



**IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL
HELD AT CAPE TOWN**

CASE NO: PSCBC204-22/23

PSA obo Bezuidenhout

APPLICANT

and

Department of Correctional Services

RESPONDENT

AWARD

DATE OF ARBITRATION	:	30 January and 03 April 2023
CLOSING ARGUMENTS	:	11 April 2023
DATE OF AWARD	:	24 April 2023
ARBITRATOR	:	I de Vlieger-Seynhaeve

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 The matter was set down for a virtual arbitration hearing on 30 January and 03 April 2023. The applicant was represented by Mr Eagar from the PSA. The Respondent was represented by Mr Chabi. The proceedings were recorded digitally.
- 1.2 During the hearing of 03 April 2023, the respondent submitted that the first part of the dispute, payment for leave for the period 2018-2021, was no longer in dispute. A memorandum had been prepared and they were awaiting the implementation thereof. They were however still contesting the second part of the claim which centers on payment of annual leave whilst being on IOD leave.

2. ISSUE TO BE DECIDED

- 2.1 The issue to be determined is whether the respondent was in breach with Resolution 5 of 2001 when it did not pay out the applicant's leave pay when she was on IOD leave.

3. SURVEY OF EVIDENCE & ARGUMENT

3.1 Applicant's submissions

- 3.1.1 Ms Bezuidenhout was the first witness and stated that she is a Chief Psychologist and started working on 01 February 2008 at Baviaanspoort Management Area. She was dismissed on 19 July 2018 and reinstated on 02 June 2021. She had reported for duty and then had encountered an IOD on 25 October 2021. The doctor had recommended that she perform light duty but she could not get an agreement with the respondent. She could not work for 8h without interruptions and she was given written warnings when she did not do so. As a result of the IOD she was on IOD leave during 2021 and 2022. She was not able to use her annual leave before the end of June 2022 as she was on IOD leave. She referred to clauses 4, 5 and 9 of the Determination. She had received an email from Mr Musuphe in April 2022 advising her that she needed to take her outstanding leave. She replied and asked what she needed to do but he did not reply. She then applied for payment at the end of June as unused credits should be paid and must be submitted before 31 July. She then referred to the Leave Circular 1 of 2019 which she found to be contradictory. She wants to be paid out her outstanding leave days in line with s 7.1.(d) which states: "*The remaining days shall be utilized within an 18 months' period. All remaining unused leave shall fall away thereafter. However, where leave due is not taken due to the employer's service delivery requirements,*

such leave shall be paid out at the end of the 18 months' period". She also needs to be paid her vacation credits that she could not utilize whilst on impugned dismissal".

- 3.1.2 During cross-examination, it was put to her that it is impossible to get annual leave while being on IOD leave as one cannot be on two types of leave at the same time. The witness replied that the Circular dealing with that is contradictory.

3.2 Respondent's submissions:

- 3.2.1 Ms Mamahlodi, the AC Cooperate Services, was the only witness and testified under oath that the applicant will be paid for the outstanding leave credits when she was dismissed. However, she cannot get annual leave while being on IOD leave as this amounts to double dipping. This was promulgated in Circular 19.

- 3.2.2 During cross-examination, it was asked whether annual leave was paid to people who were on IOD leave. The witness replied that this was the practice from 2014 to 2019 but then par 2.1 of the policy was changed and it is no longer done.

4. ANALYSIS OF EVIDENCE AND ARGUMENT

- 4.1 I have considered all the evidence and argument, but because the LRA requires brief reasons (s 138(7)), I have only referred to the evidence and argument necessary to substantiate my findings and decision. I need to reiterate that this dispute is about the interpretation of a collective agreement. It does not fall within my jurisdiction to pronounce myself on the fairness of the Resolution nor is this an alleged discrimination dispute or a dispute about equal pay for work of equal value.
- 4.2 A dispute over the interpretation of a collective agreement exists when the parties disagree over the meaning of a particular provision and a dispute over the application of a collective agreement arises when parties disagree over whether the agreement applies to a particular set of facts or circumstances.
- 4.3 When interpreting collective agreements, arbitrators should follow the judgement of the LAC in *North-East Cape Forests v SAAPAWU & Others (2) 1997 (18) ILJ 971 (LAC)*: *"A collective agreement in terms of the Act is not an ordinary contract and the context within which a collective agreement operates under the Act is vastly different from a commercial contract. Froneman DJP has indicated that the primary objects of the Act were better served by a "practical approach to the interpretation and application of collective agreements rather than by reference to purely contractual principles". This is not to say however that the ordinary principles of interpretation of contract are never appropriate when interpreting and applying*

collective agreements. In Northern Cape Forests, the Court merely stressed that the interpreter should ask the further question of whether an interpretation yielded by these principles accords with the objectives of the LRA. The fact is that a collective agreement is a written memorandum which is meant to reflect the terms and conditions to which parties have agreed at the time that they concluded the agreement. The courts and arbitrators must therefore strive to give effect to that intention. Thus, the courts frequently apply the “parole evidence” rule - that is that evidence outside the written agreement itself is not generally permissible when the words of the memorandum are clear - when interpreting collective agreements, evidence outside the written agreement itself is not generally permissible when the words of the memorandum are clear.

- 4.4 The respondent did not dispute the first part of the claim and indicated that it was agreed that the applicant would be paid her outstanding leave during the time of her dismissal which was later reversed.
- 4.5 In terms of the claim for annual leave whilst being on IOD leave: The Determination and Directive on Leave of Absence in the Public Service states in 5.1 that *“The annual leave entitlement shall be calculated proportionally in relation to each full month of service at a rate of 1,83 working days if entitled to 22 working days and 2,5 working days if entitled to 30 working days annual leave in a leave cycle”*. Only when an employee’s request for annual leave has been refused because of the employer’s service delivery requirements or if the employee is on suspension, can the employee request for the leave to be paid out (see 5.14 and 5.15). Paragraph 2 of Circular 1 of 2014 states: *“if an official did not use his leave due to being on another type of leave such as study leave, sick leave etc. the application will not be approved as one cannot be on two different types of leave at the same time. However, if the official was not able to take her vacation due to being on IOD leave, the unused leave credits should be paid”*. However, this Circular was amended in 2019 and this clause has been replaced with: *“Paragraph 5.10 of the Leave Circular 1 of 2014 is hereby withdrawn with immediate effect. Payment of unused leave credits due to “IOD” will no longer be paid to officials, as this is regarded as double dipping, an official cannot be on two types of leave at the same type”*. The Circular is in line with section 20(5) of the Basic Conditions of Employment Act which similarly states: *“an employer may not require or permit an employee to take annual leave during (a) any other period of leave to which the employee is entitled in terms of this Chapter”*. Therefore, the applicant was not entitled to be paid out for her annual leave when she was booked off on IOD leave.

5. AWARD

- 5.1 The respondent was not in breach with PSCBC Resolution 5 of 2001 when it did not pay out the applicant's annual leave whilst being on IOD leave.
- 5.2 The respondent agreed to pay the outstanding annual leave for the period that the applicant was dismissed and was later reinstated. This payment needs to be implemented before or on 31 May 2023.
- 5.3 There is no order as to costs.

Signed in Cape Town on this 24th day of April 2023

A handwritten signature in black ink, appearing to be 'I De Vlieger-Seynhaeve', written over a light blue rectangular background.

I De Vlieger-Seynhaeve
PSCBC Panelist