PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS275-17/18**

Commissioner: **Suria van Wyk**

Date of award: **9 September 2017**

In the matter between:

HOSPERSA obo LF Ncheka (Union/ Applicant)

and

Department of Health-Free State (Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing convened on 24 August 2017 at EMS in Ladybrand.

2. Mr S Ramokoatsi from HOSPERSA represented the applicant and the respondent was neither present nor represented despite being properly notified[1] to attend via fax sent to six fax numbers of the respondent on 28 July 2017.

3. A recording was made of the hearing.

[1] Rule 21.

ISSUE TO BE DECIDED

4. The issue to be decided is whether the respondent committed an unfair labour practice by not granting the applicant an opportunity to attend training.

5. The applicant sought to be granted an opportunity to go on training.

BACKGROUND TO THE ISSUE

6. The Applicant was employed as by the respondent at EMS as an Emergency Care Officer. In 2011, he passed his Ambulance Emergency Assistance (AEA) entry test, which allowed him to partake in the AEA training course. The respondent has not granted him the opportunity to attend the training.

SURVEY OF EVIDENCE AND ARGUMENT

7. At the outset, I must indicate that only relevant evidence (pertaining to the issue in dispute) will be recorded in the award and not all the evidence presented at the proceedings.

Applicant's case:

8. Mr LF Ncheka testified under oath to the following:
    a. In 2011, he passed his Ambulance Emergency Assistance (AEA) entry test, which allowed him to partake in the AEA training course. The duration of the course was four months and it was practice that the respondent would, upon application, provide leave on a 50/50 basis as per the leave policy, for such training.
    b. Since 2011 he has requested numerous times to attend such training, but he has never been granted permission to go. He again made a request to the respondent on 15 November 2016 to grant him the permission and leave to attend the course which ran from 7 August 2017 – 20 November 2017 in North West. The cost of the course and all

disbursements was for his own account and had no financial implication on the respondent.

c. The respondent again denied his request despite granting the same request to other employees. No reasons were provided for the rejection other than that staff will not be send to other regions for training.
d. All he wanted was an opportunity to attend training and to acquire the AEA qualification.

Respondent's case:

9. None presented.

ANALYSIS OF EVIDENCE AND ARGUMENT

10. Section 186(2) contains the definition of an unfair labour practice: "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 dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

11. The undisputed evidence on the applicant confirmed that the practice exists in which the respondent would grant employees an opportunity to go on AEA training and that 50/50 leave is granted in such instances. Since he passed his entry exam in 2011 he has requested numerous times to attend the training, but every time the respondent denies his request for study leave. This while other employees are granted the leave and the opportunity to attend training. His last request in 2016 was also denied without proper reasons being provided.

12. The Constitutional Court disposed of this issue in *CUSA v Tao Ying Industries and Others* (2008) 29 *ILJ* 2461 (CC) at para 66*:" A commissioner must, as the LRA requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration……The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in." The approach has been reaffirmed by this Court in NUMSA (Sinuko) v Powertech Transformers (DPM) and Others (2014) 35 ILJ 954 (LAC) at [16] – [21] per Coppin JA*."

13. From the submissions of the applicant the training itself is not provided by the respondent and that the problem that persists is the fact that the respondent fails to also grant him the leave to attend the training. In *Apollo Tyres South Africa (Pty) Ltd v CCMA & others*[2] the LAC held that a 'benefit' for the purposes of s 186(2)(a) is not limited to an entitlement that arises *ex contractu* or *ex lege.* It departed from its earlier judgments[3] and held:[4] "*In my view, the better approach would be to interpret the term 'benefit' to include a right or entitlement to which the employee is entitled (ex contractu or ex lege including rights judicially created) as well as 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. In my judgement 'benefit' in section 186 (2) (a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice*

[2] [2013] 5 BLLR 434 (LAC).
[3] *South African Post Office v CCMA & others* [2011] 11 BLLR 1183 (LC); *Hospersa v Northern Cape Provincial Administration* (2000) 21 *ILJ* 1066 (LAC); *Gauteng Provinsiale Administrasie v Scheepers* [2000] 7 BLLR 756 (LAC).and *G4S Security v NASGAWU* - Unreported (case no DA 3/08), 26 November 2009)
[4] *Apollo Tyres (supra)* para [50].

subject to the employer's discretion. Insofar as Hospersa, G4S are and Scheepers postulate a different approach they are, with respect, wrong."

14. The definition of a benefit is now wide enough to include the discretion used by the respondent to either grant a benefit or not. I therefore find that the unfair labour practice does not relate to training, but to that of a benefit and that in the absence of a valid and reasonable explanation as to why the respondent keeps on denying the applicant the leave to go on training, that such conduct amounts to an unfair labour practice.

15. In the absence of a contrary version provided by the respondent, I find that the applicant has proven that in terms of the workplace practice he has a right to be granted the leave and to be allowed to go on training as other employees and in the absence of proper reasons for the denial of such an opportunity, the conduct of the respondent amounts to an unfair labour practice.

AWARD

16. The respondent, Department of Health- Free State, has committed an unfair labour practice in terms of section 186(2) of the Labour Relations Act, 66 of 1995.

17. The respondent, Department of Health-Free State, is hereby ordered to grant the necessary leave and to allow the applicant, LF Ncheka, to attend the next AEA training course presented in the Province.

18. There is no order as to costs.

Signature: 

Commissioner: ***Suria van Wyk***