GPSSBC
General Public Service Sectoral Bargaining Council

DEFAULT AWARD

Panellist/s: Annelie Bevan
Case No.: GPBC 1315/2018
Date of Award: 20 May 2019

In the **ARBITRATION** between:

PSA obo M A DE BEER
(Union / Applicant)

and

DEPARTMENT OF CORRECTIONAL SERVICES
(Respondent)

Union/Applicant's representative: Mr H J Pretorius of the PSA
Union/Applicant's address:

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Respondent's representative: ABSENT
Respondent's address:

Telephone:
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e-mail:

DETAILS OF HEARING AND REPRESENTATION

1. The matter was heard on 3 May 2019 at the Respondent's premises, Buckle Avenue, Ellaton, Klerksdorp.
2. The Applicant was present and represented by Mr H J Pretorius of the PSA and Respondent, the Department of Correctional Services was absent. The matter was set down for 09h00, but was held in abeyance until 09h30 to allow time for the Respondent to arrive.
3. The notice of set down was successfully faxed to the Respondent, as confirmed with the Council, on 13 November 2018 to the Respondent's fax numbers, namely 012-323 3476, 012-323 4836, 086 533 0814, 012-430 4539, 086 534 4524, 086 534 6847. On the same date if was also served via e-mail on the Respondent at the following e-mail addresses: Somisa.Mawelwa@dcs.gov.za, Seshoba.kgoahla@dcs.gov.za, raymonds@dcs.gov.za, Lebogang.Leballo@dsc.gov.za, Elivs.Makhabela@dcs.gov.za, David.Chiloane@dcs.gov.za, and ThatoSelwane@dcs.gov.za..
4. The Respondent was absent and unrepresented despite being aware of the date, time and venue of the hearing.
5. The arbitration was held under the auspices of the Council in terms of Section 191 (5)(a)(iv) of the Labour Relations Act 66 of 1995 ("the LRA") and the award is issued in terms of section 138(7) of the LRA.
6. Typed notes were taken during the arbitration hearing and the hearing was electronically recorded.

ISSUE TO BE DECIDED

7. I am required to determine whether the Respondent's decision to deduct leave without pay (a holiday debt) from the Applicant's leave gratification for his pension for the year 2017 on 11 January 2018 constitutes an unfair labour practice as determined in section 186(2)(b) of the LRA, and if so the appropriate relief.
8. The Applicant seeks the following relief: that this holiday be reimbursed to him with interest.

BACKGROUND

9. The Applicant worked in the Klerksdorp Community Correctional office in 2009 until 30 November 2017, when he went on retirement.
10. The Applicant became aware of the unfair labour practice on 6 December 2017 when he was informed by the human resources office of the Klerksdorp Correctional Centre that there is a holiday debt against his name in the amount of R14 925.94.

11. The Applicant then lodged a grievance in relation to this regard and received a reply to this on 13 April 2018. He then referred an unfair labour practice dispute of benefits to the council on 25 June 2018. The matter was unsuccessfully conciliated and a certificate of outcome was issued in terms of section 135(5) of the LRA on 26 July 2018.

12. The matter was then set down for arbitration on 3 May 2019.

13. The relief that the Applicant claimed is that the holiday deduction be reversed and he be reimbursed the amount deducted with interest.

SURVEY OF EVIDENCE AND ARGUMENT

14 **The Applicant testified** that on 6 December 2017 he was informed by the human resources office, Klerksdorp Correctional Centre, that there is a debt against his name to the amount of R14 925.94. The debt arose from Leave Without Pay. Human Resources explained to the Applicant that leave without pay was deducted from his salary as for the year 2017 he did not submit leave applications for the public holidays that he did not work. The leave without pay will be deducted from his leave gratuity pay out.

15. Human Resources advised the applicant to draft a letter in which he had to give permission to collect the money from his leave gratuity payout, otherwise it would delay the payout of his leave gratuity.

16. The Applicant drafted a letter to give such permission (Bundle A, page 18). This permission was however conditional in that there was an investigation into the leave on public holidays at the Klerksdorp community Correction and that should the investigation be in favour of the officials, he would like to be refunded the said deduction.

17. The Klerksdorp Community Corrections office was working the same shift pattern since 2009. Officials did not have to report for duty on public holidays if it was not their standby week or put in an application for leave. During the years 2015 to 2017 some officials who also worked at the Klerksdorp Community Corrections office went on pension, resigned or passed one, but none of them were instructed to pay any money, nor were any money deducted from them.

18. The investigation mentioned earlier was however now completed and all officials who did not put in leave for public holidays during their off-shifts were issued with verbal warnings for all such infractions for the period November 2017 backwards. None of them had to make any payments in relation to leave without pay. The Applicant was therefore the only official working at the Klerksdorp Community Corrections office for the period 2015 to 2017 who was made to pay back any money in this regard.

19. The Applicant confirmed that he is regarded as a centre-based official. Some guidelines were issued by the Respondent when the 45 hour work-week were introduced in 2009. The head of the Klerksdorp

community Corrections office decided to implement holidays on off-shifts as per his understanding of the guidelines issued in terms of reference S9/2/4 (Bundle B, pages 7-8).

20. **The Applicant's witness, P J J Roux testified that** he works at the Klerksdorp Community Corrections office since 2000.

21. He explained that they always worked according to the practice that when you are off according to the shift pattern and there is a public holiday during the off period, then you were not required to put in leave. If you were working and a public holiday falls within this shift, and you do not want to work on the public holiday, then you had to apply for leave.

22. After 30 November 2017 there was an investigation into the leave applications for public holidays. Everyone in the office was informed that you had to put in leave in future for leave days that fall within your off-shift. Everyone was verbally warned, but no one was required to make any payments in relation to leave without pay.

THE RESPONDENT'S CASE

23. As indicated above the Respondent did not attend the proceedings.

ANALYSIS OF EVIDENCE AND ARGUMENT

24. I intend to offer brief reasons in my analysis as per Section 138 (7) of the *LRA* as amended, which provides that, *"Within 14 days of the conclusion of the arbitration proceedings – the commissioner must issue an arbitration award with brief reasons"*.

25. It is trite law that the Applicant bears the onus to prove an unfair labour practice. The test for whether this onus is discharged is the balance of probabilities.

26 It is now established law that advantages or privileges employees have been offered or granted in terms of a policy or practice subject to the employer's discretion constitutes a benefit as contemplated in section 186(2)(a) of the LRA ***(Apollo Tyres South Africa (Pty) Ltd v CCMA & others (2013) 34 ILJ 1120 (LAC)).***

27. It is evident that the Respondent had a policy (Bundle B, pages 7-8) or then at the very least a practice at the Klerksdorp Community Centre office for at least the period 2009 until 30 November 2017, whereby centre-based officials were not required to apply for leave if a public holiday falls when an official is off duty in terms of the shift system. This was confirmed by both the Applicant and his witness.

28. The Guidelines on ordinary work performed on Saturday, Sunday and public holiday in line with the 7-day establishment DCS determines in paragraphs 6 and 8 as follows:

"6. When an official is off duty according to the shift pattern and such a day is a Public Holiday, Saturday, Sunday or any other day, such official cannot be required to submit leave for such days.

8. An official who has been scheduled for specific shift and such shift falls on any day including Saturday, Sunday or public holiday and the official does not report for duty such absenteeism must be dealt with in terms of the current leave directives."

29. As this was clearly a benefit granted to the employees' subject to the employer's discretion this automatic leave on public holidays when officials are off duty can be regarded as a benefit in terms of section 186 of the LRA.

30. It is further clear from the testimony of the Applicant and his witness that the Respondent amended or changed this practice at the Klerksdorp Community Centre office after 30 November 2017 and that all employees received a verbal warning to comply with the new practice in future, namely to apply for official leave for public holidays that fall within your off duty shift.

31. In light of the fact that the practice existed and was applied to all other employees during the period 1 January 2017 to 30 November 2017, the Respondent's conduct in treating the Applicant differently and regarding those public holidays as leave without pay, constitutes an unfair labour practice relating to benefits.

Relief:

32. Section 194 of the LRA determines that: "An arbitrator appointed in terms of the Act may determine any unfair labour practice dispute.....,on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation."

33. I find that it would be reasonable to order the Respondent to reimburses the Applicant the amount of leave without pay deducted from his leave gratuity in the amount of R14 925.94, plus interest at the rate as prescribed from time to time in respect of a judgement debt in terms of section 2 of the Prescribed Rate of Interest Act, No 55 of 1975.

AWARD

34. The Respondent's decision to deduct leave without pay form the Applicant's leave gratuity for the period 1 January 2017 to 30 November 2017 constitutes an unfair labour practice as determined in section 186(2)(b) of the LRA.

35. The Respondent is ordered to reimburse the Applicant on/before 15 July 2019 in the amount of R14 925.94, plus interest at the rate as prescribed from time to time in respect of a judgement debt in terms of section 2 of the Prescribed Rate of Interest Act, No 55 of 1975.

Signature: A Bevan

Commissioner: Annelie Bevan

Sector: