



ARBITRATION AWARD

Case No: **PSHS946-19/20**

Commissioner: **Lillian Goredema**

Date of award: **20 July 2020**

In the matter between:

PSA OBO HASSAN ABBAS

(Applicant)

and

DEPARTMENT OF HEALTH- WESTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This is an award in the matter between the Applicant, Mr. Hassan Abbas and the Respondent, Department of Health- Western Cape. The Applicant was present and represented by Angelo Fisher, a PSA official, and the Respondent was represented by Mr. Abraham Solomon.
2. The matter was heard on 13 July 2020 at the Western Cape College of nursing, Athlone.
3. The proceedings were digitally recorded.

ISSUE TO BE DECIDED

4. I have to decide whether the Applicant is entitled to be credited with his annual leave benefit from 16 March 2009 to 31 December 2009, when he commenced employment with the Respondent as an intern and not from 1 January 2010 when he was employed on a contract.

BACKGROUND TO THE DISPUTE

5. The applicant joined the Respondent as an intern on 16 March 2009 until 31 December 2009 after which he was appointed on contract from 1 January 2010 until 30 June 2011 and he is currently employed on a permanent basis.
6. He alleges that the period 16 March 2009 to 31 December 2009 has not been taken into account when computing the annual leave days after employment for 10 years, resulting in an unfair labour practice. He would like that period to be considered.
7. Mr. Solomon Abrahams submitted that the Applicant was employed as an intern from 16 March to 31 December 2009 and was thus considered to be a casual employee and that period was not taken into account for purposes of computing his years of service in respect of leave due to him.

SURVEY OF THE EVIDENCE

APPLICANT'S EVIDENCE

8. The Applicant testified under oath and stated that he joined the Respondent as an intern from 16 March 2009 to 31 December 2009, after which he was employed on contract. This period was not credited to his employment record thereby impacting the leave days due to him after ten years negatively.
9. When he asked why the period is not reflected, he was advised that his date of commencement is 1 January 2010 when he was employed on contract because an intern is considered to be a casual worker.

10. He said he did not agree with this as circular HRD 1 of 2009 on the Implementation of Internship Programme dated 7 December 2009 states that an intern shall be appointed on a fixed term contract of employment which shall be extended by the period taken for leave of absence. Therefore the applicant believes he was a contract worker not a casual worker.
11. He said paragraph 13.1 of The Determination On Leave Of Absence In the Public Service dated July 2008 states that an employee retains all his/her annual leave with credits, when he/she is transferred within or between departments, due to him/her at that point in time. The employee retains likewise the leave category as reflected in Annexure A. The utilization of leave credits are subject to the provisions of this Determination.
12. He said in terms of paragraph 27 a contract worker is entitled to annual leave and he was entitled to 26 annual leave days as he had been employed for more than 10 years and he said he had started working as a contract employee from 16 March 2009.
13. In terms of a letter from the Public Service dated 8 July 2008 paragraph 4.1.1 defines a casual worker as a person employed on a day to day basis and who is paid a daily wage and who does not work more than 24 hours a month.
14. He said in terms of the Determination on Interns and Learners says that subject to determination, an intern or learner is entitled to the same conditions of service as a contract employee.
15. In answer to questions during cross-examination he agreed that he was employed on a contract of internship and he agreed that in terms of his contract he received a monthly allowance. He agreed that he was appointed as a casual worker in terms of persal code 5.83 and this was utilized for employees that do not occupy a post on the fixed establishment but must receive a recurring allowance every month. Code 5.3.1 is used to load this recurring allowance.. He admitted that he was not appointed by the Public Service against a post and was not an employee in the Public service.
16. He agreed that the period of employment is stipulated as commencing from 16 March 2009 to 16 September 2009. In terms of Persal Notice 322 the Duration of Employment

- Continuous Leave for purpose of determining the length of an employee's employment with an employer for purposes of annual leave , normal sick leave and family responsibility leave, previous employment in the public service must be taken into account if the break between the periods of employment is less than one year.

17. He agreed that the provisions of this circular was not applicable to him.

18. He agreed that when he became a contract worker on 1 January 2010. Was considered for computing the annual leave days to him after 10 years, service.

RESPONDENT'S EVIDENCE

19. Ms. Valda October testified under oath and stated that she is an Assistant Director dealing with employee leave in the department of health.

20. She said the applicant was regarded as a learner/intern and was paid a stipend. His appointment was abnormal because he was not appointed against any existent post. His stipend was coming from an external source as the funding did not come from the EPWP. His employment was termed periodic under persal code 5.3.1 and he was paid a recurring allowance. There was no need to create a post. He was paid for the hours he worked and paid on submission of an invoice.

21. She said recognition of continuous leave is for permanent appointments. Leave for periodic appointments is in terms of the Basic Conditions of Employment Act 75 of 1997, which is one day for every 17 days worked.

22. She said she was part of the panel that considered the applicant's grievance regarding his employment period 16 March 2009 to 31 December 2009 not being taken into account for purposes of computing leave due to him after 10 years, service. The panel consulted with the Premier's department who stated that they had considered his leave days from the time he was appointed as a contract worker in January 2010 as he was in an established post.

23. In answer to questions during cross-examination she said the applicant had not been considered as a contract worker as the contract of his employment in 2009 was

periodic. She said in order for learners/interns to be considered as contract workers there had to be employed against an established post, therefore that period is not recognized for the purpose of public service leave.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

24. The applicant asked that the period that he worked as an intern should be recognized in computing his ten years service with the Respondent, so the period of employment could be cumulatively ten years entitling him to 26 days annual leave in terms of Determination and directive on Leave of Absence in the Public Service.

25. I considered the oral evidence presented by the witnesses as well as documentary evidence presented by both parties.

26. The applicant had the onus of proof. He had to prove that it was unfair for the Respondent not to credit his leave days for 2009 thus depriving him of the benefit to be entitled to 26 days for being in the public service for 10 years.

27. The applicant testified that in terms of various circulars he presented as evidence he should have been considered as a contract worker and therefore eligible for public service leave conditions.

28. In response to this evidence, Ms October stated that the applicant was considered to be a casual worker as his appointment was considered to be periodic. Further, she said he was not paid a salary but an allowance and was not appointed into the public service as there was no post against which he was appointed. The witness presented the persal appointment codes to support this evidence. She said as an intern he could not have been subject to leave conditions for public service employees. He was also not a contract worker and was therefore not eligible to the same leave conditions as civil servants and his post was not eligible for consideration as being a contract post.

29. I find the evidence presented by the respondent to be credible and probable. Ms October gave a straight forward explanation of why the applicant was not credited with the year 2009 regarding leave. She backed her evidence by presenting the applicant's contract of employment as well as documents explaining the terms of such

appointment. It is apparent that the applicant was employed on a periodic basis receiving a monthly allowance and this is not the contract of an employee of the civil service.

30. I find that the applicant did not present any evidence to prove that he was a contract worker in 2009 as he was only employed on contract from 1 January 2010 as an intern. He even admitted that he was employed as a casual worker but then attempted to use a circular which stated that a casual worker should be considered to be an employee on contract but this submission was scuppered by Ms October's evidence that the applicant was not employed against any post in the civil service to warrant such a conversion. I agree that such conversion would be absurd more so when the applicant was employed on a periodic basis.

31. In the premises, I find that the applicant is not entitled to be credited with the period 16 March 2009 to 31 December 2009 as he was not employed in the civil service.

AWARD

32. The Respondent was fair in not crediting the applicant with leave days for the period he worked as an intern in 2009 as he was employed on a periodic basis. Therefore, the Respondent's conduct did not constitute an unfair labour practice and the Applicant's claim is dismissed.



Lillian Goredema