



# ARBITRATION AWARD

Case No: **PSHS1273-19/20**

Commissioner: **Allan Kayne**

Date of award: **11 October 2020**

In the matter between:

**PSA OBO HEZRON TSHEPO MPHAKA AND 2 OTHERS** (APPLICANT/UNION)

and

**DEPARTMENT OF HEALTH – NORTH WEST** (RESPONDENT)

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## DETAILS OF THE HEARING AND REPRESENTATION

1. The Public Servant's Association ("the PSA") referred a dispute to the Public Health and Social Development Sectoral Bargaining Council ("the Council"), in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 ("the LRA") pertaining to the unfair conduct of the respondent relating to benefits. The arbitration took place on 07 September 2020 at the offices of the Department of Health – North West, situated in Mahikeng.
2. The applicant was represented by Ms Zhulfa Graaff, a PSA union official, while Adv. Pogiso Monchusi appeared for the respondent.
3. Both parties submitted bundles of documents to be utilised during the arbitration proceedings.
4. The proceedings were electronically recorded, and the record filed with the Council's administration.

5. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his/her outcome.

### **PRELIMINARY ISSUE**

6. At the commencement of the proceedings, Adv. Monchusi submitted that the dispute did not fall within the definition of an unfair labour practice in terms of section 186(2)(a) of the LRA and, accordingly, the Council lacked jurisdiction to arbitrate as it related to the taking of annual leave by the applicants.
7. Ms Graaff refuted the respondent's claim that the Council lacked jurisdiction, explaining that annual leave constituted a benefit afforded to employees.
8. Considering the submissions, I ruled that it would only be possible to determine the issues to hand once evidence had been led, and I directed the matter to continue.

### **ISSUE/S TO BE DECIDED**

9. I must determine whether the respondent subjected the applicants to unfair labour practices in terms of section 186(2)(a) of the LRA and if so, the appropriate relief should follow.
10. The three applicants seek the unused annual leave credits due to them, in respect of the 2018/2019 financial year, be encashed and paid to them.

### **BACKGROUND**

11. It is common cause that the respondent suspended the three applicants, Hezron Tshepo Mphaka, Sarah Mokgatlha and Mmule Rakau, on a precautionary basis in terms of notices issued to them for which they all signed on 25 February 2019.

## **SURVEY OF EVIDENCE AND ARGUMENT**

12. The following constitutes a summarised version of the respective evidence of the parties and has not been captured verbatim. The fact that I have not captured all of it should not be misconstrued that I have not taken it into account. My findings are accordingly within the context of all of the evidence tendered.

## **APPLICANTS' EVIDENCE**

### **Hezron Tshepo Mphaka ("Mphaka")**

13. Mphaka testified under oath that he had been in the respondent's employ for 36 years and at a senior management level for the past seven years.

14. He presented the Determination and Directive on Leave of Absence in the Public Service, issued by the Department of Public Service and Administration ("the DPSA"), reading into the record the following provisions:

5.6 *The remaining leave days, if any, must be taken no later than six months after the expiry of the relevant leave cycle, where after unused leave credits shall be forfeited.*

5.15 *With effect from 31 January 2018 employees, suspended as a precautionary measure while investigations into allegations of misconduct are being completed or employees who have been suspended as a sanction as a result of misconduct within the six months (paragraph 5.6 above refers) after the expiry of the relevant leave cycle who could not utilise their unused annual leave credits, must upon request, be paid out such unused annual leave credits at the end of the six months referred to in paragraph 5.6 above.*

31.12.3 *Heads of Department must ensure that ... individual utilisation of leave is communicated to employees at the end of each annual leave cycle in respect of annual vacation leave.*

15. Each of the applicants received a notice of precautionary suspension which provided, as a condition, that they would retain their full salary and related benefits during the period of suspension. However, each of them was required

to avail themselves at any reasonable time should they be called upon to attend at its premises.

16. None of the applicants received notices from the respondent at the end of their annual leave cycles advising them that they still had residual annual leave credits due to them in respect of the 2018/2019 financial year which would be forfeited if not utilised within six months of the end of the cycle.
17. Each of the applicants submitted a request to encash the annual leave credits due to them. However, this was not approved by the respondent.
18. Under cross-examination, Mphaka confirmed that he was conversant with the determination, and he obtained a leave benefit statement on 12 June 2019. Mphaka refuted the claim that the annual leave, by that stage, had already been forfeited. He, subsequently, only became aware that the respondent ought to have advised the applicants and allowed for an encashment at the end of November 2019. At that point, he submitted his request to the respondent. Until this time, he was unaware of the residual leave credit due to him, attributing it to the tumultuous year of 2018 which saw the respondent's offices shut down for a period of almost three months and which severely impacted its operations. As a result, many employees simply could not take annual leave.
19. He disagreed that encashing the annual leave of the applicants at this late stage would constitute irregular expenditure by the respondent, arguing that the leave had already been provided for by the respondent but not utilised, owing to them not being made aware of the leave credits available to them during their suspension.
20. The second and third applicants, Sarah Mokgatla and Mmule Rakau, attested to the veracity of Mphaka's evidence, confirming that the same circumstances applied to them, save for the dates each received their leave benefit statements and submitted their requests for encashment which were recorded as follows:
  - 20.1. Mphaka - leave benefit statement obtained on 12 June 2019 and request for encashment submitted on 03 December 2019 for 12 days, amounting to R63,646.85.

20.2. Mokgatlha - leave benefit statement obtained on 27 June 2019 and request for encashment submitted on 29 November 2019 for 12 days, amounting to R53,233.50.

20.3. Rakau - leave benefit statement obtained on 28 November 2019 and request for encashment submitted on 28 November 2019 for ten days, amounting to R53,262.96.

21. The respondent's Chief Director of Corporate Services declined the applicants' requests in correspondence, dated 31 January 2020, citing that the requests ought to have been lodged by 31 July 2019 and, accordingly, the leave credits had been forfeited.

## **RESPONDENT'S EVIDENCE**

### **Thabo Segaletsho ("Segaletsho")**

22. Segaletsho testified under oath that he was a Deputy Director in the employ of the respondent, responsible for conditions of service, recruitment and selection. He confirmed that each of the applicants had, in terms of the determination, forfeited their residual 2018/2019 annual leave credits when they failed to request an encashment before 31 July 2019. To this end, paragraph 9.2 of the determination bore reference, and read as follows:

*9.2 The leave cycle remains unchanged, therefore, requests and motivations for leave payments in respect of leave credits mentioned in 5.14 and 5.15 above shall be lodged by no later than 31 July in respect of each year. If an employee failed to apply for the payment of such unused leave credits at the aforementioned due date such unused leave credits shall be forfeited.*

By agreeing to encash the leave credits, the respondent would not be complying with the determination.

23. Under cross-examination, Segaletsho testified that applicants were senior managers who were required to ensure that they were acquainted with the determination. He read into the record paragraph 5.11 of the determination as follows:

5.11 *Employees must be cautioned timeously if, at the end of the relevant leave cycle, they have not utilised their leave entitlements.*

He confirmed that, as a result of the COVID-19 pandemic, in respect of the 2019/2020 financial year, employees had all been afforded an extension to January 2021 to utilise any residual annual leave.

24. He conceded that, although not essentially the duties of the Head of Department, it was a requirement, in terms of paragraph 31.2 of the determination, that the employer ensure that each employee was made aware of any annual leave credits which may expire.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

25. Section 185(b) of the LRA prescribes that every employee has the right not to be subjected to an unfair labour practice, and section 186(2)(a) defines an unfair labour practice as, *inter alia*, any unfair act or omission that arises between and an employee involving unfair conduct by the employer relating to the provision of benefits to an employee.
26. In the well-known judgment of ***Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others (2013) 34 ILJ 1120 (LAC)***, the Labour Appeal Court held that the interpretation of a benefit included “*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.*”
27. In disputes pertaining to benefits, the onus of proof lies with the employee party, firstly to establish the nature of and entitlement to the benefit in question, and subsequently to show that the conduct of the employer, relating to the provision of that benefit, was unfair. In the matter to hand, the applicants assert that the benefit in question relates to their entitlement to annual leave.
28. It was common cause that the applicants were suspended on full pay, from 25 February 2019, whilst retaining their full salary and related benefits subject to,

*inter alia*, that they should be available to the employer at any reasonable time during the suspension.

29. It was undisputed that employees of the respondent are bound by Determination and Directive on Leave of Absence in the Public Service which provides that unutilised annual leave credits are forfeited if not taken within six months of the end of the leave cycle (i.e. by 30 June of each year). Where employees are suspended, they may request an encashment of such unused leave by 31 July, failing which the leave credits will be expire.
30. In the same way that the determination binds employees, employers are similarly required to comply with the determination, in particular, to ensure that the individual utilisation of annual leave is communicated to employees prior to the end of the annual leave cycle. Employees must be cautioned if they have not utilised their leave entitlements. *In casu*, the applicants argue that the respondent failed to do so and, as a result, their annual leave credits in respect of the 2018/2019 financial year were forfeited.
31. Considering that the determination was only amended in respect of suspended employees in January 2018, and taking into account Mphaka's uncontested oral evidence that 2018 was a year unlike any other, it had even more of an obligation to ensure that the applicants were notified of the residual leave credits and the option available to them to apply for an encashment of same or even, potentially, to apply for such annual leave.
32. The applicants have, therefore, proved on a balance of probabilities the respondent's conduct to have been unfair in relation to the provision of their annual leave benefit through its failure to comply with the determination, yet expecting full compliance from them. Had the respondent fulfilled its obligation and notified the applicants of the residual credits due to them, each of them would have been afforded an informed opportunity to take the appropriate action or not.
33. The respondent's argument pertaining to the jurisdiction of the Council lacks merit and stands to be rejected in its entirety as the applicants successfully demonstrated that they only became aware of their entitlement at the end of

November 2019, and they referred their unfair labour practice dispute well within the prescribed 90-day timeframe, on 26 February 2019.

34. The applicants have, therefore, discharged the onus required of them to demonstrate that they were subjected to an unfair labour practice by the respondent.

## **AWARD**

35. Accordingly, the respondent, the Department of Health – North West, is ordered to pay to the applicants the following amounts, by no later than 15 November 2020:

35.1. Hezron Tshepo Mphaka - R63,646.85

35.2. Sarah Mokgatlha - R53,233.50.

35.3. Mmule Rakau - R53,262.96



Allan Kayne