



ARBITRATION AWARD

Case No: PSCB454 17/18

Date: 05 May 2018

Panellist: Vuyiso Ngcengeni

In the matter between

PSA obo Naidoo G

Employee

And

Department of Health Eastern Cape

Employer

Union / employee representative:

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DETAILS OF HEARING AND REPRESENTATION

1. This is the award in the arbitration between PSA obo Gersom Naidoo, the employee and the Department of Health, Eastern Cape as the employer. The arbitration was held under the auspices of the Public Service Co-ordinating Bargaining Council (“the Council”) in terms of section 24 (4) 24 (5) of the Labour Relations Act, No 66 of 1995 as amended (“the Act”). The arbitration was held in the employer’s premises in Livingston Hospital, Port Elizabeth on 22 January 2018 and on 16 April 2018.
2. The dispute was about the interpretation and application of a collective agreement – Resolution 7 of 2000 (7)(e) *“The departments shall not unreasonably refuse to grant leave to employees who apply, taking into consideration service delivery requirements”*.
3. The employer deducted an amount of R 7 583.73 from the employee after he had taken an unapproved leave of three days in December 2016.
4. The employer submitted two bundles named A and B and the employee submitted one bundle named C. The parties submitted the closing arguments on 25 April 2018.

ISSUE TO BE DECIDED

5. I have to determine whether:-
 - The employer’s action to deduct an amount of R 7 583.73 for the three days leave taken by the employee in December 2016 was non-compliant to the Resolution 7 clause 7 (1)(e) of 2000 which regulates leave between the parties. If I find that the employer’s action was contrary to the provisions of Resolution 7 of 2000, I should order that the employer reimburse the employee with the amount deducted.

BACKGROUND TO THE ISSUE

6. The employee is employed by the employer as a deputy director – Human Resources Development and Training (“HRD”).
7. On 28 to 30 December 2016, the employee took three days leave which was not supported by his supervisor and not approved by the Head of Department. The employee had earlier submitted this leave as part of his planned leave to be taken during the end of the year.
8. The employee had a meeting on 17 February 2017 with his supervisor, Mr Victor Tobo (“Tobo”) regarding the unapproved leave the employee had taken and the fact that the leave was to be made an unpaid leave. A letter confirming the discussions to that effect which was signed by Tobo on 14 March 2017 was sent to the employee and that meant the beginning of the dispute which the employee recorded as on 17 March 2017.

9. The employee then referred the dispute to the Council on 12 September 2017. The matter was referred to conciliation on 13 October 2017 and it remained unresolved and it was then referred to arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

Employee testified under oath as follows:-

10. The employees normally submit their planned leave in January or February of each year and in 2016 he planned his leave and submitted it accordingly to the Director of Human Resources and from there it would go to the Chief Executive Officer for approval.
11. On page 5 of bundle C is the format in which their planned leave is submitted and his leave is on the Human Resources and the dates are reflected and the leave is approved by the Chief Executive Officer, Mr Madonsela on 05 March 2016.
12. Clause 15.1.1.2 of bundle B is titled – Utilisation of vacation leave and subsection (b) reads as follows: *“Employees must plan their annual leave at the start of a leave cycle. Therefore the onus is on the managers to ensure that each component has a leave roster at the beginning of each leave cycle that is inclusive of all employees.”*
13. He applied for leave on 13 December 2016 and his application was submitted and approved as reflected on page 15 of bundle A. He does not believe that the persons who signed on the leave form on 13 December 2016 (exhibit C of bundle A) had the authority to do so as those persons are not his supervisor and they may have been acting when they signed the form. The final signature is for Mr Pretorius, who is a Head of Department and he (Pretorius) made comments in reference to Tobo whereas Tobo did not sign the form. Pretorius made the note that the leave application is not supported by Tobo.
14. He remembered that according to the leave form, his leave was not approved. However, no communication was conveyed to him indicating that his leave was not approved and as a result, the employer failed to comply with item 15.1.1.2 (i) of the Eastern Cape Department of Health Policy on Leave (“policy”) (Bundle B) which reads as follows: *“Any refusal of annual leave must be confirmed in writing, stating the reasons and arrangements for rescheduling of the annual leave”*
15. He only received communication about non-approval of his leave on 14 March 2017. There was no written communication from the employer that instructed him not to take leave in December 2016, as required in terms of the policy.
16. He does not understand the reason given by Pretorius on 22 December 2016 on the leave form. He communicated with Tobo on 22 December 2016 and they talked about other issues, and then Tobo informed him that his leave would not be approved, to which

he responded by saying that he had already made arrangements to spend the leave and the arrangements included costs already spent. He also drew Tobo's attention to the circular (exhibit B of bundle C) which came from the Superintendent General, Dr T Mbengashe and was directed to Top management and the circular partly reads as – *“By the directive of the SG, kindly be informed that approval has been granted for the following year end leave arrangements determination....Please note it is compulsory for employees rendering non-essential services to take leave as from 28th December 2016-06th January 2017.”*

17. He therefore informed Tobo that in accordance with the circular, it was mandatory that employees should take leave and he also informed him that in case there was a need for some services to be rendered, he would make arrangements and come back to him the following day.
18. Tobo was talking about an intake of new recruits and an induction was planned for in advance and between 28 and 29 of December 2016, there was no planned event for the HRD. The issue of induction only came out on 22 December 2017, when they were talking about leave. The induction happens every year and it is the Human Resources process and they as the HRD are not involved.
19. On 23 December 2016, he and his colleague could not get hold of Tobo to report on the alternative arrangements they had made, as he was not present and they left such plans details with Tobo's personal assistant.
20. As he was not an essential service employee, he felt that he was bound by the Superintendent General's directive to take leave and he also recommended leave for his subordinate as per the directive.
21. Under cross examination, he mentioned that the purpose of a leave plan was to comply with the provisions of the policy and that once the plan was approved, the application form that is completed at a later stage is just an administrative form, as the decision to approve had already been taken and he had already made commitments to that regard. The supervisor has no discretion to not sign the leave form.
22. He does not agree that he is a critical service employee on the basis that he works in a hospital. There are clear guidelines on what is an essential services and his unit is not an essential service.
23. Disputes that Top management in the directive means from Chief Director upwards. He was informed by Tobo that his leave was not approved on 22 December 2016. In the previous years, he has taken leave as per his planned and approved leave. He received annexure D of bundle C by hand from Tobo and he immediately tried to speak to him regarding his dissatisfaction with it.

24. He requests that he should be treated fairly and be compensated for the days he took his leave.
25. He stated that Tobo did not explicitly state that he was not going to accept alternative arrangements during their meeting on 22 December 2016.

Mr Samkelo Msila ("Msila") testified on behalf of the employee, under oath as follows:

26. He worked as the Human Resource officer and he reports to the employee. As a norm, they fill leave applications prior to the festive season and get the necessary approval.
27. Before he went on leave in December 2016, he and the employee had a meeting with Tobo about leave arrangement in relation to the induction that was scheduled to take place. They informed Tobo that the plan was that the induction would be held at the end of January 2017. Tobo then told them that there would be an induction in December for medical interns which takes place every year.
28. They told Tobo that they (him and the employee) would not be available as their leave were already approved and they have plans. They agreed in the meeting that the employee would come back to Tobo regarding the arrangements of the person who would be in the induction, and the employee got Mrs Stanley to represent the HRD in the induction. The employee informed Tobo about the arrangement either on 22 or 23 December 2017.
29. He is not sure if Tobo knew about the arrangement of Mrs Stanely, however, due to the fact that they had a discussion, he (Tobo) ought to have known.
30. It was for the first time that their department was to participate in the induction of medical interns.
31. His understanding was that clinical department was responsible for the induction and their department would only come in to collect the documents necessary.
32. In the meeting they had with Tobo, only the employee's leave was discussed. No one was left in their department as they are the only two employees in the department and they were both on leave.
33. Mrs Stanley works in the human resources administration and she attended the induction as requested by the employee and she is familiar with the HRD activities. There was no restriction as to who could be requested to represent the department in the induction.

Employer's case

Mr Victor Tobo on behalf of the employer testified under oath as follows:

34. He is the director of Human Resources- General and Administration and ICT.

35. All employees prepare leave plans and propose dates at the beginning of the year and give that to the Chief Executive Officer to be signed off and the plan for 2016 was signed off in terms of clause 15.1.1.2 of bundle B.
36. What led to the employee's leave to not be recommended was because the employee had approved Msila's leave for the same period and given that only two people worked in the department, he did not support the employee's leave because there was an orientation on 30 December 2016 (see p 15 of A).
37. The issue of essential services as alluded in page 4 of A was in relation to planned activities that were due to take place in December 2016 and as management, the HRD had a role to play. They had received an email which from the Chief Executive Officer, which they took as an instruction, on 11 December 2016 and it made it clear that the HRD was among the other departments that were required to participate in the induction.
38. In the meeting he had in December with the employee and Msila, he informed the employee that he is not supporting his leave application, unless Msila would not be taking leave in the same period. The two gentlemen raised the name of Mrs Stanley and he disagreed with the name as she was from the recruitment section.
39. The memo on page 4 is not exhaustive and given the fact that there was an induction in Livingston, HRD was critical and as the management, they saw the memo as allowing them the discretion to make decisions.
40. There was no feedback from the employee on the matter, and he and Msila went on leave and no one was left in the HRD.
41. He was able to have a meeting with the employee on 17 February 2017 regarding the non-approval of the leave he took. The employee indicated that he had tried to find him on 23 December 2016 and he (Tobo) was at work on that day and he also had his phone with him on.
42. After the letter regarding the non-approved leave and the pending salary recovery, he did not receive any formal feedback, except that he was told that there was a grievance lodged regarding the matter.
43. The leave form on page 15 was not authorised. There was communication to the employee, to inform him that his leave was not authorised and it was not approved, as the plan was approved on the basis that Msila would be acting in the position of the employee (page 5 of C).

ANALYSIS OF ARGUMENTS:-

44. The Labour Appeal Court (“LAC”), per Sutherland JA (with whom Ndlovu and Musi JJA concurred), in *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal* [2016] 7 BLLR 649 (LAC) (“the Hospersa case”), defined what an interpretation and application of a dispute is. It stated at [17] and [19]:
- “A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked.”*
45. Clause 15.1.1.2 of the policy is titled – Utilisation of vacation leave and subsection b reads as follows: *“Employees must plan their annual leave at the start of a leave cycle. Therefore the onus is on the managers to ensure that each component has a leave roster at the beginning of each leave cycle that is inclusive of all employees.”*
46. The difference in interpretation by the parties is that the employee submitted that the approval of the leave plans alluded to above is final and that the supervisor lacks discretion to not approve the leave form. Toba submitted that the leave plans are proposals and the signatures thereto are recommendations and that the supervisor has the discretion to either approve or not approve the leave at the time that the employee applies for it using the leave form.
47. The employee relied on the past practices to substantiate his claim and also in the circular from the Superintendent General, Dr T Mbengashe. In the email, it is mentioned that it is compulsory for employees rendering non-essential services to take leave as from 28 December 2016 except for staff in critical positions. The employee submitted that his department was not a critical department and that was corroborated by Msila.
48. Toba referred to the email they got from the Chief Executive Officer on 11 December 2016 in which the HRD and the human resources were invited to make presentations in the orientation. To that end, Toba submitted that the HRD was a critical department as there was the orientation project to take place and it had to comply with the instruction given through the email.
49. Clause 15.1.1.2 (b) makes it mandatory for employees to submit their planned annual leave at the beginning of the year. It is my understanding that a planned leave is not an approved leave as submitted by the employee. If that were the case, there would not have been a need to complete a leave form and still take it through the approval process. The employee himself has recommended a leave application for Msila, against what was in the planned leave and as such, the employee’s submission is inconsistent with his own actions. The employee had the onus to prove that the employer has failed to follow the policy as per the resolution stated above, and he merely spoke about the past

practice and yet, the difference in the end of 2016 was that there was a specific project and that his department was specifically instructed to partake in the project.

50. The employer explained the reasons to the employee and although the employee disputed that the employer stated that an arrangement has to be that Msila's approval is reversed for the employee's leave to be approved, the employee knew that his leave was not supported and he could have done more than just leave a message on Tobo's secretary on 23 December 2016, when Tobo was at work in the same premises.
51. I am persuaded by the employer's explanation and I it is my finding that the clause 15.1.1.2 (b) is about leave plan which is still subject to approval at the time the employee applies for it.
52. The employee mentioned that the employer also failed to comply with item 15.1.1.2 (i) of the policy as mentioned in paragraph 14 above. The employee mentioned that he remembered that according to the leave form, his leave was not approved and yet no communication was conveyed to him indicating that his leave was not approved and as a result, the employer failed to comply with item 15.1.1.2 (i) of the policy.
53. Tobo stated that he informed the employee that his leave was not supported and gave the reasons as stated above. Tobo admitted that the reasons were not given in writing as per the Resolution, but nonetheless, the explanation was given which he felt was sufficient.
54. The employee further mentioned that he only received communication about non-approval of his leave on 14 March 2017. There was no written communication from the employer that instructed him not to take leave in December 2016, as required in terms of the policy. The employee again submitted that on 23 December 2016, he and Msila tried to get hold of Tobo, so that they could inform him about the arrangements, and they did not meet him. Under cross examination, the employee stated that he was informed by Mr Tobo on 22 December 2016 that his leave was not approved.
55. For the employee to say that he only found out that his leave was not approved on 14 March 2017 simply cannot be true and this is contradicted by his own testimony that he gave under cross examination. Furthermore, the employee and Msila would not have made arrangements and wanted to report back to Tobo, had he not known that his leave was not supported.
56. The resolution states that the approval of leave shall be given taking into consideration the service delivery requirements, and in my view, the fact that there was a project of orientation in December 2016 and the HRD was specifically expected to attend, means that there was a requirement for a service to be delivered and that is in compliance to the resolution.

57. It is my view that the employer has complied with clause 15.1.1.2 (b) of the policy and did not comply with sub-clause (i) of the same. However, given the fact that the employer informed the employee albeit not in writing, that his leave was not supported, and also the arrangements that needed to be done, I am satisfied that the employer has served the purpose of clause 15.1.1.2 (i), and that is to inform the employee of the refusal of his leave application and the reasons thereof. Also, it is important to note that the refusal at the time of the meeting was still subject to the employee reverting back to Tobo in the following day regarding the arrangements, and the employee did not revert back to Tobo, and also, the employee went on leave together with Msila, despite knowing that such action would leave their office without an employee.
58. A large portion of the employee's evidence was more into the unfairness or not of the conduct of the employer, and since I am not required to make a determination in terms of section 186 (2)(b), I would not venture into that arena.

AWARD

59. The employer, Eastern Cape Department of Health has not unreasonably refused to grant leave to the employee, Gersom Naidoo, in terms of Resolution 7 of 2000 (7)(e).
60. The employer has correctly interpreted and applied clause 15.1.1.2 (b) of the policy.
61. The application is dismissed.

A handwritten signature in black ink, appearing to be 'Vuyiso Ngcengeni', written in a cursive style.

PSCBC Panelist
Vuyiso Ngcengeni