



# ARBITRATION AWARD

Panelist/s: Chris Mbileni  
Case No.: PSHS68-10/11  
Date of Award: 18-Aug-2010

**In the ARBITRATION between:**

In the ARBITRATION between:

**PSA obo Claassen, Ilse M.**

**Applicant Party**

and

**Department of Health: Western Cape**

**Respondent Party**

**Applicant's representative:** Mr. Johan C. Kapp

**Applicant's address:** PSA  
P.O. Box 1837  
Cape Town, 8000

**Telephone:** 021-409-7365/082-880-8955 **Fax:** 021-409-7399

**Respondent's representative:** Mr. Russel Collop

**Respondent's address:** Department of Health – Western Cape  
P.O. Box 2060  
Cape Town, 8000

**Telephone:** 021-483-3969 **Fax:** 021-483-3952

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## 1. Details of hearing and representation:

- 1.1 The arbitration was set down in terms of s186(2)(a) of the Labour Relations Act (the "LRA") 66 of 1995 as amended. The hearing was held on the 5<sup>th</sup> August 2010 in the

Boardroom of the 16<sup>th</sup> Floor, Provincial Building, Tower Block, 4 Dorp Street in Cape Town.

1.2 Mr. Johan C. Kapp, an official of the PSA appeared for the applicant Ms Ilse M. Claassen while the respondent was represented by Mr. Russel Collop from Labour Relations at Head Office at the arbitration proceedings.

1.3 The parties agreed to submit heads of arguments supported by documentary evidence marked Bundle A (applicant's bundle) and Bundle R (respondent's bundle) as there was no factual dispute between them. They further agreed to submit their heads of arguments on paper on 11<sup>th</sup> August 2010 via email.

## 2. Issue in dispute:

2.1 The first issue to be decided is whether or not the PSA on behalf of Ms Claassen should have applied for condonation before referring the dispute to the Council (PHSDSBC).

2.2 The second issue to be determined is whether or not the Council has jurisdiction to arbitrate the dispute if condonation is not granted.

2.3 The third issue to be determined is whether or not Ms Claassen is entitled to 28 days vacation leave per annum in terms of the agreement, i.e. whether the provisions of transfer agreement were correctly interpreted by the respondent.

## 3. Summary of submissions and arguments:

### 3.1 The applicant's submission and argument:

3.1.1 Mr. Kapp had submitted that Ms Claassen had been appointed by DP Marais Santa Centre (SANTA) on the 1<sup>st</sup> September 1991. Ms Claassen continued working there until she and other employees were transferred to the Department of Health: Western Cape on the 1<sup>st</sup> September 2006.

3.1.2 Mr. Kapp had further submitted that prior to the employees' transfer from the old employer, being SANTA to the Department of Health in terms of s197 of the LRA, the Department of Health, SANTA and NEHAWU signed the Transfer Agreement which spelt out the terms and conditions of the transfer.

3.1.3 Mr. Kapp further submitted that paragraph 4.2 on page 5 of the Transfer Agreement, states: ***the conditions of service and service benefits applicable on transfer are set out in Annexure B*** attached to this agreement. Annual Leave for Normal Workers:

- (a) 1 – 9 years service = 22 working days p/a
- (b) 10 – 14 years service = 26 working days p/a
- (c) 15 years + = 28 working days p/a.

3.1.4 Mr. Kapp further submitted that under the last column, Annexure B of Transfer Agreement, it is stated under Option of leave pay out, that: ***staff with 15 years service to retain benefit (extra 2 days pa)***.

3.1.5 Mr. Kapp further submitted that the applicant had received a letter of appointment (pages **A(23)-(a(24))** of Bundle A. On page **A(31)** of Bundle A, paragraph 6 towards the

end of the page states: *“personeel wat by die vorige werkgewer 15 jaar diens voltooi het, behou hulle aanwas van 28/40 dae volgens ooreenkoms.”*

- 3.1.6 Mr. Kapp further submitted that the applicant was initially informed by word of mouth and then later in writing on 22<sup>nd</sup> May 2009 [see pages A(16) and A(18) of Bundle A] that she was not entitled to the 2 extra days' leave.
- 3.1.7 Mr. Kapp further submitted that the applicant had completed 15 years under SANTA's employ as on 31<sup>st</sup> August 2006. The applicant was transferred on the 1<sup>st</sup> September 2006 in terms of s197 of the LRA.
- 3.1.8 Mr. Kapp had argued that the applicant had completed 15 years service immediately prior to her transfer in terms of the Transfer Agreement. It is the applicant's argument that at the end of 31<sup>st</sup> August 2006, the applicant qualified for the 2 extra days leave and from 1<sup>st</sup> September 2006, she should have enjoyed the benefit of the 2 extra days' leave.
- 3.1.9 Mr. Kapp further argued that the only requirement for the 2 extra days was the completion of the number of years in terms of the Transfer Agreement. The applicant was transferred only after the completion of 15 years of service and therefore in terms of letter of appointment read with s197 of the LRA, she is entitled to the benefit of 28 days' leave.
- 3.1.10 In conclusion, Mr. Kapp submitted that the facts are clear and therefore the arbitrator should make a ruling in the applicant's favour and order the respondent to grant her the 2 extra days.

### **3.2 The respondent's submission and argument:**

- 3.2.1 Mr. Collop had submitted that on the 29<sup>th</sup> August 2006, all employees of DP Marais Santa Centre were transferred to the Western Cape Department of Health in terms of s197 of the LRA. The parties, i.e. Department, SANTA and NEHAWU (representing employees) signed a Transfer Agreement to transfer the employees on the 1<sup>st</sup> September 2006.
- 3.2.2 Mr. Collop further submitted that the agreement stipulated that normal SANTA employees who had 15 years plus service qualified for 28 days leave per annum, whereas the Provincial Government Western Cape employees with 10 years plus service were eligible for 26 working days' leave.
- 3.2.3 Mr. Collop further submitted that the applicant was dissatisfied with the decision made by the respondent not to grant her the additional 2 days vacation leave which would have made her eligible for 28 days' leave instead of 26 days.
- 3.2.4 Mr. Collop further submitted that the applicant, Ms Claassen had subsequently lodged an inquiry with the Human Resource Manager of SANTA (see pages 14 and 15 of Bundle R). The Chief Director: Regional Hospitals, APH & EMS, Ms L. du Plessis disapproved her 28 days' leave (see page 16 of Bundle R).
- 3.2.5 Mr. Collop further submitted that Ms Claassen had remained dissatisfied with the response and consequently lodged a formal grievance (see page 17 of Bundle R). It was alleged that the Investigating Officer into this issue did not even contact the applicant for almost 3 years. It was the respondent's argument that the applicant should have applied for condonation when it referred the dispute to the Council for conciliation.

- 3.2.6 Mr. Collop further submitted that the Executing Authority's response did not address the grievance to Ms Claassen's satisfaction (see pages 20 and 21 of Bundle R). The PSA on behalf of Ms Claassen referred a dispute to the Council of unfair conduct relating to benefits (see pages 22 to 28 of Bundle R).
- 3.2.7 Mr. Collop further submitted that a conciliation meeting was convened on the 9<sup>th</sup> June 2010 and a certificate of outcome was issued stating that the dispute remained unresolved.
- 3.2.8 Mr. Collop argued that the PSA had referred the unfair labour practice dispute out of the 90-day time limit in respect of unfair labour practice disputes. Mr. Collop further argued that the Council does not have jurisdiction to arbitrate the dispute.
- 3.2.9 Mr. Collop further argued that the applicant, Ms Claassen was not eligible for 2 additional leave days per annum to make it 28 days' leave per annum. Mr. Collop further argued that Ms Claassen did not have 15 years service on the date of transfer, i.e. 1<sup>st</sup> September 2006 and therefore did not qualify for the higher leave category of 28 days (see 2<sup>nd</sup> page of Annexure B under the Transfer Agreement contained in Bundle R).
- 3.2.10 Mr. Collop further argued that the applicant only had 26 days leave and therefore could only *retain* her already attained benefit.
- 3.2.11 Mr. Collop submitted in closing that the arbitrator should rule in terms of the Council having no jurisdiction to arbitrate the dispute and to dismiss the application.

#### 4. Analysis of submissions and argument:

- 4.1 The parties agreed that the facts were not disputed, including the fact that the *Investigating Officer did not even contact her. Almost 3 years later they say she is not entitled.* It is not clear why a certificate of outcome would be issued in the presence of both parties and the respondent did not raise the question of condonation with the panellist then.
- 4.2 According to the referral form, the dispute arose on the 29<sup>th</sup> March 2010 after the Minister of Health had made a decision regarding her grievance. The respondent's argument regarding the jurisdictional issue is not clear, as no date was mentioned to be used as a benchmark against which the 90-day time limit could be measured.
- 4.3 The Council assumed jurisdiction upon the issuance of the outcome certificate, in particular if the respondent decided not to raise a point in limine. Jurisdiction means the power to entertain a referral, which power is given to the Council by s136 on the issuing of a certificate of outcome, unless the certificate is set aside on review or on expiry of the 90-day period.
- 4.4 Based on the above, the Council is competent to arbitrate the dispute between the PSA on behalf of Ms Claassen.
- 4.5 A dispute over the *interpretation* of a collective agreement exists when the parties disagree over the meaning of a particular provision; a dispute over the *application* of a collective

agreement arises when the parties disagree over whether the agreement applies to a particular set of facts or circumstances.

4.6 The primary purpose of interpreting collective agreements must therefore be to ascertain what the parties had intended. In **UWCASU v University of the Western Cape [2002] 5 BLLR 487 (LC)**; **NUMSA v Volkswagen of South Africa (Pty) Ltd [2002] 1 BALR 1 (P)**; **FAWU v Supply Chain Services [2000] 9 BALR 1095 (IMSSA)**. Contra, see **IMATU v Cape Town Municipality (1999) 20 ILJ 960 (CCMA)**. Thus:

(a) where the wording of the agreement is clear and unambiguous, the parties may not rely on evidence beyond what is embodied in the document to demonstrate their intention at the time it was concluded [see **Johnson v Leal 1980 (3) SA 927 (A)**].

(b) the words in the agreement must be given their ordinary grammatical meaning and must be interpreted in the context of the agreement as a whole [see **Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd 1974 (1) SA 641 (A)**].

(c) where words are unclear or ambiguous, regard may be had to the circumstances surrounding the agreement such as previous negotiations between the parties, correspondence between them and the manner in which they acted on the document [see **Coopers and Lybrand & Others v Bryant 1995 (3) SA 671 (A)** at 768].

4.7 The Transfer Agreement's Annexure B clearly states that Annual Leave for Normal Workers:

- (a) 1 – 9 years service = 22 working days p/a
- (b) 10 – 14 years service = 26 working days p/a
- (c) 15 years + = 28 working days p/a.

4.8 In terms of 4.7(c) above, the wording is clear and unambiguous and therefore the parties may not rely on evidence beyond what is embodied in the Transfer Agreement to demonstrate their intention as on 29<sup>th</sup> August 2006 when the agreement was concluded and signed [see **Johnson v Leal 1980 (3) SA 927 (A)**].

4.9 In the circumstances, it is clear that the applicant had given incontrovertible evidence. I have no reason to reject the applicant's evidence on a balance of probabilities that the applicant had completed 15 years which qualified her to the 2 extra days' leave.

## 5. Award:

5.1 I, accordingly find that the PSA has managed to discharge its onus to prove that Ms Claassen qualified for the 2 extra days' leave in terms of the Transfer Agreement, which was collectively signed by the respective parties.

5.2 I therefore order the respondent to grant the applicant the 2 days' leave.

5.3 The parties **must** take note that this arbitration award is final and binding in terms of s143(1) of the LRA and it may be enforced through the Council or CCMA as if it were an order of the Labour Court.

5.4 The parties **must** take note further that there is no order as to costs.

Signed and dated at Johannesburg on this the 18th day of August 2010.

Panellist:   
Chris Sizili MBELENI.