



ARBITRATION AWARD

Case Number: **PSHS496-23/24**

Commissioner: **Allan Kayne**

Date of award: **01 December 2023**

In the matter between:

PSA OBO JASPER CHIMANZI

Applicant

and

DEPARTMENT OF HEALTH – MPUMALANGA

Respondent

DETAILS OF THE HEARING AND REPRESENTATION

1. The Public Servants Association (“PSA”) referred an unfair labour practice dispute on behalf of the applicant to the Public Health and Social Development Sectoral Bargaining Council (“the Council” or “the PHSDSBC”) in terms of section 186(2)(a) of the Labour Relations Act, 66 of 1995 (“the LRA”). The arbitration proceedings took place on 17 November 2023 at the respondent’s provincial offices in Mbombela, and closing arguments were furnished a week later.
2. Nomfundo Mlangeni, a PSA official, represented the applicant, while Maxwell Sithole appeared for the respondent.
3. Each party submitted a bundle of documents to be used during the arbitration proceedings. The proceedings were manually and digitally recorded, with the record being filed with the Council’s administration.

4. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his outcome.

BACKGROUND

5. The respondent employed the applicant in 2016. Prior to his transfer to the National Department of Health, effective 01 May 2023, he fulfilled the role of its Chief Information Officer.
6. The respondent placed the applicant on precautionary suspension starting 31 October 2022, which was uplifted on 30 April 2023.
7. On his return to work, the applicant submitted his cellular telephone claim for the period October 2022 to April 2023, amounting to R9,800 (7 months x R1,400). However, the HOD¹, Dr Ndhlovu, refused to approve and pay the claim.

ISSUE/S TO BE DECIDED

8. I must determine whether the respondent subjected the applicant to an unfair labour practice relating to benefits in terms of section 186(2)(a) of the LRA, and if so, to what relief he is entitled.
9. The applicant seeks payment of his cellular telephone subsidy from October 2022 to April 2023 in the amount of R9,800. The applicant further seeks a costs order against the respondent for the travel expenses he incurred in pursuing his dispute.

SURVEY OF EVIDENCE AND ARGUMENT

10. The following constitutes a summarised version of the parties' **relevant evidence** and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not considered it. My findings are accordingly within the context of all the evidence tendered.

APPLICANT'S EVIDENCE

Jasper Chimanzi ("the applicant" or "Mr Chimanzi")

11. The applicant testified under oath that, on 30 April 2023, after the upliftment of his precautionary suspension, he requested payment of his cellular telephone subsidy from

¹ Head of Department

October 2022 to April 2023. In his correspondence to the HOD, he explained that he had submitted them previously, but no payment was forthcoming. On 26 June 2023, the HOD responded to him, indicating that given his suspension between 31 October 2022 and 30 April 2023, he was not required to perform any official duties and, therefore, was not entitled to payment. The HOD advised him to instead submit a list of any official calls he made during this period, for which a reimbursement would be considered.

12. According to his original Application for Cellular Telephone Subsidy, after several inflationary adjustments since originally being approved, as of October 2022, he qualified for a monthly subsidy of R1,400 to cover his cellular telephone expenditure, including usage and insurance. The respondent could withdraw the subsidy only if the applicant misused it. During his suspension, he was required to be available to the respondent, who communicated with him on his cellular telephone. When submitting his claim, he complied with the respondent's policy and attached copies of his invoices in support thereof. There was no requirement for any employee receiving the subsidy to submit an itemised list of official calls made.
13. This was not an isolated instance where the applicant was suspended. Previously, the respondent placed him on precautionary suspension from October 2021 to 08 April 2022, after which he submitted a similar claim to the HOD, who approved and paid it at the prevailing rate. In challenging the respondent's unfair conduct pertaining to the benefit, he had incurred unnecessary expenditure, having been required to travel from Pretoria to Nelspruit to attend the arbitration. Accordingly, in addition to the subsidy, he sought a further reimbursement of the costs incurred.
14. Under cross-examination, Mr Chimanzi confirmed that his suspension was on full pay. However, as he was not required to travel on official business during the suspension, he was not entitled to submit any travel claim. Had the respondent required him to attend to official business whilst on suspension, he would have been entitled to submit a travel claim. The cellular telephone subsidy differed from a travel claim in that it covered the handset, airtime, insurance and call costs, whether or not the telephone was utilised. He clarified that his application for the subsidy occurred once-off, and the respondent periodically adjusted its value. There was no need to reapply for it annually or to specify which calls were work-related and which were not. There was no official policy to hand on which he based his assertions.

RESPONDENT'S EVIDENCE

Maxwell Sithole (“Mr Sithole”)

15. Mr Sithole testified under oath that he was the respondent’s Director of Corporate Services, previously having fulfilled other senior roles within Human Resource Management. He recalled, like the applicant, being placed on precautionary suspension in July 2014 whilst continuing to receive his regular remuneration and benefits. Given that, during his suspension, he was not required to perform official duties, he did not submit travel claims or claim his cellular telephone allowance. Even upon his return to work, he did not retrospectively submit any claims. There was nothing unusual about the respondent contacting the applicant on his cellular telephone during his suspension, as he was required to be available. There was nothing unusual about requesting the applicant to provide a breakdown of official calls made during his suspension so that he could be reimbursed.
16. According to Mr Sithole, the former HOD erred by approving payment of the applicant’s cellular telephone subsidy during his first suspension. He submitted that the current HOD was correct not to approve payment in respect of the applicant’s second suspension. He questioned which policy the applicant had relied on, recalling that there was only one compiled by the DPSA², yet neither party presented a copy thereof.
17. Under cross-examination, Mr Sithole suggested that since he had not claimed his cellular telephone subsidy during his suspension, Mr Chimanzi ought not to either. He refuted that the application for the subsidy constituted an agreement between the parties and was definitely not a policy, only specifying the approved terms and conditions, which required the official to be on duty in order to qualify for payment. It made no reference to what applied during suspensions. Mr Sithole reiterated that he had been told that the former HOD’s payment of the applicant’s subsidy during the first suspension had been irregular and that he subsequently took a stand on the second occasion.

² Department of Public Service and Administration

ANALYSIS OF EVIDENCE AND ARGUMENT

18. Section 185(b) of the LRA provides that “*every employee has the right not to be subjected to an unfair labour practice*”, while section 186(2)(a) of the LRA defines an unfair labour practice to include “*any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee*”.
19. In the well-known judgment of ***Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others (2013) 34 ILJ 1120 (LAC)***, the Labour Appeal Court held that the interpretation of a benefit included “*a right or entitlement to which the employee is entitled (ex contractu or ex lege including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer’s discretion.*”
20. In disputes pertaining to benefits, the onus of proof lies with the employee party, firstly to establish the nature of and entitlement to the benefit in question and subsequently to show that the employer’s conduct, relating to the provision of that benefit, was unfair. In the matter to hand, the applicant asserts that the respondent’s conduct, by refusing to pay his cellular telephone subsidy for the months of October 2022 to April 2023, amounting to R9,800, is unfair. Although both parties anecdotally referred to a policy, neither introduced same into evidence to support their opposing positions. Apart from the applicant’s claim forms, the only documentation providing any assistance in this matter was his original application, approved in 2017. Surprisingly, despite his cellular telephone subsidy being referred to as a benefit therein, the respondent claimed this not to be the case. Inexplicably, the respondent further insisted that the application form did not constitute any agreement between the parties despite clearly demonstrating a meeting of the minds with the applicant requesting the benefit therein and the respondent granting same to him. Quite correctly, it was silent regarding the impact of a precautionary suspension on the continued payment of the subsidy, the only reference to its termination being specified to be if the employee misused the benefit, in respect of which no such evidence was adduced. Essentially, the application confirms the respondent’s decision to pay Mr Chimanzi an amount of R1,400 per month on receipt of a claim form and supporting documentation until the benefit is withdrawn.

21. Furthermore, I am unconvinced that the respondent's refusal to reimburse the applicant is solely based on his suspension, having observed that the applicant was only suspended on 31 October 2022. Yet, the respondent's refusal included the full month of October when the applicant rendered service. Mr Sithole's reference to his suspension was entirely irrelevant to the present matter, as was the comparison to travel claims. He seemed not to appreciate that the applicant's protracted suspension on full pay entitled him to his usual benefits, which included his cellular telephone subsidy to cover the fixed and variable costs of operating the device, whether or not he used it. There is no basis to accept the respondent's assertions that the applicant was only entitled to claim for official calls made during this time.
22. Accordingly, guided by the judgment of the Labour Appeal Court in Apollo Tyres, the applicant has successfully demonstrated his entitlement to a benefit by virtue of the agreement between the parties. By refusing continued payment of the benefit for any reason other than that specified in said agreement, the respondent's conduct was unfair and constitutes an unfair labour practice. The relief sought by the applicant is simply to be paid the subsidy of R1,400 for the period 01 October 2022 to 30 April 2023, which is not unreasonable and must be granted.
23. In addition to his subsidy, the applicant seeks a reimbursive costs order against the respondent in the amount of R5,243.60 in respect of the travel and accommodation costs he incurred by attending the arbitration proceedings in Nelspruit. His reasoning regarding the respondent's failure to resolve his initial grievance or to settle the dispute at conciliation is unpersuasive, and costs are unwarranted in the circumstances.
24. It also bears noting that, despite not being formally addressed during the arbitration proceedings, in its closing arguments, the respondent averred that the applicant's dispute was late, given that it arose on 01 November 2022, and that, without a condonation application, the Council lacked jurisdiction to deal with the dispute. With the evidence of the applicant being that he was not permitted to contact the respondent during his precautionary suspension, I accept that he utilised the first available opportunity to submit his claim when he returned to work on 30 April 2023. Only on 26 June 2023 did the HOD advise that his claim would not be paid, meaning that the act or omission constituting the unfair labour practice arose on 26 June 2023. He subsequently referred his dispute to the Council on 29 August 2023, well within the 90 days prescribed in section 191(1)(b)(ii) of the LRA, and it was not out of time.

AWARD

25. The respondent subjected the applicant to an unfair labour practice relating to benefits as contemplated in section 186(2)(a) of the LRA.
26. The respondent, the Department of Health – Mpumalanga, is ordered to pay the applicant, Jasper Chimanzi, his cellular telephone subsidy in the amount of R9,800 by no later than 15 January 2024.
27. There is no order as to costs.



Allan Kayne