GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

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IN THE GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL ARBITRATION

HELD VIRTUALLY VIA MICROSOFT TEAMS ON 30 June 2022

In the arbitration between

PSA obo D MATSIMELA AND 02 OTHERS **APPLICANT**

AND

DEPARTMENT OF CORRECTIONAL SERVICES **RESPONDENT**

JURISDICTIONAL RULING IN RESPECT OF DISPUTE REFERRED TO ARBITRATION

CASE NUMBER:	GPBC1869/2021
DATE DOCUMENTS RECEIVED:	01 FEBRUARY 2022
DATE OF ARBITRATION:	30 JUNE 2022
NAME OF PANELLIST:	GEORGE GEORGHIADES

JURISDICTIONAL ARBITRATION RULING IN RESPECT OF DISPUTE REFERRED TO ARBITRATION

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The part-heard arbitration hearing between ***PSA obo D Matsimela and 02 Others*** and the ***Department of Correctional Services***, was set down to be conducted virtually via MS Teams on 30 June 2022, under the auspices of the General Public Services Sector Bargaining Council ("**GPSSBC"**). The matter was referred to the GPSSBC for arbitration as an Unfair Labour Practice, in terms of section 186(2)(a) of the Labour Relations Act 66 of 1996 ("**LRA**"), relating to Benefits.

1.2 Both parties were present at the virtual arbitration, which was digitally recorded by the panellist.

1.3 The applicant was present and represented by Mr. Flip vd Walt, PSA official of the Mpumalanga Provincial Office, while the respondent was represented by Ms. Thelma Nkuna, for the respondent.

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1.4 Due to level 6 load shedding that had been implemented by ESKOM, the parties continually struggled with network connectivity, with the proceedings only commencing around 11h00. During the hearing, the parties had considerable difficulty in hearing the other parties and vice versa.

2. ISSUES TO BE DECIDED

2.1 In this matter, I was required to determine whether the conduct of the respondent was unfair and if so, to award the appropriate relief.

3. PRELIMINARY ISSUES

3.1 The respondent submitted that the Council lacks the jurisdiction to hear this matter, as the dispute relates to a transfer, which is not one of the listed grounds contained in section 186(2)(a).

3.2 The applicant disputed this, arguing that in terms of a concluded collective agreement signed between the parties, the dispute related to a right, which the respondent was refusing to acknowledge and respect.

3.3 Insofar as the respondent's argument, the applicants are educationists, employed at the Barberton Correctional Services Prison. They applied for a transfer to Tzaneen Correctional Service Prison, which was approved by the respondent on 01 April 2022.

3.4 This approval was later withdrawn on the basis that the respondent had issued a moratorium on the filling of all posts and because the applicants were not prison officials, but educationists.

3.5 The applicants lodged an internal grievance which was unsuccessful, whereafter a dispute was referred to the GPSSBC as an unfair labour practice, relating to benefits.

3.6 The respondent argued that the matter related to a dispute regarding a transfer and not due to a failure by the respondent to provide a benefit. As transfers are not contained under section 186(2)(a) as one of the grounds for an unfair labour dispute to exist, the Council lacks the jurisdiction to deal with the dispute.

3.7 The respondent referred to a GPSSBC arbitration award wherein which the panellist ruled that transfers were not considered as one of the grounds for an unfair labour practice to exist and as such, this dispute should be considered similarly.

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3.8 The applicant argued firstly, that the transfers applied for by the applicants, were not limited to prison security officials only, but to all grade 5 – 7 employees of the Department of Correctional Services. This requirement was met by the applicants and subsequently, the applications for a transfer to Tzaneen Correctional Services Prison was approved on 01 April 2022.

3.9 The applicant submitted that as the alleged moratorium on the filling of previously-approved posts was not brought as evidence, and the existence of such a moratorium was disputed, the respondent could not rely on such an allegation.

3.10 The applicant argued that the transfer was not in dispute as it had been approved by the delegated authority, being the Regional Commissioner, on 01 April 2021. The applicants were instructed to report for duty at Tzaneen before the end of April 2021. However, the approval of the transfer was never communicated to the applicants.

3.11 The applicant referred the panellist to the matter of ***Apollo Tyres South Africa (Pty) Ltd v CCMA 2013 5 BLLR 434 (LAC)***, where the Court held that a "benefit" in terms of Section 186(2)(a) is not limited to an entitlement that arises from contract or legislation, but extends to include '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.'

3.12 The panellist was further referred to the case of ***Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services (P112/02) [2003] ZALC 20 (7 February 2003)***, wherein which the Court held that non-communication of a decision taken by an employer, regarding the transfer of an employee, was considered to be an unfair labour practice and a violation of their rights.

4. ANALYSIS OF PARTIES' ARGUMENTS

4.1 The applicant referred the dispute as an unfair labour practice in respect of section 186(2)(a), concerning benefits. The onus of proof therefore lies with the applicant to prove, on a balance of probabilities that an unfair act or omission arose between the applicant and the respondent involving unfair conduct by the respondent, relating to the provision of benefits to the applicant.

4.2 The Apollo Tyres judgment provides guidance as to what constitutes a "benefit" in terms of Section 186(2)(a). It is clear from the judgment that the notion of "benefit" is broad enough to

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cover legal entitlements as well as benefits to which an employee is not entitled as of right; for example, discretionary benefits.

4.3 The Apollo Tyres case's interpretation of the term "benefit" accords with Section 23 of the Constitution and the purpose of Section 186(2)(a) of the LRA. Thus, as the law currently stands per Apollo Tyres, the statutory unfair labour practice provision may be relied upon to regulate benefit disputes, including disputes about discretionary benefits. This finding makes the constitutional right to fair labour practices practicable for an aggrieved employee by providing them with an effective remedy.

4.4 In ***Simela and Others v MEC for Education, Eastern Cape and Another [2001] 9 BLLR 1085 (LC)***, the Court held that: *"In addition to fair administrative action, State employees are afforded a Constitutional right to fair labour practices. Although the unfair transfer of an employee is not catered for in the LRA, an employee is not precluded from relying directly on the Constitution to enforce his or her right not to be subjected to unfair labour practices."* (at 1099, para 56).

4.5 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.

4.6 The list of types of conduct that could constitute an unfair labour practice is an eclectic mix that covers a variety of different policies and practices engaged in by employers. Importantly, the Courts have held that the list of unfair labour practices contained in section 186(2) is exhaustive (in other words, a closed list). This was confirmed in ***Nawa v Department of Trade and Industry [1998] 7 BLLR 701 (LC)***, at 703.

4.7 Unless the conduct of the employer falls (at least partially) within the scope of one of the types of conduct listed in section 186(2), it would simply not amount to an unfair labour practice and the CCMA or bargaining council would not have jurisdiction to hear the matter as an unfair labour practice.

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4.8 Unfair conduct of the employer relating to the transfer of an employee cannot constitute an unfair labour practice in itself (as "transfer" is not in the list in section 186(2)), unless the employee can show that the transfer, or the refusal thereof, can show that this amounted to the failure by the employer to provide a benefit, or that the transfer amounted to a demotion, both of which are contained on the list.

4.9 In addition to the list being closed, irrespective of the type of conduct complained of and the fact that the conduct complained of does appear on the list, the dispute before the CCMA or bargaining council must be, by its nature, a dispute of rights. Disputes of rights (a dispute about the interpretation or application of rights that already exist in a contract, collective agreement or legislation) are resolved through arbitration or adjudication.

4.10 Having considered the arguments of the parties, in the absence of any compelling evidence, I am not persuaded that the respondent's unsupported allegations that a moratorium was indeed placed on the filling of posts and transfers.

4.11 The respondent's reliance on the weight of an arbitration award appears to be misguided, as it is trite that direction and dependence in respect of arbitrations, are guided by judgements passed down by the Courts. Even if one was required to consider the contents of such a document, this was not placed before the panellist for consideration.

4.12 The respondent's argument that only prison officials were entitled to apply for a transfer, could not be supported by any memorandum or directive and considering that the transfer of the applicants was approved on 01 April 2022, suggests that this was highly improbable.

4.13 It is common cause that the transfer application made by the applicants was successful, approved by the respondent's Deputy Regional Commissioner on 01 April 2021 and as such, is not the dispute before me. The applicant confirmed that the transfer was not the unfair conduct of the respondent that arose, but rather the respondent's conduct in failing to communicate the outcome of the application and the failure to have notified the applicants of the withdrawal thereof.

4.14 Having considered the judgment of the Appollo Tyres case, where the Courts provided as to what constitutes a "benefit" in terms of Section 186(2)(a), and where it is clear from the judgment that the notion of "benefit" is broad enough to cover legal entitlements as well as benefits to which an employee is not entitled as of right; for example, discretionary benefits, I am persuaded that the

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referral of the dispute by the applicant relates to a benefit, and that the Council is clothed with the jurisdiction to hear the dispute.

RULING

1. The dispute referred to arbitration by the applicant relates to the unfair conduct by the respondent involving a dispute of rights, relating to benefits.

2. The Council is clothed with the jurisdiction to arbitrate the dispute.

3. The Council's Case Management Office is requested to schedule the matter for arbitration.

Signed at ***Mbombela*** on this ***4th*** day of ***July*** 2022.

George Georghiades
GPSSPC: Dispute Resolution Panellist