



PANELIST: ADVOCATE J P HANEKOM

CASE NO: PSCB8 -16/17

AWARD DATE: 13 SEPTEMBER 2016

In the matter between:

PSA obo COETZEE P J

Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES- NATIONAL

Respondent

DEFAULT AWARD

DETAILS OF THE HEARING AND REPRESENTATION:

1. This matter was set down for arbitration in on 30 August 2016 concerning a dispute about the interpretation and/or application of a collective agreement (Resolution 7 of 2000 – hereinafter referred to as the “Resolution”). Mr. A. Strydom, union representative of PSA represented the Applicant. The Respondent was absent at the set down time of 10h00. According to Mr. Strydom the Respondent was aware of the case as he spoke to Mr. Lumphondo of Legal Services within the Department about the case prior to the hearing date. I also confirmed with the Council that the Respondent was given proper notice on 14 July 2016 by email send to abram.lumphondo@dcs.gov.za and Isaac.magoro@dcs.gov.za at 10h42. The Council also served the notice of set down on the Respondent by facsimile on that same day send to fax numbers 021 5587316, 021 5587350, 0865337197, 0865347934, 012 3233475, and 012 3233476. I was convinced that the Respondent received proper notice and continued with the hearing in its absence.
2. I digitally recorded the verbal argument made by the Applicant on that day.

ISSUE TO BE DECIDED:

3. I have to decide whether the Respondent correctly applied and interpreted the Resolution.

BACKGROUND:

4. The Applicant is employed as a Correctional Officer Grade I at Stellenbosch Community Corrections. The Applicant applied in advance for planned annual leave for various periods (eight periods) ranging from 21 Dec 2009 until 13 October 2015.
5. The Department booked the Applicant's vacation leave according to the shift roster, whilst the Applicant argued that the Applicant should have been taken off the shift roster and that Applicant's leave should have been calculated according to normal working days (Monday to Friday) in terms of the prescripts.
6. According to the Applicant the Respondent deducted an extra 30 days from Applicant's leave credits by its method of calculation. Therefore the Applicant requested that the Respondent pays the Applicant the monetary value of the 30 days leave in the amount of R18 407, 24.

ARGUMENT BY THE APPLICANT:

7. I have decided to summarise the Applicant's argument as far as I consider relevant for the purpose of my award.
8. It was the Applicant's argument that paragraph 7.1(a) of the Resolution states that the leave dispensation in the Resolution will only provide a framework that maybe refined depending on the service delivery requirements of the various sectors. The service delivery requirements of the Respondent necessitated the introduction of a 7-day work week and ultimately require employees to work shifts.
9. In August 2012 the Minister for Public Service and Administration issued a Leave Determination (hereinafter referred to as the Leave Determination. Paragraph 8.5 of the Leave Determination states *"If the employee applies for annual leave in advance in accordance with the leave schedule such leave must be taken into account in the scheduling of shifts. The employee must not be scheduled for (a) shift(s) for the duration of the period of annual leave in which case the granting of annual leave will be countered as working days which shall mean Monday to Friday."*
10. According to the Applicant he applied for leave in advance for all the periods concerned and therefore the Leave Determination should be read with the Resolution as such. The Respondent calculated the Applicant leave other than from Monday to Friday, but in terms of paragraph 5.4 of the Determination referred to below in paragraph 14 of my award. Therefore the Respondent owes the Applicant the amounts for the days below.

Date	Scale	P/Day	
2009/12/25	178881	R 490.08	
2009/12/26	178881	R 490.08	
2009/12/27	178881	R 490.08	
2010/01/09	178881	R 490.08	
2010/01/10	178881	R 490.08	
2010/12/25	192297	R 526.84	
2010/12/26	192297	R 526.84	
2010/12/27	192297	R 526.84	
2011/01/08	192297	R 526.84	
2011/01/09	192297	R 526.84	
2011/12/24	211530	R 579.53	
2011/12/25	211530	R 579.53	
2011/12/26	211530	R 579.53	
2012/01/07	211530	R 579.53	
2012/01/08	211530	R 579.53	
2012/06/23	226338	R 620.10	
2012/06/24	226338	R 620.10	
2013/01/05	226338	R 620.10	
2013/01/06	226338	R 620.10	
2013/12/21	248514	R 680.86	
2013/12/22	248514	R 680.86	
2014/01/04	248514	R 680.86	
2014/01/05	248514	R 680.86	
2014/12/20	266904	R 731.24	
2014/12/21	266904	R 731.24	
2015/01/01	266904	R 731.24	
2015/01/03	266904	R 731.24	
2015/01/04	266904	R 731.24	
2015/10/10	285588	R 782.43	
2015/10/11	285588	R 782.43	
		R 18,407.24	

ANALYSIS OF THE ARGUMENT:

11. I only have the Applicant's version before me to consider. I have decided only to focus on those issues I consider relevant.
12. Paragraph 7.1 of the Resolution states:

"Annual leave:

- a) *The annual leave dispensation in this agreement shall provide a framework that may be further refined, subject to service delivery requirements of any sector.*
- b) *Employees shall accrue leave days per annual leave cycle, which shall be granted according to annexure A*
- c) ... "

13. To my mind the provisions of paragraph 7.1 of the Resolution refer to above is silent as to what is meant by working days. There is a gap as to how to count working days. Generally as far as the interpretations of collective agreements are concerned, ordinary words should be given their ordinary meaning, unless it leads to ambiguity. In case of ambiguity, extrinsic evidence may be considered if the words in a

collective agreement are ambiguous or if the ordinary meaning give rise to absurdity – see *FAWU vs. CCMA and others* [2007] 6 BLLR 499 (LC). Further fairness and equity may play a role when the import of a collective agreement is not clear or when there is a gap or a missing portion – see *SASBO vs. First National Bank of South Africa* [1995] 10 BLLR 108 (IC); *Samwu vs. South African Local Government Bargaining Council and others* [2012] 4 BLLR 334 (LAC).

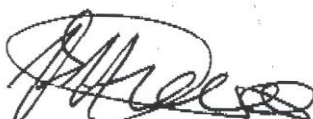
14. It is clear from reading paragraph 7.1 (a) of the Resolution that the agreement provides a framework that may be refined in future. That is indicative of the parties' intention. The Resolution is quiet as to how to count annual leave working days in the case of shift workers. Fairness and equity in my view dictates that I can fill the gap in the Resolution by looking at the Leave Determination.
15. The Leave Determination is a determination issued by the MEC applicable in the Public Service sector. Further the determination amongst others deals with the calculation of annual leave according to working days in respect of shift workers-paragraph 5.4 and paragraph 8 of the Leave Determination. In terms of paragraph 5.4 of the Leave Determination for the purpose of annual leave, leave will be counted as working days, namely Monday to Friday, except in the case of shift workers. Then working days will be counted to include public holidays, Saturdays and Sundays. However paragraph 8.5 of the Leave Determination reads: *"If the employee applies for annual leave in advance in accordance with the leave schedule such leave must be taken into account in the scheduling of shifts. The employee must not be scheduled for (a) shift(s) for the duration of the period of annual leave in which case the granting of annual leave will be counted as working days which shall mean Monday to Friday."* Prior to the Leave Determination other Determinations in respect of leave of absence were issued in July 2008 and 2009. Both Determinations contained provisions in paragraph 5.3 of those agreements that stated *"5.3. For the purpose of granting annual leave, working days shall mean Monday to Friday."* Neither of those Determinations had any reference to shift workers. In the absence thereof, I have to find that annual leave in respect of shift workers at the time should be calculated on the same basis that is *"granting annual leave, working days shall mean Monday to Friday."*
16. It is the Applicants argument that I should take the Leave Determination into account when interpreting the Resolution. Paragraph 8. 5 quoted above clearly states that if an employee applies for annual leave in advance, the employee must then not be scheduled for a shift during that period of annual leave, in which case the annual

leave will be calculated from Monday to Friday as working days.

17. The wording of paragraph 8.5 of the Leave Determination clearly makes reference to the words "*applies for annual leave in advance*". In my view this means that an employee should fill in an application for leave of absence some time before the vacation leave is taken. So much so that management can schedule shifts accordingly. The employee in such case must not be scheduled for a shift during the period of vacation leave. In other words if the shift worker's leave application is not made in advance and the employee is already booked for shifts according to the new shift roster during the period of vacation leave, then according to my understanding paragraph 5.4 above applies. The Applicant in the instant case applied for annual leave in advance. Accordingly I am convinced that paragraph 8.5 above applies. I also find that the previous Determinations referred to in paragraph 14 above applied at the time. The Applicant's leave days should have been calculated from Monday to Friday. The employer should therefore not have deducted the weekends and public holidays as stipulated in paragraph 9 above from the Applicant's leave credits.

AWARD:

18. In the premises I make the following award:
- (1) I find that the Respondent did not correctly apply and interpreted the Resolution.
- (2) I order the Respondent to pay the Applicant the amount of **R18 407, 24** in respect of 30 days annual leave on or before **30 October 2016**.



ADV J P HANEKOM