



# ARBITRATION AWARD

Panellist/s: P JAIRAJH  
Case No.: GPBC958/2021  
Date of Award: 21 NOVEMBER 2021

## In the ARBITRATION between:

PSA obo JM GOVENDER

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(Union / Applicant)

and

DEPARTMENT OF CORRECTIONAL SERVICES

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(Respondent)

**Union/Applicant's representative:** MR L. NAIDU

Union/Applicant's address:

Telephone:

Telefax:

**Respondent's representative:** MR T. ROUX

Respondent's address:

Telephone:

Telefax:

## DETAILS OF HEARING AND REPRESENTATION:

1. This matter was scheduled for arbitration via virtual hearing on 1 October 2021. The applicant was represented by Mr L. Naidu from PSA and the respondent by Mr T. Roux, an Employee Relations Manager at the Department of Correctional Services.
2. At the arbitration, the applicant and respondent agreed not to lead viva voce evidence but submit written Heads of Arguments. The common cause issues, issue in dispute, relief sought and opening statements were recorded in a written agreement. Parties agreed that the applicant/employee will serve its Heads of Arguments on the Council, commissioner and the respondent on or before 12 October 2021, the respondent/employer will serve its Heads of Arguments (answering) on or before 21 October 2021 and the applicant will serve its replying Heads of Arguments on or before 1 November 2021. Final submissions were received on 9 November 2021.

### **ISSUE TO BE DECIDED**

3. I am required to determine whether the respondent committed an unfair labour practice related to benefits.

### **BACKGROUND TO THE DISPUTE**

4. The DPSA issued a Directive wherein applicants between the ages of 55 to 60 were invited to apply for early retirement without penalties.
5. The Applicant claims that he met the criteria and applied for early retirement. He completed his application together with supporting documents on 18 September 2019 and underwent an Exit Interview with his Manager. Subsequently, the Applicant was informed that his application was out of time.

### **SURVEY OF EVIDENCE AND ARGUMENT**

#### **APPLICANT'S SUBMISSIONS**

The salient aspects of the Applicant's submissions are recorded below.

6. The Applicant's dispute relates to an Unfair Labour Practice committed by the Respondent, in failing to process and approve the applicants Application for Early Retirement (ER) without Penalisation of Pension Benefits in terms of the DPSA directive on early Retirement without Penalisation of Pension Benefits in terms of

Section 16(6) of the Public Service Act, 1994 despite meeting the criteria as set out in the aforesaid directive.

7. Applicant is employed as CC Staff Support (HR) at Durban Juvenile Prison. He was 53 years and 9 months on the 18 September 2019 when he applied for ER in terms of the aforementioned DPSA directive.<sup>1</sup>
8. The DPSA directive provided for applications from employees in the Public Service departments including the Respondent's department who would be 55 years but not yet 60 years of age during the Medium Term Expenditure Framework (MTEF) period, being financial period 2019/20 to 2020/21.<sup>2</sup>
9. The Applicant met all the required criteria. Applicant was 55 years in January 2021 which fell within the period mentioned above, thus he was invited to a workshop and his name was included in the list of qualifying candidates to apply to be released for an early retirement.<sup>3</sup>
10. The offer of early retirement in terms of the aforesaid directive went through a consultation process with the relevant Labour Unions in the Respondent's workplace before it could be implemented.<sup>4</sup>
11. The offer was applicable from the 1<sup>st</sup> April 2019 until 30 September 2019 and applied to all of the Respondents employees in terms of DPSA guidelines, Annexure "A" and "B" and DPSA Questions and Answers Document.<sup>5</sup>
12. The time frame alluded to as the closing date for all applications was 30<sup>th</sup> September 2019. The directive further provides that no applications outside this period would be considered.<sup>6</sup>
13. The workshop document presented by the Respondent to all qualifying candidates detailed the requirements, procedure and time frames when applying for ER.<sup>7</sup>
14. Nowhere in the workshop document or any other document does the date of 12 July 2019 appear. The only date that is referred to in the workshop documents and which was communicated to the eligible applicants, was that they "must" apply

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<sup>1</sup> Applicant's Bundle, pages 58 - 64

<sup>2</sup> Applicant's Bundle, pages 8, 36, 38, 35, 42

<sup>3</sup> Applicant's Bundle, pages 91 - 95, 92 (3<sup>rd</sup> on list)

<sup>4</sup> Applicant's Bundle, page 96

<sup>5</sup> Applicant's Bundle, pages 28, 21, Mokhele's Memo 55 (3.1 – 3.3), 21 (Item 2)

<sup>6</sup> Applicant's bundle, page 38

<sup>7</sup> Applicant's bundle, pages 29 - 52

from 1<sup>st</sup> April 2019 up to 30 September 2019 and no other date was communicated to them.<sup>8</sup>

15. The mere use of the word "must" in this provision make the provision peremptory and there was no discretion afforded to the Respondent to amend or vary this period or dates unilaterally.
16. The Respondent had not communicated any project plans or any other cut-off dates after the presentation of the workshop.
17. Had such project plan with time frames being communicated to the Respondent's employees and qualifying candidates, the applicant would have known of such plans or cut-off dates because he works in the Human Resource section at the Juvenile Prison.
18. The applicant, his supervisor or the HR Department at the Juvenile Prison were not aware of any other cut-off date other than the 30<sup>th</sup> September 2019. Had they known of another date then they would not have accepted the applicant's application and processed same to the Area Commissioner's Office.
19. Applicant completed his application on the 18 September 2019 with accompanying documents such as his identity documents, motivation and persal reports which were drawn from the persal system on 2019-09-18 and submitted to his supervisor before 30<sup>th</sup> September 2019.<sup>9</sup>
20. The applicant's supervisor, Mr Sigamoney (hereinafter referred to as "Sigamoney"), who is the Head of the Correctional Centre (HCC) provided his comments and supported the Applicant's application on the 18<sup>th</sup> September 2019 when he conducted an exit interview, which the Applicant had acknowledged.<sup>10</sup>
21. Once the Applicant had submitted his application to his supervisor, he thereafter had no control of his application. His supervisor had to then process the documents to the relevant HR Office and Area Commissioner's Office.<sup>11</sup>
22. Applicant received an email on 1<sup>st</sup> October 2019 from Mrs Pillay (hereinafter referred to as "Pillay"), who works at the Durban Area Commissioners Office and who was responsible for collating and forwarding the applications to the Regional

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<sup>8</sup> Applicant's bundle, pages 29 – 52,

<sup>9</sup> Applicant's bundle, pages 58 - 70

<sup>10</sup> Applicant's bundle, pages 71 – 75, 49

<sup>11</sup> Applicant's bundle, page 49

Commissioners Office on or before the cut-off date of 30<sup>th</sup> September 2019, indicating that the ER applications forwarded to the Regional Commissioner's Office KZN on the 30<sup>th</sup> September 2019 was indeed not considered by their office.<sup>12</sup> This clearly indicates that the Applicant's supervisor had processed the Applicant's application at the institution level to the Area Commissioners Office but was rejected without any reasons advanced thereof.

23. The Applicant was later given verbal feedback by his supervisor that his application was rejected because it was submitted outside of the closing date. He did not have anything in writing as to what the closing date was, other than the email from Mrs Pillay.

24. The response of the grievance from the Director Mohan (hereinafter referred to as "Mohan"), who is the Head of Corporate Services at the Area Commissioner's office in Durban states the following: -

"Official submitted within the time frame & was not processed. He was informed in October that he is not considered. Recommended that dispute be incorporated in the current ongoing arbitration as dispute is of the same nature. Refer to Regional Commissioners office (RC office) for consideration to avoid another application for arbitration".<sup>13</sup>

25. Sigamoney and Mohan were not aware of any cut-off date other than the 30<sup>th</sup> September 2019 hence the email from Pillay on the 1<sup>st</sup> October 2019.<sup>14</sup>

26. The response to the Applicant's grievance by the Regional Head Human Resource in Pietermaritzburg states that; "No Application for Early Retirement without penalties was received by the grievant"<sup>15</sup>. The Regional Co-Coordinator Human Resource response alludes to the closing date for application for ER was the 30<sup>th</sup> June 2019 and the Respondent avers in these proceedings that the closing date was the 12<sup>th</sup> July 2019. Both dates are not known to any of the qualifying employees or the Labour Organizations.<sup>16</sup>

27. Clearly there are conflicting versions between the Area Commissioners Office and the Regional Commissioners Office however; communication problems between

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<sup>12</sup> Applicant's bundle, page 76

<sup>13</sup> Applicant's bundle, page 79

<sup>14</sup> Ibid

<sup>15</sup> Applicant's bundle, page 84

<sup>16</sup> Applicant's bundle, pages 84 and 96

these two offices cannot be attributed to the applicant's fault because he was only required to submit his application to his supervisor, which he had done.

28. Even if the Respondent asserts that it was entitled to change the closing date which the applicant denies, then the Respondent has a duty to inform the all employees eligible to qualify via a general circular of the new cut-off date for applications.
29. A response by DPSA which was used in the similar case of *Sarjodei and 18 others* states:

"Applications for Early retirement as limited for this current MTEF period whereby the applications were opened as of 1<sup>st</sup> April 2019 — 30 September 2019 closing date of applications were for applicants to apply and submit forms to their employers".
30. The letter from the Respondent's Head Office refers to the DPSA circular, annexure A and B and a workshop which was conducted by the Respondent. No reference is made to a closing date of 12<sup>th</sup> July 2019 or 30<sup>th</sup> June 2019 but refers to a date which entrenches the date of 30<sup>th</sup> September 2019.<sup>17</sup>
31. A further Respondent's circular dated 8<sup>th</sup> April 2019 states that:

"3.3 The DPSA directive dictates the implementation of the circular with effect from the 1 April 2019 - 30 September 2019 for qualifying officials for the financial year 2019/20 and 2020/21".<sup>18</sup>
32. An email from the Respondents Head Office to officials at the Regional office clarifies what is meant by late application: -

"Colleagues kindly note that by late application for early retirement without penalization we mean the application that was received by the employer on or before 30<sup>th</sup> September 2019 but there was a delay to submitting to head office".<sup>19</sup>
33. The Respondent's reasons given for rejecting the Applicant's application is without basis and it is clear that there was no acceptable, fair or rational basis why the Applicant's application was not accepted and processed.

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<sup>17</sup> Applicant's bundle, pages 1 – 5, 6 – 13, 14 – 20, 21 – 27, 28, 29- 52, 54 - 57

<sup>18</sup> Applicant's bundle, page 55

<sup>19</sup> Applicant's bundle, page 88

34. The Respondent clearly did not interpret the DPSA directive and the accompanying documents correctly which resulted in the Applicant being prejudiced whilst other applicants of the same age were granted the ER.

## **RESPONDENT'S ANSWERING SUBMISSIONS**

The salient aspects of the respondent's submissions are recorded below.

35. The respondent maintains that no application was received from the applicant.<sup>20</sup>
36. The respondent submits that Mrs. Nzama had corrected the date of the 30<sup>th</sup> of June 2019 which is contained on the applicant's grievance feedback letter to that of the 12<sup>th</sup> of July 2019 as per her confirmatory affidavit. The date of the 12<sup>th</sup> of July 2019 is the date on which all ER applications should have been submitted to DCS National Head Office.<sup>21</sup>
37. The respondent contests that the ER form<sup>22</sup> and Annexure A<sup>23</sup> indicate that applicants aged 55 to 60 are eligible to apply for ER.
38. The respondent agrees that the applicant was 53 years at the time of his application, he turned 55 years of age in January 2021 and his name appears on the list of officials to attend the ER workshop.
39. The respondent contests that they misinterpreted the age requirement in terms of the DPSA directive and disagrees with the applicant's explanation of the DPSA's age requirement for ER.
40. The respondent contests that the applicant applied for ER on the 18<sup>th</sup> of September 2019 as the applicant's application form<sup>24</sup> was never completed by the employer.
41. The respondent contests the applicant's submissions pertaining to the cut-off date as the internal communication<sup>25</sup> highlighted the date of the 12<sup>th</sup> of July 2019 as the date on which applications should have reached Head Office and which was not adhered to by some applicants, hence the non-acceptance of some ER applications.

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<sup>20</sup> Respondent's bundle, page 157

<sup>21</sup> Ibid

<sup>22</sup> Respondent's bundle, page 46

<sup>23</sup> Respondent's bundle, page 32 (par 1.3), page 34 (par 3.1.1)

<sup>24</sup> Applicant's bundle, pages 58 - 63

<sup>25</sup> Respondent's bundle, page 63

42. The respondent contests that the applicant's supervisor provided his comments and supported the applicant's application as his application form<sup>26</sup> had not been completed by the supervisor.
43. The respondent notes the applicant's submission pertaining to the conflicting versions between the Area Commissioners Office and the Regional Commissioners Office but maintains that no ER application for the Applicant was received by the KZN Regional Office.<sup>27</sup>
44. The respondent contends that there were other timelines applicable to these ER applications.<sup>28</sup>
45. The respondent partly agrees with the applicant's submission that applications must have been made between the period of 1 April 2019 to 30 September 2019 but contests that the Workshop Presentation<sup>29</sup> also refers to the establishment of project teams and committees as well as assessment and moderating teams; "to ensure that timeframes mentioned in the DPSA guidelines are adhered to". The dates of the 1<sup>st</sup> of April to the 30<sup>th</sup> of September 2019 were therefore not the only timeframe communicated to the applicants as per the workshop presentation.
46. The respondent notes the applicant's submission pertaining to the prescribed time frames for applications<sup>30</sup> but contests, that the 12<sup>th</sup> of July 2019 was a date set by the DCS National Head Office for the acceptance of all ER submissions in line with the workshop presentation<sup>31</sup>.
47. The respondent contends that the applicants were informed of the date of the 12<sup>th</sup> of July 2019 during the respective ER workshops.
48. The respondent contests the applicant's submissions that the 12<sup>th</sup> of July 2019 was a fabricated date and supports its argument with T.O. Mokhele's memo.<sup>32</sup>
49. The respondent contests that no ER application for the applicant was received by the KZN Regional Office as per the applicant's grievance feedback letter.<sup>33</sup>

## **APPLICANT'S REPLYING SUBMISSION**

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<sup>26</sup> Applicant's bundle, pages 58 - 63

<sup>27</sup> Respondent's bundle, page 157

<sup>28</sup> Applicant's bundle, page 40, Respondent's bundle, page 63 & 160

<sup>29</sup> Applicant's bundle, page 40

<sup>30</sup> Applicant's submissions, page 14, para 6.8 and 6.9

<sup>31</sup> Applicant's bundle, page 40

<sup>32</sup> Respondent's bundle, page 63

<sup>33</sup> Respondent's bundle, page 16



The salient aspects of the applicant's replying submissions are recorded below.

50. It is submitted that if the Applicant's application was not fully completed, then it was the responsibility of the HR officials to assist employees to correctly complete the form in accordance with the workshop document.<sup>34</sup>
51. The Respondent does not state in which respect the Applicant's application form was not fully completed and why his application was accepted by his supervisor and processed to the Management area (Mohan's office) if his application was not completed fully.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

I have considered all the arguments of the parties as well as the documentary evidence submitted.

52. The Applicant claims that the Respondent committed an unfair labour practice relating to benefits by failing to process and approve his application for ER.
53. This matter was referred for arbitration in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 ("the LRA").
54. In terms of section 186(2)(a) of the Labour Relations Act 66 of 1995, Unfair Labour Practice means any unfair act or omission that arises between an employer and an employee involving-
  - (a) unfair conduct by the employer relating to the promotion, demotion, probation [excluding disputes about dismissal for a reason relating to probation] or training of an employee or relating to the provision of benefits to an employee.
55. In *Apollo Tyres South Africa (Pty) Ltd V Commission of Conciliation Mediation and Arbitration & Others [2013] 5 BLLR 434 (LAC)*, the Court held that the proper approach is to interpret the term "benefit" to include a benefit to which the employee is entitled (ex contractu or ex lege, including rights judicially created) as well as an advantage or privilege which the employee has been offered or granted in terms of a policy or practice subject to the employer's discretion.

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<sup>34</sup> Respondent's bundle, page 109, par 6 - 7


56. The onus is on the applicant to show that the employer's conduct in not approving his application for ER without Penalisation of Pension Benefits was unfair.
57. It is not in dispute that the applicant turned 55 years in January 2021, therefore in terms of the DPSA Directive the applicant fell within the age bracket of the MTEF period, being 2019/20 to 2020/21, to apply for early retirement. Further, it is not in dispute that the applicant was invited to a workshop together with other qualifying officials.
58. The applicant contends that he submitted his application on the 18<sup>th</sup> of September 2019 and this is confirmed by his supervisor, Sigamoney. Further, Mohan confirms that his office received the applicant's application on or about the 19<sup>th</sup> of September 2019, which remained unchallenged.
59. The respondent's mere allegation that the applicant's application form was not fully completed by the employer is immaterial as the applicant complied with what was required from him. I agree with the applicant, that if his application form was incomplete, it was the role and responsibility of the HR Units to assist him to correctly complete the form.
60. The applicant contends that the closing date of the applications was the 30<sup>th</sup> of September 2019 as reflected in the workshop presentation and they maintain that no other date was communicated to the applicants. Further, it is noted that Sigamoney and Mohan confirmed that they were not aware of any other closing date save for 30<sup>th</sup> of September 2019.
61. The respondent makes reference to an internal memo which reflects the closing date as 9<sup>th</sup> July 2019, however this memo is dated the 1<sup>st</sup> October 2020 and I agree with the applicant that there is no indication that this memo was directed to the applicants for early retirement.
62. The respondent has not provided proof that the actual closing date was 12<sup>th</sup> July 2019 and that same was communicated to the applicant.
63. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) the court held at par [79] "A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the

decision of the employer. What is required is that he or she must consider all relevant circumstances."

64. Based on the above it is my finding that the applicant has discharged the burden of proof on a balance of probabilities that the respondent's failure to approve his application for early retirement was an unfair labour practice.

#### **AWARD**

65. The Respondent/employer perpetrated an act of unfair labour practice against the applicant in respect of benefits.
66. The respondent, Department of Correctional Services, is hereby ordered to approve the applicant's application for early retirement without penalties on or before 28 February 2022.
67. There is no order as to costs.



GPSSBC Commissioner: P. Jairajh