



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: **JOSEPH MPHAPHULI**

Case No: **PSHS296-17/18**

Date of Award: **13 October 2017**

In the matter between:

Nehawu obo Hungana

(Union/ Applicant)

and

Department of Health- Western Cape

(Respondent)

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The hearing was conducted at the offices of the Department of Health – George. The hearing was conducted on 28 September 2017 and in terms of Section 191 of the Labour Relations Act 66/1995.

1.2 Mr. Nico Liebenberg, Assistant Director, Labour Relations appeared for the Respondent. The Applicant was represented by Mr. Patrick Mava Brown, NEHAWU official.

1.3 The proceedings were digitally recorded.

2. ISSUE IN DISPUTE

2.1 I had to determine whether there was an unfair labour practice or not, and the appropriate remedy, if any.

3. BACKGROUND TO THE DISPUTE

3.1 The Applicant has been in the service of the Respondent for eleven years. The Applicant served in the capacity of a senior administration officer at a salary of R283 000.00 per annum.

3.2 The Applicant to be permitted to take study leave ahead of examinations. Further that the Respondent continue to fund the Applicant's studies in his repeat year.

4. COMMON CAUSE ISSUES

4.1 The Respondent has a bursary scheme for employees. The Applicant has met the requirements for bursary allocation.

4.2 In addition, the Respondent had a special study leave policy. According to the policy study leave applications are to be accompanied by an examination time table and must be completed and submitted in advance.

5. SURVEY OF EVIDENCE

5.1 APPLICANT'S CASE

5.1.1 The Applicant, Mr. Hungana testified. He was currently studying for a human resources qualification. He requested for study leave from about 01 November 2016. The request was initially made by word of mouth. He formulated the request in writing later on the same day. He could not however attach the examination time table as it was not yet available at the time.

5.1.2 The policy requires that a study leave application form must be accompanied by the relevant examination time table. The examination was due from 07 November 2016 to 11 January 2017.

- 5.1.3 The Respondent rejected the application citing operational requirements as a reason. The Respondent could not release the Applicant because the Applicant's service were required in the period in question.
- 5.1.4 The Applicant did not feel that the reason advanced was justification to refuse him permission to write examinations. At the time of application for leave the Applicant had already discharged all material and critical duties associated with his office and to cater for the requirements in the week/ period of his absence.
- 5.1.5 The Respondent's refusal to allow the Applicant to proceed on study leave prejudiced the Applicant enormously in that he now has to self-fund. The Department would not carry expenses for a course repeat as contemplated by the Bursary Scheme.
- 5.1.6 The Respondent has put the Applicant in this precarious and audios position and it is for this reason that the Respondent should be held liable to pay for his studies in the year 2017.
- 5.1.7 As far as he was concerned the Respondent breached the study policy and must live with the consequences. It was his view that the Applicant must continue to benefit from the bursary for purposes of completing the first semester which he must repeat.

5.2 RESPONDENT'S CASE

- 5.2.1 Mr. Zaahir Emandien, senior admin officer H.R, previously an assistant direct, H.R the position he held at the time the dispute arose also testified. He was the Applicant's direct superior and the Applicant reported to him at the time.
- 5.2.2 He was aware that the Applicant was the holder of a bursary for part time studies. On or about 01 November 2016 the Applicant approached him to inform him that the Applicant was due to write examinations the following week.

- 5.2.3 He was hesitant to accede to the request due to activities planned for the week in question. He undertook to discuss the matter with the director and revert to the Applicant.
- 5.2.4 There was a planned audit, induction and arbitrations to be attended to. There were no proper arrangements made to execute these duties in the Applicant's absence.
- 5.2.5 The Applicant did not at any stage submit a leave application form or supporting documents, namely. time table prior to the examination date.
- 5.2.6 The Applicant was in attendance in a meeting with the Director on 01 November 2016 wherein the requirements were spelt out to the Applicant. The Applicant undertook to submit the time table but could not present anything to inspire confidence that the audit would take place as scheduled. The audit files were not submitted and were not prepared.
- 5.2.7 He only had sight of the application on the day of arbitration.
- 5.2.8 The bursary contract remains in place. It was one of the bursary conditions that the beneficiary must pass scheduled examinations and progress for the Applicant to continue to fund the studies. Any course repeats will be at the bursar's expense.
- 5.2.9 The Applicant failed to give advanced notice of any leave he intended to take, particularly for the month of November in all the leave planning meetings until 01 November 2016.

6. ANALYSIS OF EVIDENCE AND ARGUMENT

- 6.1 The existence of an unfair labour practice is a subject of proof. Proof is a subject of evidence. Unlike in dismissal cases where the existence of a dismissal is not in dispute, proof of the existence of an unfair labour practice is at the instance of the referring party.

- 6.2 The Applicant being the referring party had the onus to establish the existence of the unfair conduct complained of.
- 6.3 The Applicant was the only witness in his case and so was Mr. Emandien in the Respondent's case.
- 6.4 The essence of the Applicant's case was that the Respondent unfairly refused him permission to sit for his examinations in 2016. The Respondent's alleged unfair conduct caused him to fail and could not as a consequence not progress to the next study level. In the result the Respondent has equally unfairly refused to fund his repeat studies.
- 6.5 Mr. Emandien for the Respondent rejected the Applicant's evidence. Instead Mr. Emandien stated that the Applicant failed to comply with the study leave requirements.
- 6.6 The requirements were that a leave application should be completed in advance and be accompanied by an examination time table.
- 6.7 Note should equally be taken of the fact that the Applicant did not at all dispute the Respondent's documented evidence confirming that examination time tables were issued at registration and were available on the institution's website throughout the year.
- 6.8 It should also be noted that it was not dispute that the Applicant did not submit a leave application for study purpose.
- 6.9 Also undisputed evidence was the Respondent's evidence that the Applicant did not at any stage give any indication that he would be sitting for examinations in November 2016 at all leave planning meetings throughout the year.
- 6.10 The Applicant has no answer to the information supplied by the affected institution pertaining to examination time tables save to say that he only received his time table on 05 November 2016 following a request.

6.11 The onus was on the Applicant to subscribe to the established requirements to secure study leave as contemplated by policy.

6.12 I find the Respondent's version more probable compared to the Applicant's version. The Applicant has failed to discharge the onus of proof.

7. AWARD

7.1 There was no unfair labour practice, alternatively the Applicant failed to prove its existence.



Joseph Mphaphuli

Signed

PHSDSBC Panelist

13October 2017