



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: George Georghiades
Case No.: GPBC1869/2021
Date of Award: 24 August 2022

In the ARBITRATION between:

PSA obo MATSIMELA D AND 01 OTHER

(Union / Applicant)

and

DEPARTMENT OF CORRECTIONAL SERVICES

(Respondent)

Union/Applicant's representative:

Flip vd Walt _____

Mobile: _____

Email Address: _____

flip.vanderwalt@psa.co.za _____

Respondent's representative:

Seshoba Kgoahla _____

Mobile: _____

Email Address: _____

seshoba.kgoahla@dcs.gov.za _____

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing between **PSA obo Matsimela, Deborah and 01 Other** and the **Department of Correctional Services (DCS)**, was held under the auspices of the General Public Service Sector Bargaining Council ("**GPSSBC**") face-to-face on 15 August 2022, at the Barberton Correctional Services, Barberton.
2. The notice of set down of the matter for **arbitration** was served on 08 July 2022 and the face-to-face hearing was conducted on 15 August 2022, in terms of section 186(2)(a) of the Labour Relations Act 66 of 1996 ("LRA").
3. The proceedings were conducted in English and were digitally recorded.
4. The applicants, **Ms. Deborah Matsimela and 01 other**, was represented by PSA official, **Mr. Flip vd Walt**. The respondent, **Department of Correctional Services (DCS)**, was represented by **Ms. Seshoba Kgoahla**.
5. The parties each submitted their evidence bundles. The applicant's bundle was marked as Bundle "A", while the respondent's bundle was marked as Bundle "B".

PRELIMINARY ISSUES

6. By mutual agreement between the parties, the citation of the dispute was amended, as one of the applicants (T. Tshisikule), resigned from the services of the DCS and was no longer a party to the dispute.
7. One of the applicants, Ms. Mapule Berry Ramollo, who was on leave due to a stress-related condition, previously appeared virtually and confirmed that Mr. vd Walt was duly authorised to act on her behalf and that she would accept the outcome of the arbitration hearing. The respondent agreed to this and I confirmed that Mr. vd Walt was authorised to represent Ms. Ramollo at the hearing.

ISSUE TO BE DECIDED

8. The respondent failed to implement an approved transfer application by the applicants, that was approved by the respondent's delegated authority. I am required to determine whether the conduct of the respondent was fair.
9. The applicants seek to be transferred to Tzaneen Correctional Centre, or financially compensated, should I find in their favour.

BACKGROUND TO THE DISPUTE

10. The applicants are employed by the Department of Correctional Services (DCS), as educationists at the Barberton Correctional Services school.
11. The applicants argued that they had applied for a transfer from Barberton Correctional Services to Tzaneen Correctional Centre. Despite the transfer application having been approved by the delegated authority, the respondent failed to implement the approved transfer.
12. The respondent disputed this, arguing that as the posts were filled and no longer vacant, the transfer of the applicants could not have been implemented.
13. In order to prove their respective cases, the applicant testified and called one witness, while the respondent called one witness to testify at the proceedings. Both parties referred to and relied on documented evidence contained in their respective evidence bundles.
14. Upon the conclusion of their submissions, both parties made written submissions insofar as their closing arguments, which I have considered in my award below.

SURVEY OF SUBMISSIONS AND ARGUMENTS

THE APPLICANT'S CASE:

The applicant, Ms. Deborah Matsimela, testified under oath that:

15. She is employed by the Department of Correctional Services as an educationist at the Barberton Correctional Service School. She has been employed in this position since 01 November 2016.
16. Together with Ms. Ramolla, she attended a job fair hosted by the Polokwane region of the DCS, where they were advised to apply for a transfer in respect of vacant educationist posts at the Tzaneen Correctional Centre.
17. The reason why they applied for a transfer to Tzaneen, was because they both originated from Limpopo, close to Tzaneen, where their children and families lived. They wanted to be close to their children and family.
18. They applied for a transfer in respect of the vacant posts and were invited to attend interviews in respect thereof. Their applications were successful and approved by the delegated authority on 01 April 2021, but were later unfairly retracted by the respondent.
19. On 06 April 2021, the Regional Manager: HR Administration, Mr. KM Mashala, issued a letter on behalf of the Regional Commissioner, who was the delegating authority, to the Area Commissioners of Barberton and Polokwane, informing them that the straight transfer of the applicants was approved

and that the Management Areas and the Regional Office should facilitate the implementation of the transfer. They were requested to inform the applicants of this and requested to attend and handle the matter.

20. On 15 April 2021, the Area Commissioner, Mr. M Mhlongo, issued a letter confirming that the Acting Deputy Regional Commissioner had approved the applications of the applicants, for straight transfer from Barberton to Tzaneen.
21. In his letter dated 15 April 2021, the Area Commissioner made reference to a moratorium that affected the department, stating that the applicants would be released once the moratorium on these posts' advertisements were lifted.
22. On 22 June 2021, the Regional Manager: HR Administration, Mr. KM Mashala, issued a letter on behalf of the Regional Commissioner: Limpopo, Mpumalanga & North West Region (LMN) to the Area Commissioners of Barberton and Polokwane, informing them that the officials could not be accommodated in terms of the straight transfer, due to the unavailability of vacant posts.
23. On 07 July 2021, the Area Commissioner, Mr. M Mhlongo, issued a letter to the DH: Personnel at Barberton Correctional Centre, informing them that the applicants could not be accommodated at Tzaneen Correctional Centre, due to the unavailability of vacant posts.
24. A route form in respect of the application for transfer by the applicants was approved by the Acting Deputy Regional Commissioner, Ms. GP Pretorius on 01 April 2021, after a detailed and supported internal memo submission was provided for approval by the AO: Placements and Transfers, Ms. B L Rametsi on 25 March 2021.
25. Before the approval by the delegating authority was granted, this submission was firstly recommended by the Regional Manager: HR Administration, Mr. KM Mashala and the Regional Coordinator: HRM and Support, Ms. M K Sibiya, on 29 March 2021 and thereafter, by Ms. M R Letsoalo, Regional Head: Human Resources, on 30 March 2021.
26. The respondent's Transfer Policy provides guidelines concerning the transfer of employees, that must be taken into account, before a final decision is made. These include the availability of a suitable vacant post into which an employee may be transferred and reasonable notice to the employee from the date on which the transfer is approved. The policy provides that a period of 30 days is considered to be reasonable.
27. The route form and memorandum approved by the delegating authority considered the Transfer Policy, confirming that the applicants could be accommodated into available and vacant posts. The

approval by the Acting Deputy Regional Commissioner, provided that the applicants were to report to Tzaneen before the end of April 2021. The applications for transfer were recommended and approved in line with the guidelines contained in the respondent's Transfer Policy

28. Despite the approval of the transfer, the instruction by the delegating authority that the applicants were to report to Tzaneen before end of April 2021 and the confirmation of this instruction by the Regional HR Manager (K M Mashala) to the Management Areas and the Regional Office to facilitate the implementation of the transfer, the respondent failed to do so. The applicants were not advised of the delegating authority's approval and instruction to report at Tzaneen before the end of April 2021.
29. At the time of the approval of the application for transfer to Tzaneen (01 April 2022), the posts were confirmed to be vacant. On 22 June 2021, the Area Coordinator: Corporate Services Polokwane Management Area, Mr. J M Makhura, sent a letter to the Area Commissioner (LMN), informing him that there were no vacant posts to accommodate the applicants, as they had been filled by learners who were absorbed into these positions.
30. At the time of the approval of three applicants' transfer application (25 March – 01 April 2021), no reference was made to any moratorium having been in place or applicable to the applicants' transfer application.
31. The respondent failed to implement and facilitate the approved transfer by the delegating authority on 01 April 2021, justifying its failure to have done so, on an unsupported reliance of the existence of an alleged moratorium and the filling of the posts by learners.

The applicant's first witness, Mr. Godfrey Mbulelo Ludicks, testified under oath that:

32. He is employed at JRS Solutions as an administrator. He was incarcerated at Barberton Correctional Facilities, where he was the chairperson of the Students' Representative Council (SRC), which formed part of the correctional schooling system.
33. On 13 September 2021, he chaired an SRC meeting at the School Section where a certain Mr. Myeni, an official of the Department of Correctional Services, dealing with the School Section, confirmed that he was instrumental in ensuring that three educationalists whose transfers had been approved to another prison, were not transferred.
34. This non-implementation of the applicants' transfers was allegedly due to his engagements with a certain Ms. Tebello, to ensure that the streams of education being offered at Barberton, were not reduced by the leaving of the three educationalists who had been transferred from Barberton, to another prison.

The applicant closed its case.

THE RESPONDENT'S CASE

The respondent's first witness, Mr. Kwena Martin Mashala, testified under oath that:

35. He is employed by the respondent as the Regional Manager: HR Administration at the Limpopo, Mpumalanga & North West Region (LMN). He has been employed by the respondent since 2003.
36. On 06 April 2021, he issued a letter on behalf of the Regional Commissioner, to the Area Commissioners of Barberton and Polokwane, informing them that the straight transfer of the applicants was approved and that the Management Areas and the Regional Office should facilitate the implementation of the transfer. These offices were requested to inform the applicants of this and were requested to attend to and handle the matter.
37. The process that was conducted by the DCS in respect of dealing with transfers entailed the following: (1) the applicant completing an application, (2) the recommendation of the transfer by the Area Commissioner, (3) a memorandum being generated, based on the DCS's policy requirements and considerations of the guidelines therein, such as the availability and vacancy of the post, (4) the supporting of the transfer by all line officials in line with the considerations of the DCS Transfer Policy, (5) the approval of the transfer application by the delegated authority and (6) the communication of the outcome thereof to the applicant.
38. On 22 June 2021, based on the feedback he had received from the Regional Commissioner of the Limpopo region, he issued a letter to the Area Commissioners of Barberton and Polokwane, informing them that the officials could not be accommodated in terms of the straight transfer, due to the unavailability of vacant posts.
39. There were some educationalists who were transferred to the Tzaneen Correctional Centre, but as time went on, these posts became unavailable, as there were learners who were absorbed into these posts.
40. These posts became unavailable over time, due to the post establishment being filled. There were currently no vacant posts into which the applicants could be placed and this was the reason why the applicants were not transferred from Barberton to Tzaneen.
41. The moratorium referred to by the Regional Commissioner in his letter dated 15 April 2021, was always in force, but in the case of the applicants, the Limpopo region advised that they had four vacant posts available and as such, the moratorium was not considered.

42. If the applicants were to be transferred to Tzaneen, this would result in no posts being available for them there, or alternatively, those persons whose posts the applicants would be filling, would be without a post.
43. If the applicants were transferred from Barberton to Tzaneen, there would be a shortage of educationalists at Barberton as their posts that they currently filled, would be empty and there would be a surplus of educationalists at Tzaneen Correctional Centre.
44. The applicants did not suffer any prejudice as a result of the failure by the respondent to implement their approved transfers. They remained in the employment of the respondent, where they have been employed since 2016.
45. He did not know a Mr. Myeni or a Ms. Tebello as referred to by Mr. Ludicks, confirming that neither were employed at the regional HR office, which was the section responsible for implementing the transfer of officials within the DCS.
46. Under cross-examination, he conceded that at the time of the approval of the straight transfers and when the letters were written in April 2021, the posts for which the applicants had applied, were vacant. The posts were filled after the learners at Tzaneen Correctional Centre were absorbed into the vacant posts and was the case at the time when the letters on 22 June 2021 and 07 July 2021 were issued.
47. The Regional HR section complied with all guidelines of the DCS Transfer Policy and correctly advised that the applicants should have been informed of the approval of their applications for transfer.
48. Based on the approval of the transfers on 01 April 2021 and his letter dated 06 April 2022, the respondent was required to have instructed the applicants to have reported for duty at Tzaneen Correctional Centre before end of April 2021, as per the approved route form and outcome, signed by the delegating authority.
49. The Area Commissioner failed to act on this instruction and to implement the transfer of the applicants. The vacant posts were filled by learners after the transfer applications were approved for the filling of posts at Tzaneen Correctional Centre.
50. If the Area Commissioner had implemented the approved transfer of the applicants from Barberton to Tzaneen, these posts would not have been filled by other persons as they were earmarked for the applicants

The respondent closed its case.

ANALYSIS OF EVIDENCE AND ARGUMENT

51. I considered all relevant evidence and arguments raised by the parties and in line with section 138(7) of the LRA requiring me to provide brief reasons, I have therefore only referred to evidence and arguments that I regard necessary to substantiate my findings and resolve the dispute.
52. The onus of proof in respect of an allegation of unfair conduct, lies with the applicant to prove. In this matter, the applicants have referred the dispute to the GPSSBC relating to the alleged unfair conduct of the respondent, relating to “benefits” in terms section 186(2)(b) of the LRA. The onus lies with the applicants to prove that the conduct of the respondent was unfair.
53. Section 186(2)(a) of the Labour Relations Act 66, 1995 (“the LRA”) provides, inter alia that the unfair conduct of an employer relating to the provision of a “benefit” to an employee constitutes an unfair labour practice. What constitutes a benefit for this provision has been considered by numerous arbitration awards and court decisions, often in contradictory terms.
54. In **Hospersa v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC)**, the Labour Appeal Court (“LAC”) adopted a narrow approach as to what constituted a benefit – it had to be something that an employee is entitled to in terms of a contract of employment or collective agreement, or entitled to in terms of a statute. In effect, the LAC sought to maintain the distinction between “disputes over rights” and a “disputes of interest”. The former is capable of adjudication or arbitration, the latter being resolved through collective bargaining.
55. In **Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others 2013 5 BLLR 434 (LAC)**, the Labour Appeal Court adopted a far wider interpretation. It rejected the view that a benefit was limited to contractual or statutory entitlement in the following terms –
- “In my view, the better approach would be to interpret the term ‘benefit’ to include 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. In my judgment ‘benefit’ in s 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer’s discretion.”*
56. In its recent decision in of **Department of Defence v Ruth Farre – [2021] CA17/2020 LAC CPT**, the LAC referred with approval to Apollo Tyres in the situation where the employee claimed that the employer had committed an unfair labour practice by demoting her. In the LAC, the employer argued,

inter alia, that an unfair labour practice could only be claimed if a “prior right” had been infringed – this echoing the approach adopted in the HOSPERSA decision. The LAC, regarding Apollo Tyres decision, rejected this argument. It stated that –

“[24] ... That she was then ‘transferred’ back to her previous post with the concomitant reduction of salary and obligation to repay ZAR178 88.98 constituted the kind of practice that falls within the scope of principle of an unfair labour practice which does not depend on a prior right as opposed to the assessment of the conduct of the appellant causing significant unfairness to a dedicated employee”.

57. The Farre decision is authority for the view that the approach adopted in Appollo Tyres also applies in the case of “benefit” disputes. An employee need not show an entitlement that arises *ex contractu* or *ex lege*.
58. In this matter, the approval of the dispute was not in dispute. The failure by the respondent to implement the approved transfer was also common cause. Guided by the authority of the LAC in the **Appollo Tyres** and **Farre** judgements, I am required to determine whether the claim by the applicants that they ought to have been transferred based on their right that arose from the approval of the transfer by the delegating authority and whether the reasons for the respondent’s failure to have implemented this right, was an unfair conduct.
59. The delegating authority approved the transfers of the applicants on 01 April 2021 and ordered that the applicants should report for duty in Tzaneen by no later than 30 April 2021.
60. The Regional Manager: HR Administration, issued a letter on 06 April 2021 on behalf of the Regional Commissioner, to the Area Commissioners of Barberton and Polokwane, informing them that the straight transfer of the applicants was approved and that the Management Areas and the Regional Office should facilitate the implementation of the transfer, which they failed to do.
61. At the time of the approval, pursuant to the guidelines of the respondent’s Transfer Policy having been considered, the posts for which the applicant’s had successfully applied, were vacant and available to be filled by the applicants.
62. The reliance on the unavailability of the posts by the respondent as a reason for its failure to have implemented the transfers, although the posts were practically unavailable on 22 June 2021, this reason cannot be considered as a reasonable one. The posts only became unavailable after they were filled by learners, between 15 April 2021 and 22 June 2021, after the approval of the transfer by the delegating authority on 01 April 2021.

63. The moratorium referred to in the letter issued by the Area Commissioner, Mr. M Mhlongo on 15 April 2021, could not be considered to be a fair reason for the non-implementation of the transfer of the applicants to Tzaneen by the respondent, as he was not the delegating authority, the posts were vacant, available and ordered by the delegating authority, Ms. G P Pretorius.
64. Having considered the aforementioned and being guided by the authority of the LAC above, I find that the conduct of the respondent, in failing to implement the approved transfers of the applicants, constitutes unfair conduct in line with section 186(2)(a) of the LRA, relating to benefits.
65. Insofar as the relief sought by the applicants, I am not persuaded that the ordering of the transfer of the applicants will be in line with the prescripts and purports of social justice, as the relief will not contribute to disposing of the dispute in its entirety.
66. Although the transfer of the applicants may address the ultimate desires of the applicants, I am of the opinion that the transfer will create a situation where a further dispute will manifest itself, as those who currently occupy those posts, will be unfairly prejudiced and the learners who depend on the educationalists in Barberton, will also be negatively affected.
67. In order to finally dispose of the dispute and in line with the moral values of social justice, I believe the alternative relief of compensation, as sought by the applicants, would be more appropriate, fair and better suited.
68. The respondent's bundle (at page 25) provided the salary details of the applicant, Ms. Deborah Matsimela, as being R 301 089.00 per annum, which I have used to calculate the quantum of my award below.
69. I find that the respondent should pay the applicants each four (4) months' salary as fair compensation, in respect of this dispute.

AWARD

1. The conduct of the respondent in failing to implement the transfer of the applicants was unfair.
2. The respondent, the **Department of Correctional Services**, is ordered to compensate the applicant, **Deborah Matsimela and 01 other**, each four (4) months' salary (calculated at R 301 089.00 per annum) in the amount of **two hundred thousand, seven hundred and twenty-six rand (R 200 726.00)**.
3. The amount in respect of (2.) above is calculated as follows:

Ms. Deborah Matsimela: R 25 090.75 x 4 months = R 100 363.00

Ms. Mapule Ramollo: R 25 090.75 x 4 months = R 100 363.00

4. The GPSSBC is ordered to close its file in the matter with case reference number GPBC1869/2021.

A handwritten signature in black ink, slanted upwards from left to right, consisting of several overlapping strokes.

George Georghiades
GPSSBC Panellist