Dictionary *supra* at 3718.

To construe work in the sense contemplated by the respondents would give rise to a strained and extremely wide meaning contrary to the ordinary meaning of the term as usually understood. Upon a proper construction of the sections in question referred to above, "work" should be limited to its ordinary grammatical meaning and not receive the very strained and extremely wide interpretation sought to be placed upon the term by the respondents.

In construing the meaning of "work" in the context of the definition of strike in a similarly worded definition of strike in the then applicable South African legislation, the

Appellate Division (now Supreme Court of Appeal) in South Africa held that the term "work" should not be widely construed and that it should be narrowly interpreted, embracing the presumption against the deprivation of or interference with common law right in this context referred to above. It held that the term that work must be limited to mean work that an employee is contractually obliged to perform and would not extend to voluntary overtime work for the purpose of a definition of a strike and that the refusal to perform voluntary overtime work would not constitute a refusal **"to continue to work"** or **"to resume their work".**

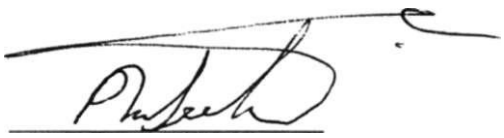
SA Breweries Limited v Food & Allied Workers Union & Others, *supra.*

The consideration that all firemen including the respondents, whilst on non-active standby duty, may not partake of alcohol is not in any way dispositive of the question raised in this appeal and in the complaint. Given the nature of the provisions of emergency services such as would also be provided by doctors, plumbers, electricians, magistrates (on week-end duty) and other person, who by virtue of their conditions of service are required to be on standby after hours, such a term (abstaining from alcohol on standby) would, if not an express term of their conditions or service, most certainly have been implied. This requirement can not however elevate non-active standby duty to the performance of work in order to qualify for overtime in terms of the Act, as was found by the court *a quo.*

The fact that the appellant as employer would appear to have devised the platoon system, does not mean that the non-active standby duty performed by the respondents

and other firemen becomes work **"on the instructions of the employer",** as found by the court *a quo.* The requirement to perform /on standby duty is part and parcel of the conditions of service to which the respondents agreed, even if duty rosters are determined by the appellant pursuant to those conditions of service. It does not define the nature of that duty and certainly does not elevate it to the performance of work.

In the result the complaint should have failed and therefore the cross appeal is dismissed. The appeal succeeds.



TEEK, PRESIDENT

ON BEHALF OF THE APPELLANT	**Adv D F Smuts**
	Adv R Heathcote
Instructed by:	**Shakingo Law Chambers**
ON BEHALF OF THE RESPONDENT	**Mr C Light**
Instructed by:	**Legal Assistance Centre**