



ARBITRATION AWARD

Panelist: John Cheere Robertson
Case No.: PSCBC433-21/22
Date of Award: 09 January 2023

In the Matter between:

PSA obo A Zenzile
(Union / Applicant)

And

Department of Health: Eastern Cape
(Respondent)

Applicant's representative: Mr R Vosloo (PSA) _____
Applicants' address: _____

Telephone: 082 880 8958 _____
Email: riaan.vosloo@psa.co.za _____

Respondent's representative: Mr S Nxumalo _____
Respondents address: _____

Telephone: 060 559 8113 _____
Email: sibusisonx1@gmail.com _____

DETAILS OF HEARING AND REPRESENTATION

- 1 This matter was referred for arbitration to the Public Service Co-ordinating Bargaining Council (PSCBC) in terms of Paragraph 3.1(c) of the Dispute Resolution Procedures of Council¹, read with Clause 14 of PSCBC Resolution 7/2000 (R 7/2000) and section 24(5) of the Labour Relations Act (LRA)² and was heard via the zoom digital platform on 27 May 2022, 28 July 2022 and 29 November 2022. Mr R Vosloo (PSA), represented Mr A Zenzile (applicant). Mr S Nxumalo, represented the Department of Health Eastern Cape (DoH EC) (respondent). The proceedings were digitally recorded. The parties requested to submit written closing arguments by 12 December 2022. The applicant party submitted written closing arguments on 12 December 2022. The respondent has not submitted any written closing argument and the period for submission having expired I have commenced with my award.

ISSUE IN DISPUTE

- 2 The issue to be determined is whether the respondent correctly interpreted or applied PSCBC Resolution 7/2000, in particular whether the respondent should pay the applicant for leave not taken during 2021 in respect of the annual leave cycle of 2020.

BACKGROUND AND SURVEY OF EVIDENCE

- 3 The applicant handed up a bundle of documents Exhibit A1-A83³, by agreement on the basis that the contents were not in dispute, were relevant and admissible and were admitted as evidence in this arbitration of what they purport to be and required no further proof as to authenticity, delivery and receipt. During cross-examination of the applicant, the respondent handed up a bundle (which I have marked as Exhibit R1-R7). These too, were admitted into evidence on the same basis as above. I shall where necessary refer to the documents as A3, A24-A25, R4 etc.
- 4 The following was common cause between the parties:
 - 4.1 The leave cycle in question was 01 January to 31 December plus 6 months⁴.

¹ Annexure A to the Constitution of the PSCBC

² The Labour Relations Act, 66 of 1995 (LRA)

³ Note: A59-A66 are not relevant to the dispute before the PSCBC, the applicant replaced these with A69-A83.

⁴ The leave cycle is 12 months commencing on 1 January of each year (Paragraph 5.1 of Part 2 of The Determination on Leave of Absence in the Public Service). In terms of paragraph 5.5 any leave not taken within 6 months after expiry of the relevant leave cycle will be forfeit.

- 4.2 Employees are entitled to 30 working days per annum (A56)
- 4.3 The applicant had taken annual leave of 18 working days as at the end of December 2020.
- 4.4 The applicant had applied for 8 days leave in total over two periods of leave of 4 days each namely:
- 14 06 2021-17 06 2021 (A54)
 - 22 06 2021-25 06 2021 (A53)
- 4.5 The total amount claimed by the applicant in lieu of the 8 working days leave not taken is R 6 024.64, calculated as prescribed by the DPSA, namely: $R\ 16\ 361.50 \times 12 = R\ 196\ 338 \div 260,714 = R\ 753.08 \times 8 = R\ 6\ 024.64^5$ (A68).
- 4.6 The respondent has not paid the applicant the amount of R 6 024.64 in lieu of leave not taken.
- 4.7 The reason for the refusal was indicated on the leave forms at A54 and A53, namely:
- 14 06 2021-17 06 2021 *"Leave was not recommended after consulting own Shift Leader, three of staff on leave on these days already"*.
Signed Manager S/Supervisor on 08 06 2021 (A54).
- "According to Mr Groep 3 staff members will be will be on leave for these shifts". Signed Signature of HOD or Designee on 11 06 2021 (A54)
- 22 06 2021-25 06 2021 *"Leave not recommended after consulting own Shift Leader, decision was taken because three people on leave"*.
Signed Manager S/Supervisor on 08 06 2021 (A53).
- "According to Mr Groep, Shift Leader of the shift, 3 staff members will be on leave on these dates". Signed Signature of HOD or Designee on 11 06 2021 (A53)

- 5 The applicant, **Mr Athi Zenzile**, testified to the following effect.
- 5.1 He, is an ambulance practitioner / basic life support practitioner, stationed at the Emergency Medical Service (EMS), Vincent, East London, Eastern Cape. He

⁵ At A68 the total is given as R 6 024.40. The yearly amount of the applicant's salary is incorrect and should be R 196 338.00 and not R 196 338.00. I have recalculated the value of 8 working days as per the given formula at A68. The total is R 6 024.64.

commenced employment with the respondent on 10 December 2007. He had taken 18 of the 30 working days leave due to him, during the annual leave cycle, by end December 2020. This fulfilled the requirement, (Clause 7.1(c) of R 7/2000), to the effect that he was required to take a minimum period of 10 working days per annual leave cycle. The remaining days to be utilised within an 18 month period (i.e. the 12 month cycle plus 6 months), failing which the balance of his leave would be forfeited, unless the leave could not be taken due to the employer's service delivery requirements. In such a case the leave should be paid out at the end of the 18 month period (Clause 7.1(d) of R 7/2000).

- 5.2 During June 2021, within the 18 month period, he applied for leave of 8 days. The 8 days being part of the balance of his annual leave of 12 days (A56) due to him for the annual leave cycle (01 01 2020-31 12 2020). He applied for this leave on 8 06 2021 in two lots of 4 days, namely 14 06 2021 to 17 06 2021 (A54) and 22 06 2021 to 25 06 2021 (A53). He was prepared to forfeit the additional 4 days. The leave was not granted on the basis that 3 staff members on the same shift would also be on leave during the periods in question. The date the leave was not granted was 11 06 2021, and was signed by the HOD or Designee, in both cases (A53-A54). His leave was refused and not rescheduled. The applicant sought payment in lieu of the leave he was unable to take, in accordance with paragraph 5.9 of Part 2 of the Determination on Leave of Absence in the Public Service (DLA). On not receiving payment he lodged a grievance. The grievance was not entertained by the respondent and the applicant then referred a dispute to the PSCBC, the subject of this arbitration.
- 5.3 The respondent was in agreement that employees had 18 months within which to take their annual leave allocation of 30 working days, i.e. the yearly leave cycle and the following 6 months. However the respondent contended that the applicant had applied for leave at a late stage, when all the other staff had been granted leave and accordingly the respondent could not release him and could not grant the applicant the leave. The applicant was of the view that the reason he was not given leave was that others in his shift had been given leave and not him.
- 5.4 It was put to the applicant that he had fallen sick, coincidentally, on the periods coinciding with the periods of leave he had applied for. Initially the applicant denied this. He was unable to answer without the relevant documents before him. On the production, by the respondent, of copies of an attendance register, reflecting the

applicant as off sick for the days in question (R2-R3) and applications for sick leave for the periods 14 06 2021 to 17 06 2021 and 22 06 2021 to 25 06 2021 together with medical certificates for the two periods (R4-R7), the applicant agreed that he had been off sick, had provided medical certificates and that the respondent had approved his sick leave on full pay. In his view, sick leave and annual leave were separate categories and he was accordingly still entitled to the outstanding vacation leave. Notwithstanding that the dates were the same, his claim was for leave credits due, in respect of annual leave he had not been allowed to take. He was due 12 days but only sought payment for 8 days.

5.5 At no time had the respondent cautioned him, as required in terms of paragraph 5.6 of Part 2 of the Determination on Leave of Absence in the Public Service (DLA) (A19). On the refusal of his applications for leave on 11 06 2021 (A53-A54) no arrangements had been made for the rescheduling of his annual leave as required in terms of paragraph 5.8 of the DLA. He had applied for vacation leave during the last 6 months of the 18 month period, this had not been granted. He had requested payment in lieu of the 8 days annual leave not taken as per paragraph 5.9 of the DLA and the respondent had not paid him.

6 The respondent elected not to lead any witnesses and closed its case.

7 In closing arguments the applicant basically re-stated the above and argued to the following effect:

7.1 He had complied with clause 7.1 (c) of R 7/2000. His applications for leave were not granted on the basis of the employer's operational requirements/service delivery requirements, due to the absence of the three shift members during the periods of leave requested. He was entitled to be paid out for such leave not taken as per clause 7.1 (d) of R 7/2000.

7.2 It was not clear why the other members should get preference and no evidence was led as to when they applied for leave. It was accordingly disputed that the other members may have applied for leave earlier.

7.3 The fact that he went on sick leave during the period in question was irrelevant. He had applied for the periods of leave in question. He later fell ill and his sick leave with sick leave certificates was approved after meeting all the requirements. Sick leave was a different category of leave with its own credits, cycle and requirements and was completely different from annual leave.

- 7.4 He did not apply for leave at the last minute. He had not been cautioned by the employer to use up his leave credits at any stage as required in terms of paragraph 5.6 of the DLA.
- 7.5 His applications for leave were not rescheduled, as required to be done by the employer, in terms of paragraph 5.8 of the DLA. He had nevertheless applied for leave within the six month period.
- 7.6 He had requested payment of the leave not granted, in terms of paragraphs 5.9.1 and 5.9.2 of the DLA. The respondent had not paid him at the end of the six month period (30 06 2021). This was contrary to the provisions of paragraph 5.9 of the DLA.
- 7.7 It was undisputed that the respondent had failed to apply PSCBC R 7/2000 and the applicant sought an award for payment of the cash amount of the leave not granted and not taken due to the employer's service delivery requirements, namely R 6 024.64
- 8 As stated above the respondent has not submitted closing arguments.

ANALYSIS OF EVIDENCE AND ARGUMENT

- 9 I have considered all the evidence and argument, but because the Labour Relations Act no. 66 of 1995 (LRA) requires brief reasons (Section 138 (7)), I have only referred to the evidence and argument necessary to substantiate my finding and award.
- 10 Excerpts of the relevant governing prescripts, PSCBC Resolution 7/2000 and The Determination of Leave of Absence in the Public Service are the following:
- 10.1 Resolution 7 of 2000 provides inter alia, the following in respect of annual leave at clause 7.1(c) and (d):
- 7.1(c) *A period of 10 working days leave per annual leave cycle shall be a compulsory requirement. The utilisation of this leave must take into account sectoral service delivery requirements.*
- 7.1(d) *The remaining days shall be utilised within an 18 month 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 at the end of the 18 month period.*
- 10.2 The Determination on Leave of Absence in the Public Service at paragraph 5.6, 5.8 and 5.9 of Part 2 provides amongst other things, the following in respect of annual leave:
- 5.5 *The remaining leave days, if any, must be taken by no later than 6 months after the expiry of the relevant leave cycle, where after any unused leave credits shall be forfeited.*

5.6 *Employees must be cautioned timelessly if, at the end of the relevant leave cycle, if they have not utilized their leave entitlements.*

...

5.8 *Any refusal of annual leave must be confirmed in writing, stating the reasons and arrangements for rescheduling of the annual leave.*

5.9 *If, due to the employer's service delivery requirements, an employee's application for leave is denied and not rescheduled, such leave must, upon request, be paid out to the employee at the end of the 6 months' period referred to in 5.5 above. Employee requests for payment of unused leave credits must be:*

5.9.1 *in writing; and*

5.9.2 *accompanied by written proof of refusal of leave by the Head of Department.*

11 The fact that the applicant fell ill and took sick leave for the periods he had requested annual leave, does not disentitle him to claim payment of leave taken in the 1st instance due to the employer's service delivery requirements. He is entitled to claim payment in lieu of the annual leave not taken, in terms of clause 7.1(d) of R 7/2000, and for the reasons set out below. In any event sick leave is separate from annual leave and operates on a different cycle.

12 It is self-evident from the common cause facts and the applicant's testimony, that:

12.1 He took 18 days during the 12 month leave cycle ending December 2020, thereby complying with the compulsory requirement at clause 7.1(c) of R 7/2000, i.e. leave of a period of 10 working days is compulsory per annual leave cycle.

12.2 He applied for 8 working days of the balance of the annual leave days due to him during the 6 month period after the end of the year leave cycle, i.e. within the 18 month period as required in terms of clause 7.1(d) of R 7/2000.

12.3 The applicant's applications for leave for the periods 14 06 2021-17 06 2021 (A54) and 22 06 2021-25 06 2021, submitted on 08 06 2021 were not approved for service delivery reasons (A53, A54), namely that three of the shift workers would be on leave during these periods.

12.4 The respondent did not make arrangement for the rescheduling of the leave applied for as required in terms of paragraph 5.8 of Part 2 of the DLA. The leave was applied for on 8 06 2021 and not approved on 11 06 2021. Accordingly there would have been

sufficient time to reschedule the leave. In the circumstance the respondent's case as per the opening statements and cross examination does not assist it.

- 12.5 The respondent did not caution the applicant with regards to the taking of the balance of his annual leave at the end of the leave cycle, as required in terms of paragraph 5.6 of Part 2 of the DLA.
- 12.6 The applicant applied for payment in lieu of the leave denied him, at the end of the period in accordance with paragraph 5.9.1 and 5.9.2 of Part 2 of the DLA.
- 12.7 That the respondent has not paid the applicant in lieu of the leave denied him, at the end of the 18 period in question, as required in terms of clause 7.1(d) of R 7/2000 and paragraph 5.9 of Part 2 of the DLA.
- 13 In the circumstances I find that the applicant has proved that he is entitled to payment in lieu of leave not taken (R 6 024.64) due to the respondent's service delivery requirements as per the provisions of clause 7.1, in particular 7.1(d) of PSCBC Resolution 1/2007. I make the following award.

AWARD

- 14 The applicant, Mr Athi Zenzile, is entitled to payment of R 6 024.64 (calculated as set out in paragraph 4.4 above) as and for leave not taken due to the respondent's, the Department of Health Eastern Cape's, service delivery requirements, in respect of the periods 14 06 2021 to 17 06 2021 and 22 06 2021 to 15 06 2021, a total of 8 working days.
- 15 The respondent, the Department of Health Eastern Cape, is ordered to pay the applicant the sum of R 6 024.64 on or before 28 February 2023.



John Cheere Robertson
PSCBC Panelist