



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL

ARBITRATION AWARD

Panellist/s: M.Safa
Case No.: GPBC2061/2021
Date of Award: 19 May 2022

In the ARBITRATION between:

NOLITHA NGXEKANA

(Union / Applicant)

And

KSD FET COLLEGE / DEPARTMENT OF HIGHER EDUCATION AND TRAINING

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The matter was set down for arbitration on the 03 May 2022 on the virtual platform, Zoom.
2. The Applicant was represented by Mr Zigqibo Khahla from the union, PSA and the Respondent was represented by Mr Andile Faltein.
3. The proceedings were recorded on Zoom.

ISSUE TO BE DECIDED

4. To decide whether or not the Respondents acted unfairly in terms of section 186(2) of the LRA by deducting the salary of the Applicant in July 2021, and to make an appropriate award.

BACKGROUND TO THE ISSUE

5. The Applicant is employed by the Respondent as an Administration Officer.
6. The Respondent gave the Applicant leave without pay and deducted R2 280 for the three days when the Applicant was absent in July 2021.
7. Unhappy with the deduction the Applicant lodged an internal grievance which was not attended by the Respondents.
8. She then referred the dispute in terms of section 186(2) of the Labour Relations Act.
9. The relief the Applicant is seeking is for the deduction on her salary to be declared unfair in terms of section 186(2) of the LRA and to have the deducted salary refunded.

SURVEY OF EVIDENCE AND ARGUMENT

10. Each party led evidence through one witness and there was one bundle of documents which was used by both parties.
11. At the conclusion of the arbitration the parties proposed and it was accepted that they submit their closing arguments in writing by the 9 May 2022. Both parties submitted their arguments in time.

Applicant Evidence

12. The Applicant testified that on the 26 April 2021 she came to school to apply for leave as her mother was sick.
13. When she came to the college her supervisor was not in office and she left the leave form with an intern to give it to her supervisor. She later called the intern and was informed that the form has been handed over to Mr Mgetyana, the supervisor.
14. When she came back from three days' leave she explained to the supervisor that she had to go on leave as her mother was sick.
15. She said that her supervisor pretended to accept the explanation but when the Applicant went to Human Resource office she was informed that the Respondent was going to deduct her salary for the three days she was absent.
16. When she enquired from her supervisor, Mr Mgetyane, she was informed that he(supervisor) authorized the deductions deliberately because the Applicant had refused to come to school when he required her to.
17. She said when she was absent Mr Mgetyane called her and sked her to come to the work as he wanted a certain file. The Applicant could not come to as her mother has by then passed away. She said she called the supervisor and even sent a short message but he ignored her.
18. When asked what has been the usual process to apply for leave she said they usually leave the forms in Mr Mgetyana's office who in turn would sign the forms. She said on the day she did not wait for the approval of the supervisor since she had an emergency of a sick mother.

19. When she came back from leave she did not provide any proof. She also stated that in terms of the leave regulations there is no need for someone to bring a document as evidence if the leave applied for is annual leave. She said it was required to bring evidence only if the employee is applying for special leave.

Respondent Evidence

20. The witness of the Respondents, Mr Sibongiseni Mgetyane testified that they were having auditors at the college and the auditors had requested a particular file of a student. He said it was the responsibility of the Applicant to bring the file but after about a week she still did not bring the file.
21. The Applicant was excused to go for a long weekend and to look for the file the following week. The following week the auditors changed and asked for another file instead. He said he called the Applicant (who was not at school) to come to the school to get the file.
22. Few minutes after calling the Applicant an intern came to the office of the witness with the application for leave form for the Applicant. The witness refused to accept the leave forms. The witness felt that the Applicant was running away from the auditors.
23. He said when the Applicant came back from the leave she was given a leave form to fill.
24. He said that in terms of the procedure when an employee applies for annual leave the employee has to negotiate leave and they agree before he can sign the form for approval. He said that in the annual leave the document (PERSAL printout) indicating the leave credit should be attached. Because when the Applicant was called she said her grandchild was sick she was expected to bring the proof for that.
25. He stated that the Applicant had been following procedures before when applying for leave and thus she knew the procedures. He believed the deductions on the salary of the Applicant were correct.
26. With regards to the grievance he said on the day of the grievance meeting he had a doctor's appointment and could not attend it.
27. He said he informed the Applicant about the deduction by calling her to the office, telling her verbally about the deduction and made her sign on the form for deduction which was to be for one day of absence. He asked for the evidence of her absence but the Applicant did not provide it. He further said there was no law that said verbal communication is not allowed.

28. When asked he said he did not see the need to take the Applicant to a disciplinary enquiry as he felt the offence was not serious so as to warrant disciplining. He believed that a person who is absent should not be paid for the day of absence. He acknowledged that the option of leave without pay did not accord the Applicant an opportunity to state her side of the story.
29. The other witness of the Respondent, Mr Zukisa Galada, testified that when an employee applies for annual leave he or she must submit an application at least five (05) working days in advance unless there are circumstances preventing that. He admitted that a sick mother may be one of the unforeseen circumstances.
30. He said the annual leave needs to be approved first because the leave is approved based on the operational requirements of the employer.
31. Referring to Leave determination and Directives he said an employee who is applying for leave can send a relative or colleague to submit the application form on his or her behalf. He admitted that the intern who was sent to submit the application form for the Applicant qualified as one of the people who can be sent in terms of Leave Directives.
32. As Human Resource office they received the Applicant's application form for leave with a recommendation for leave without pay.

ANALYSIS OF EVIDENCE AND ARGUMENT

33. This issue in dispute is captured on paragraph 3 of the referral form where it is stated that, "*deduction of salary without due diligence.*" The relief the Applicant is seeking is on paragraph four where she states that she would like to be refunded the money that was deducted.
34. Thus the dispute is about the deductions the Respondent effected in the salary of the Applicant and whether or not they were fair in terms of section 186(2) of the Labour Relations Act.
35. Even though some evidence was led about the leave regulations of the Respondent and whether or not the Applicant complied with them, this was not the issue. As it will be demonstrated later the dispute regarding the leave has its own platform.
36. The legislation dealing with deductions is Basic conditions of Employment Act where section 34 holds thus;

(1) An employer may not make any deduction from an employee's remuneration unless—
 (a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
 (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.
 (2) A deduction in terms of subsection (1) (a) may be made to reimburse an employer for loss or damage only if—
 (a) the loss or damage occurred in the course of employment and was due to the fault of the employee;
 (b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;
 (c) the total amount of the debt does not exceed the actual amount of the loss or damage; and
 (d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one quarter of the employee's remuneration in money.

37. The Labour Court in **Jonker v Wireless Payments Systems**¹ explained the above provision as follows;
"It is indeed correct that as a general rule the Basic Condition Employment Act prohibits deductions from employees' salaries without their prior consent. However, deductions without consent are permitted where it is permitted by the law, collective bargaining agreement and a court order or arbitration award."
38. In this dispute when an enquiry was made to the Applicant and the Respondent it was established that there was no consent of the Applicant before the deductions were made. It was also common cause that there was no collective bargaining agreement, court order and arbitration award authorising the deductions.
39. The witness of the Respondent who is the supervisor of the Applicant testified that he called the Applicant to his office, told her about the deductions and caused her to sign on the form. This to me does not amount to obtaining the consent of the Applicant. Thus the deductions made on the salary of the Applicant were not done in terms of the procedure prescribed by section 34 of the Basic Conditions of Employment Act.
40. It can be discerned that the purpose of section 34 of the BCEA is to prevent arbitrary deductions by the employer and to provide a procedure and guide to be followed by the employers before effecting deductions on the salaries of employees.
41. The Constitutional Court in **PSA obo Ubogu v Head, Department of Health, Gauteng an Others**² reiterated the position that the principles that no one should be a judge in his own matter and that the

¹ Jonker v Wireless Payment System cc (J1137/09) [2009] ZALC 150; (2010) 31 ILJ 381 (LC) para 21.

² PSA obo Ubogu v Head, Department of Health, Gauteng and Others 2018 (2) 365 (CC) para 67.

other side should be heard aim to eliminate proscribed arbitrariness in a way that gives content to the rule of law.

42. The court further held that to say everyone must be allowed to state his or her case does not imply that his or her version is right and must be accepted, but because in evaluating the cogency of any argument the arbiter must have regard to the points of views of both parties in order to come up with an objectively justifiable conclusion.
43. In this matter the Respondent acted arbitrary by not giving the Applicant an opportunity to state her case before a conclusion was made that there was a need to make the deductions.
44. In his evidence the witness of the Respondent testified that the reason why he decided to effect the deductions is because the Applicant was absent without the authority or permission.
45. Annexure A of PSCBC Resolution 1 of 2003(Disciplinary Code) lists absence from work without permission as one of misconducts. The rest of the resolution gives procedures to be followed when disciplining employees falling under the scope of the bargaining council, of which the Applicant falls.
46. When the Applicant absented himself from work allegedly without authority it was to be expected that she was going to be disciplined in terms of the resolution and an appropriate sanction be imposed also in terms of the resolution.
47. When asked why he did not discipline the Applicant, the witness of the Respondent testified that he felt the misconduct was not so serious as to warrant disciplining. This was an incorrect interpretation and application of the disciplinary code. This is so because the code provides for how to deal with both serious and less serious misconduct. The code is also the only tool managers have to use to discipline employees.
48. That the supervisor chose to simply authorize the deductions without following a procedure and without applying the code means he opted for self-help. Self-help is when the employer bypasses the formal process of resolving disputes by application of the law in a fair hearing before an independent tribunal or forum.³ Self-help is arbitrary and unfair to the employee (Applicant).
49. One of the purposes of the code as contained in clause 1.7 of the resolution is to prevent arbitrary and discriminatory actions by managers towards employees. Thus it is the code itself that frowns upon the arbitrary actions of the Respondent.

³ PSA obo Ubogu v Dept of Health: Gauteng para 67

50. It is my finding that the action of the Respondent to deduct from the salary of the Applicant without following a procedure prescribed by law was unfair as defined in section 186(2) of the Labour Relations Act.
51. Section 193(5) of the LRA provides that an arbitrator appointed may determine an unfair labour practice dispute in terms that are deemed reasonable which may include ordering re-instatement, re-employment or compensation.
52. Since there was no dismissal in this dispute the relevant determination is compensation. The LRA determines that the compensation must be just and equitable.
53. In view of the amount that was deducted on the salary of the Applicant the equitable and just compensation will be one-month compensation.
54. According to the salary advise in the bundle the Applicant's monthly salary is R24 574.44.

In the circumstances I make the following award;

AWARD

55. The action of the Respondent to effect deductions on the salary of the Applicant in July 2021 was unfair in terms of section 186(2)(a) of the Labour Relations Act.
56. The Respondents are hereby ordered to pay the Applicant compensation equivalent to one-month salary. The one-month salary is R24 574.44 and must be paid by the Respondents jointly and severally each paying the other to be absolved. The compensation must be paid to the Applicant's bank account within one month of receipt of this award.



Panellist: Mbulelo Safa

Sector: Government