

ARBITRATION

AWARD

Panellist/s: PJ GREYLING

Case No.: GPBC408/2021

Date of Award: 03 JUNE 2021

In the ARBITRATION between:

PSA obo L MEDEWANE
(Union / Applicant)

and

DEPARTMENT OF PUBLIC WORKS
(Respondent)

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Respondent's address:

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MMABATHO

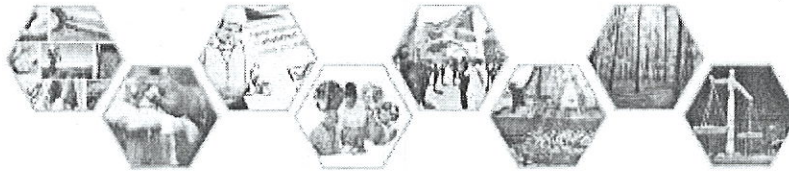
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The matter was heard on 24 May 2021 at the Respondent's premises in Mafikeng. The Applicant, Ms L Mdedwane was represented by, Ms Z Graaff, a trade union official. The Respondent, the Department of Public Works was represented by Mr B Makolomako.

ISSUE TO BE DECIDED:

2. It is to be decided whether the issue of a final written warning for absenteeism on 18 November 2020 and the subsequent deduction from the Applicant's salary in the amount of R3,282.00 constitutes an unfair labour practice as envisaged in terms of Section 186(2) of the Labour Relations Act.

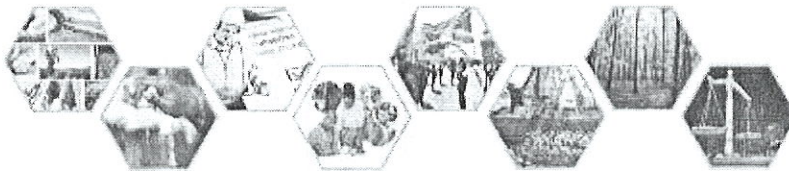
BACKGROUND TO THE DISPUTE:

3. The Applicant started her employment on 01 May 2012 as a cleaner in the Department of Health. She was promoted and appointed as a cleaner supervisor as from 01 March 2017 in the Department of Public Works. The Applicant earns a basic salary of R12,472.75 per month. The Applicant wants the final written warning to be set aside and the amount of R3,282.00 to be paid back to her.

SURVEY OF EVIDENCE AND ARGUMENT:

Evidence by the Applicant

4. The Applicant, **Ms L Medewane**, testified under oath to the following:
 - 4.1 The Applicant stated that she was on leave from 23 October 2020 until 30 October 2020. On 22 October 2020 she received a call from a house nanny informing the Applicant that her mother passed away and that she had to leave for Lesotho. Since the nanny looked

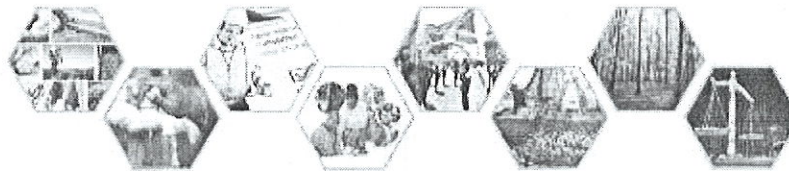


after the witness's children, the Applicant acted immediately as the children could not be left unattended. She also had to arrange transport for the nanny.

- 4.2 The witness tried to make telephonic contact with the supervisor Ms Seheri. As she was unable to make contact she went to her office but the supervisor was not in her office. She had no other option but to send an e-mail to Ms Seheri indicating that she would be absent from work due to a crisis at home for the period 23 to 30 October 2020. She believes that the issue of the approval of her leave could be dealt with on her return to work.
- 4.3 The Applicant returned to work on 02 November 2021. She received a phone call from Ms Seheri who told to bring a leave form to her office. According to the witness it was stated to her that Ms Seheri opened the e-mail on 26 October 2021 and that the supervisor submitted the e-mail message to Ms Mahlatsi, the director. Her supervisor made no comment about her leave and she assumed that the leave will be approved. The witness refers to the leave form (BoD A, p17) and indicated that no reason was provided for her leave not being approved. She further stated that the Respondent did not make any contact with her during her absence from work.
- 4.4 On 07 December 2020 the Applicant became aware that the leave was not approved. She afterwards requested a salary advice for January 2021. It became apparent that a deduction was made from her salary regarding leave. She stated that she never consented to any deduction being made from her salary. She also referred to the leave register which indicates that the leave was initially approved but was later on cancelled. The Applicant then further referred to the policy which provides that permission to go on leave should not unreasonably declined taking into consideration service delivery requirements.

5. The second witness for the Applicant was **Ms V Kachale**. She testified under oath to the following:

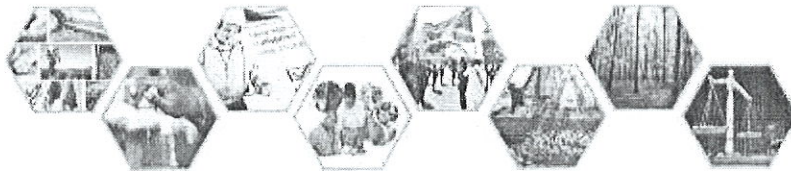
- 5.1 The witness stated that she was present on 22 October 2020 when the Applicant tried to make contact with her supervisor. She went with her to the supervisor's office and she saw



that the supervisor was not in attendance. She further stated that the Applicant had to leave quickly as she had to pick up her children at school.

The Respondents Evidence

6. The first witness for the Respondent was **Ms RR Masilo**. She testified under oath to the following:
 - 6.1 The witness is the chief property clerk. She is responsible for the facilities and the Applicant's supervisor, Ms Seheri reports to her. Ms Seheri, on a number of occasions complained to her about the Applicant's occasional absences from work without the necessary authorisation.
 - 6.2 During October 2020 Ms Seheri was on sick leave. The Applicant sent an e-mail that she intended to be absent from work. Nobody knew where the Applicant was. When Ms Seheri returned, the witness confronted her about the Applicant's whereabouts. On the Applicant's return Ms Seheri enquired from her why she did not approach any of the other supervisors to approve her leave. Ms Seheri also approached Ms Mathlatsi and asked her to intervene in this matter.
 - 6.3 Ms Mathlatsi called a meeting. The witness attended the meeting. The Applicant was called in to explain why she did not obtain the necessary permission to go on leave. The Applicant however stormed out of the meeting and indicated that she will explain once she has calmed down. The matter was therefore not resolved. The Applicant indicated that wanted to deal with the matter at a later stage. Ms Mathlatsi indicated that due to her busy schedule, that would be impossible. It was then decided that the Applicant's leave will not be approved and that the period of absence will be without pay.
 - 6.4 The witness further explained that an application for leave is to be submitted seven days in advance. It is expected of employees to on an annual basis submit a leave schedule.
 - 6.5 Under cross-examination the witness stated that on previous occasions when the Applicant's supervisor, Ms Seheri was not present, the Applicant approached the witness



for the necessary approvals. She further explained that if leave is approved without pay, the necessary documentation is taken to the leave section to do the necessary calculations. According to the witness she was of the view that the specific individual will be notified of the decision to approve leave without pay.

7. The third witness for the Respondent was **Ms MD Seheri**. She testified under oath to the following:

7.1 The witness stated that she is the Applicant's supervisor. The witness was on leave on 22 October 2020. When she arrived back at work on 26 October 2020 she opened her e-mails and she saw the Applicant's e-mail, which indicated that she will not report for work for the whole week.

7.2 On the Applicant's return she came to her office with a leave form which was not completed. She asked the Applicant why the form was not completed. She also enquired why she did not obtain permission beforehand. The Applicant accused her of expecting her to run around like a "headless chicken" to try and obtain permission for leave. The witness then decided to approach Ms Matlatsi. A meeting was arranged but the Applicant walked out of that meeting. The witness decided to wait for a while before taking any steps in the hope that the Applicant will show remorse but the Applicant never came back to explain herself.

7.3 The failure of the Applicant to explain herself left the witness no choice but to decline the approval of the leave. She went to the leave section where it was established from the records that the absence was recorded as approved leave and that the Applicant received full salary. A correction was then made.

8. The fourth witness for the Respondent was **Ms BC Moswatlhe**. She testified under oath to the following:

8.1 The witness is the head of the leave section. The Respondent applies a specific policy which is embodied in a document called the Leave Administration policy. This policy was introduced in June 2018. In terms of the policy a leave cycle starts in January and ends on



31 December of a specific year. Employees are expected to apply for leave in advance and it should also be approved before going on leave. She also pointed out that depending on the employee's seniority, leave accrues on a monthly basis.

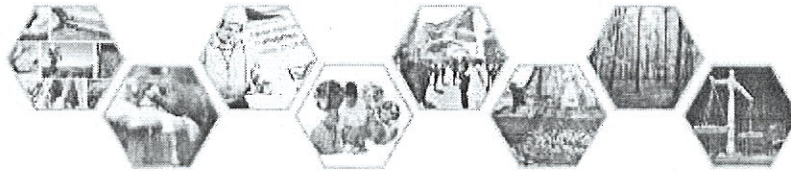
- 8.2 If an employee is to be absent due to unforeseen circumstances such employee must, within five working days from the first day of absence, provide reasons for the absence. The leave is to be approved within two days of receipt of this explanation. The employer is entitled to approve the leave without pay. The notification must be made to the applicable supervisor within the five-day period.
- 8.3 With regard to the completed form, the witness stated that it was initially completed as vacation leave and also captured accordingly. Upon closer scrutiny it however became apparent that there was contradictory information on the form and that the leave was in actual fact not approved. On that basis a process for the recovery of an amount of R3,281.00 was implemented. An amount of R1,094.00 was deducted on a monthly basis. The first deduction was made in January 2021 at the last in March 2021. The witness stated that it is not the Leave Section's responsibility to notify employees of the deductions.

SUBMISSIONS BY THE PARTIES:

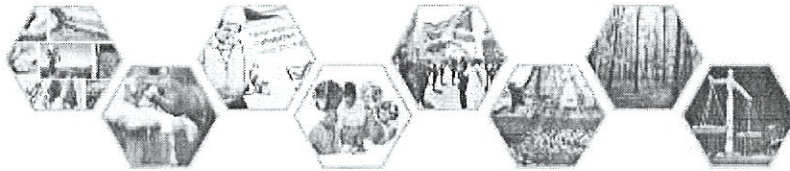
9. Both Parties have submitted heads of argument which were considered in the analysis.

ANALYSIS OF SUBMISSIONS AND ARGUMENT:

10. This sequence of events that lead to this dispute can be summarised as follows:
- 10.1 The Applicant was absent from work from 23 October 2020 until 30 October 2020;
- 10.2 The Applicant absented herself due to certain urgent and unforeseen personal circumstances. At the time the emergency presented itself the Applicant's supervisor was absent from work due to illness and her permission to take leave could therefore not be obtained beforehand.



- 10.3 The Applicant did not approach a more senior supervisor for permission but sent an e-mail to her supervisor indicating that she will be on leave all from "23 October 2019 up until 30 October 2019" (sic) due to a "private" matter.
- 10.4 The Applicant also apologised for not complying with procedures. She stated the following: "my apologies as i did do proper arrangements" (sic). On 2 November 2020 the Applicant made a correction by inserting the word "not" between the words "did" and "do";
- 10.5 A meeting was convened on 3 November 2020 by a director, Ms Mathlatsi to deal with the unauthorised absence. A number of managers and supervisors were present at this meeting. The Applicant left the meeting before the matter could be concluded and refused to discuss the issue;
- 10.6 It was subsequently decided not to approve the leave but as the leave was not correctly completed it resulted in the leave being processed as approved leave. The Applicant therefore received her full salary on 15 December 2020. This situation was subsequently corrected during December 2020 and deduction procedures were implemented which resulted in three deductions made from the Applicant's salary to recover the amount of R3,281.00 erroneously paid;
- 10.7 The Applicant also received a written warning on 18 November 2020 regarding her "tendency of being absent from work without having informed your supervisor about your whereabouts". The warning is valid for a period of six months after which it will be removed from the Applicants personal file.
11. The Applicant in the referral described the nature of the dispute as one pertaining to "Benefits (salary issues/leave pay/transfers excluded)" The Applicant indicated that the dispute arose on 06 January 2021. The dispute is described as "Respondent unfairly disapproved Applicant's leave and implemented leave without pay". As to the remedy sought it is stated that "Applicant's leave to be approved and the deducted money to be paid back to her".



12. The Applicant's heads of argument records a number of reasons why it is believed that the Applicant was subjected to an unfair labour practice:

12.1 In the first instance, that the Respondent did not comply with the Departmental Leave Policy, which specifically provides that the department shall not unreasonably refuse to grant leave to employees who apply, taking into consideration service delivery;

12.2 In the second instance, it is argued that the Respondent, in making the deduction from the Applicant's salary, did not comply with the provisions of Section 34(1) and (2) of the Basic Conditions of Employment Act, 75 of 1997 (BCEA);

12.3 That a deduction was made without the permission of the Applicant and without complying with the other requirements of the relevant section. In this regard it is also argued that Section 38(2)(b)(i) of the Public Service Act, 103 of 1994 has been ruled unconstitutional and there is therefore no legal basis to deduct any amount from the Applicant's salary;

12.4 In the third instance, it is submitted that the conduct of the Applicant of not informing her supervisor of her absence beforehand, does not warrant disciplinary action in the form of a warning.

13. The Respondent submitted that the salary deduction can be substantiated for the following reasons:

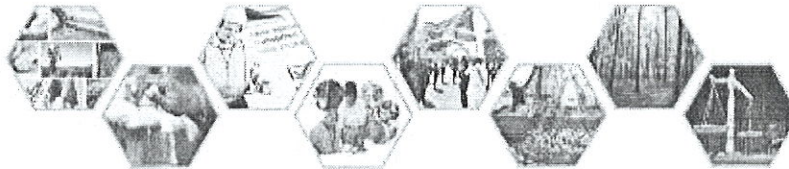
13.1 The Applicant consented to the deduction in the meeting that was held on 03 November 2020. The Applicant, during those proceedings apparently indicated that if the director, Ms Mahlatsi wants to give her leave without pay she may do so;

13.2 The Respondent is permitted by law in terms of the Departmental Leave Policy, para 7.1 of the said policy, which provides as follows;

"No employee is allowed to go on leave before his/her vacation leave application is approved. Any vacation leave not approved by an authorised official beforehand shall be regarded as unauthorised leave for which appropriate disciplinary measures that include leave without pay will be taken";



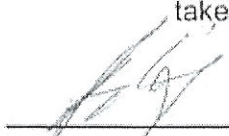
14. It appears that if the parties are to a certain extent confused as to the actual dispute. The Applicant appears to have followed a double barrel procedure by relying on non-compliance with Section 34(1) and (2) of the BCEA in the first instance and the full application of discipline in respect of the warning issued. It must however be noted that in terms of Section 77 of the BCEA the Labour Court has exclusive jurisdiction in respect of all matters relating from the said Act. The CCMA therefore does not have the jurisdiction to deal with a claim emanating from the BCEA.
15. However, it is the Respondent's position that the failure to allow the Applicant paid leave was a disciplinary measure taken against the Applicant. The Applicant was disciplinary sanctioned for being absent from work without permission. This action was not merely seen as a mechanism to recover a loss or damages, but an act of discipline.
16. Section 186(2)(b) provides that an unfair labour practice inter alia entails the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee. What therefore needs to be decided is whether the disciplinary action and sanction against the Applicant was fair.
17. With regard to the disciplinary procedure it must be noted that the Applicant was instructed to attend a meeting on 03 November 2020 to discuss the absence. Neither party submitted any evidence that the Applicant received a notice to attend a disciplinary enquiry and what the allegation of misconduct entails. It was the evidence that this meeting was called to discuss the Applicant's tendency to be absent without leave. It was apparently at this meeting, after the Applicant left, that it was decided that the Applicant should be sanctioned. This was based on the Applicant's assertion that the Respondent could deduct the applicable amount from her salary if it desires to. For some reason or another nobody notified the leave section to ensure the necessary deduction for the unapproved leave days in her December 2020 salary. The Respondent was therefore obliged to introduce recovery procedures and the deductions were made as from January 2021. What is further to be noted that the written warning issued on 18 November 2020 does not inform the Applicant that she will not be paid for the days absent.



18. It is further evident from this letter that no disciplinary process was followed in respect of the Applicant's unauthorised absence from work. It is not even clear from the evidence presented who eventually took the decision to sanction the Applicant.

AWARD:

19. In view of the above, I must conclude that the disciplinary sanction of not paying the Applicant for the period 23 October 2020 until 30 October 2020 and the warning issued constitutes an unfair labour practice as envisaged in terms of Section 186(2)(b) of the LRA.
20. In terms of Section 193 (4) an arbitrator appointed to determine an unfair labour practice dispute may determine the matter on terms that the Commissioner deems reasonable which may include ordering reinstatement, re-employment or compensation. In considering the appropriate remedy I have taken cognizance of the fact that the Applicant is to a certain extent also the author of her own misfortune. She could have approached any of the other superiors to obtain permission for her absence. She could also have participated in the meeting of 03 November 2020. I have therefore decided to only overturn the sanction as applied by the Respondent and not to apply any other remedy.
21. It is ordered:
- 21.1 That the written warning issued on 18 November 2020 is herewith set aside;
- 21.2 That the Respondent pays the Applicant the amount of R3,281.00 by no later than 30 July 2021;
- 21.3 That the Applicant's accrued leave account be debited with the number of leave days taken during the period 23 October 2020 until 30 October 2020 (six days).



Name: PJ GREYLING
(GPSSBC) Arbitrator