



AWARD

YOUR REFERENCE NUMBER FOR THIS CASE:

Please quote this reference number when communicating. It will assist us in providing information more quickly and efficiently.

PSCB305-12/13

FOR ATT:	LJ Jensen	FOR ATT:	R Tshabalala / B Samaai / M Ntshikila
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Referring party details PSA obo Moll, WVDL P O BOX 11027 Hatfield Tel: 012 432 4835 Fax: 012 432 4848/9	Responding party details Department of Correctional Services - National Private Bag X393 Pretoria 0001 Tel: 012 430 0100 Fax: 012 430 4539 / 011 260 0241 / 086 599 4475
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13 February 2017

Dear Sir/Madam,

Matter Between: **PSA obo Moll, WVDL**
and: **Department of Correctional Services - National**
Issue: **24(2), [24(5)] - Collective agreement - interpretation or application
(Res 7 of 2000)**

Please find attached award for this matter.

Yours sincerely,

Tracey Mokoena
Case Management Officer
Case Number: PSCB305-12/13



AWARD

Panellist/s: WILLEM KOEKEMOER

Case No.: PSCB305-12/13

Date of Ruling: 11 March 2013

In the matter between:

PSA obo MOLL, WVDL

(Union / Applicant)

and

DEPARTMENT OF CORRECTIONAL SERVICES - NATIONAL

(Respondent)

Union / Applicant's Representative:	Mr Jensen (PSA representative)
Union / Applicant's Address:	P.O Box 11027
	Hatfield
	0028
Telephone:	012 432 4835 / 082 885 7456 / 083 482 2487
Telefax:	012 432 4848 / 9
Respondent's Representative:	Mr Samaai (Respondent representative)
Respondent's Address:	Private Bag X393
	Pretoria
	0001
Telephone:	012 430 0100 / 011 208 9522 / 082 053 6889
Telefax:	012 430 4539 / 323 3476 / 011 818 3343 / 011 260 0241

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was conducted on 12 February 2013 at the Correctional Services conference facilities at Modderbee, Springs.
2. The respondent was represented by Mr B Samaai of the respondent.
3. The applicant was represented by Mr Jensen of PSA.
4. A combined bundle of documents was handed up by the parties, and it was agreed upon that the documents are what they purport to be.
5. The arbitration hearing was digitally recorded.
6. The parties agreed not to call any witnesses and to submit oral argument.
7. This award was due on 26 February 2013. Subsequent to the arbitration date, I requested extension to submit the award on 11 March 2013, which extension was granted.

BACKGROUND TO THE DISPUTE

8. The applicant declared a dispute relating to the interpretation or application of the PSCBC Resolution No.7 of 2000 relating to his annual leave he forfeited in the 2010/2011 leave cycle. The particular dispute relates to the interpretation and application of paragraphs 7.1 and 7.6 of the aforementioned Resolution, which provides as follows:

7.1 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) 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.

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.

e) The department shall not unreasonably refuse to grant leave to employees who apply, taking into consideration service delivery requirements".

7.6 Leave for occupational injuries and disease

"a) Employees who, as a result of their work, suffer occupational injuries or contract occupational disease, shall be granted occupational injury and disease leave for the duration of the period they cannot work.

b)

9. During July 2010, the applicant had a severe injury on duty and he was unable to work for almost a year. The applicant, at the time of the accident, had 26 days annual leave to his credit and he did not utilise same within the particular 18 months annual leave cycle. The applicant claimed that he was unable to utilise the said leave as a result of his accident. The applicant forfeited these leave days due to the provisions of paragraph 7.1.
10. The applicant filed a grievance with the employer on 8 May 2012, which outcome was not in favour of the applicant. The applicant then filed a second grievance on 11 May 2012, which outcome was similarly not in his favour.
11. The applicant then referred a dispute to this Council on 6 August 2012 relating to his forfeited annual leave. In his referral it was indicated that he had an injury on duty which rendered it impossible for him to take annual leave for 2010 / 2011. He had been informed that he had now forfeited his annual leave.
12. The applicant requested that his leave credit, which he unfairly forfeited, be paid out to him, alternatively be rescheduled to enable him to utilise same at a later stage. The matter was then set down for Conciliation on 3 October 2012. As the matter could not be resolved, a certificate of non-resolution was issued. The applicant filed his request for arbitration with this Council on 3 October 2012, indicating that the employer unfairly refused annual leave or pay out of such annual leave.
13. The matter was then set down before me for Arbitration on 12 February 2013.

ISSUE TO BE DECIDED UPON

14. The dispute before this Council is in terms of Sections 24(2), [24(5)] - Collective agreement - interpretation or application (Res 7 of 2000).
15. The particular issue in dispute concerns 26 annual leave days to the credit of the applicant at the time the applicant was injured. The applicant forfeited the said annual leave days due to him not utilising same within the particular 18 months annual leave cycle, as is provided for in paragraph 7.1.
16. The applicant contended that he could not have applied for the said leave within that particular cycle of 2010 / 2011 and even if applied for and granted, would not have been in a position to utilise same due to his injury status during said cycle. The respondent opposed the applicant's claim.

ARGUMENT

What follows below is a summary of the submissions by the representatives of the respective parties.

The Applicant's Argument

17. The applicant's representative argued as follows:

- The applicant was severely injured during July 2010 when a massive steel gate fell on him. On or before the accident, the applicant had 26 annual leave days to his credit. Subsequent to the accident, the applicant was on occupational injury sick leave in terms of paragraph 7.6 for almost a year.
- When the applicant returned from his occupational injury leave and he enquired about his annual leave that was to his credit just before the accident, he was informed that he in fact forfeited this annual leave due to him not utilising same within the cycle.
- The applicant lodged a grievance in this regard but the outcome of the grievance was not in his favour.
- The applicant then referred this dispute to this Council.
- The representative of the applicant submitted that it is common cause that employees would not forfeit annual leave in the event of annual leave that could not be taken due to service delivery requirements of the respondent. The applicant did not take his annual leave in the 2010/2011 cycle, as he was incapacitated and therefor unable to utilize same and he was on occupational injury leave in terms of paragraph 7.6.
- The applicant could not take both forms of leave, as in the event of him taking annual leave, he would lose occupation injury status.
- Due to the severe nature of the injury of the applicant, he was unable to apply for the annual leave and would not have been in a position to utilise same in that leave cycle.
- It was argued that in the event that the applicant applied for his annual leave at that time and it was granted, it would have been a futile exercise.
- The applicant was simply deprived of making use of his entitled annual leave due to circumstances beyond his control.
- In a similar case *PSA obo KAIA v Correctional Services*, an employee was deprived of utilising his annual leave as a result of his suspension. The commissioner ruled in favour of the employee, indicating that where an employee was on suspension, he was unable to utilise annual leave, which was not a result of his own doing.
- The commissioner ruled that the applicant be paid 12 days for the leave he forfeited.
- See also *Jardine v Tongaat-Hulett Sugar* [2003] 7 BLLR K 717
- It was emphasised in the said cases that the affected employees were deprived of utilising their annual leave, due to intervention and not as a result of their own acts or omissions.
- He submitted that the same principle should apply *in casu*.
- He further submitted that it would be unfair in the event that an employee is deprived of an entitled benefit due to no fault of his own.

- The applicant was also not, in terms of policy, cautioned that he would forfeit his annual leave should he not take it within a certain period.
- The principle was emphasised that an employee in such circumstances could not be deprived of his benefits.
- Annual leave constitutes a personal matter and when applied for and utilised, particular family circumstances are to be taken into consideration by the specific employee.
- How could an employee practically apply for and utilise his annual leave when incapacitated due to an injury at his place of work?
- Circumstances beyond the control of the applicant barred him from meaningfully applying for and utilising his entitlement to annual leave.
- The representative of the applicant concluded by requesting that the applicant be paid his forfeited annual leave, alternatively, his forfeited annual leave be rescheduled for utilisation by the applicant at a later stage.

The Respondent's Argument

18. The respondent's representative argued as follows:

- The respondent did not refuse or decline the applicant the relevant annual leave, as he never applied for such leave.
- The applicant is not entitled to the particular annual leave, as he forfeited same in terms of resolution 7 of 2000.
- In terms of said resolution, the applicant could not carry his vacation leave forward for more than 18 months.
- This case could not be compared with the cases the applicant's representative referred to, as the respondent did not suspend the applicant.
- There is a difference between being on suspension and being on occupational injury leave
- The cases the applicant's representative referred to is therefore irrelevant.
- The applicant is a senior employee who on a daily basis advises other subordinates and he should have known about the provision that he could forfeit his annual leave if not taken in the 18 month cycle.
- There was therefore no need to caution the applicant in this regard.
- When the applicant returned from his occupational injury leave, there was still sufficient time available for the applicant to apply for his annual leave, which he did not do.
- He requested that the case of the applicant be dismissed.
- He referred to *Dhanraj & Another v Department of Correctional Services [2010] 9 BALR 909 (PSCBC)*

ANALYSIS

24. According to Grogan, Workplace Law, p361:

“A dispute over the interpretation of a collective agreement exists when the parties disagree over the meaning of a particular provision;

.....a dispute over the application of a collective agreement arises when the parties disagree whether the agreement applies to a particular set of facts or circumstances. However, the dividing line is not always clear.

...The arbitrator in NUMSA / VWSA interpreted the agreement by applying the common-law principles of interpretation of contract. Some arbitrators hold that such an approach is incorrect, because collective agreements are sui generis - the object of the interpreter should rather be to ensure that the collective agreement effectively ensures sound industrial relations.

*Thus in Northern Cape Forests v SA Agricultural & Allied Workers & others * the Labour Appeal Court pointed out that '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 that of an ordinary commercial contract'*

.....“This, said the court, would have frustrated one of the objects of the LRA—namely, the effective, fair and speedy resolution of labour disputes. It was, said the court, quite clear that these primary objects of the Act were better served by the 'practical approach to the interpretation and application of the collective agreement rather than by reference to purely contractual principles'.

This is not to say that the ordinary principles of interpretation of contracts 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 whether the 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 the parties have agreed at the time 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—i.e. that evidence outside the written agreement itself is not generally admissible if the words of the memorandum are clear - when interpreting collective agreements.”*

25. In the Labour Appeal Court case of *SA Municipal Workers Union v SA Local Government Bargaining Council & Others*, it was reflected: *“After reference to relevant case law, the court held that a collective agreement was unlike ordinary contracts and that the primary objects of the LRA 1995 were better served by an interpretive approach suited to promote the 'effective, fair and speedy resolution of disputes'. That was the approach adopted by the arbitrator. He had identified the purpose of the collective agreement, namely, the provision of an annual leave benefit for the employees, particularly*

those working a shift system, and had interpreted the agreement in a manner that he deemed fair and equitable.” [my emphasis]

26. In said case, it was emphasised that where an arbitrator is called upon to interpret a collective agreement or to determine the application thereof in a specific situation, the purpose of the collective agreement is to be determined together with the principles of fairness and equity.
27. *In casu*, paragraph 7.1 provide, amongst other, that where an employee could not utilise his annual leave as a result of the service delivery requirements of the employer, the employee could be paid his annual leave that he could not utilise in that cycle. I could find no reason why the same fair principle could not apply in the event where an employee could not utilise his annual leave as a result of circumstances beyond his control. The criteria referred to in the said provision, “*service delivery requirement of the employer*”, protect the employer’s ability to render service and to protect the employee in reverse circumstances in the application of this provision, could only be fair and equitable. I could find no reason why an applicant in his circumstances should forfeit his annual leave due to his incapacity status. The applicant was removed from his place of work due to a work related injury. Why the same principle of fairness should not apply where an employee had to exercise occupational injury leave, would not make any sense in fairness.
28. See:
- *PSA obo Makhaya M P v Department of Correctional Services (unreported)*
 - *Jardine v Tongaat-Hulett Sugar [2003] 24 ILJ 1147 (LC)*
 - *Dhanraj & Another v Department of Correctional Services [2010] 9 BALR 909 (PSCBC)*
 - *SA Municipal Workers Union v SA Local Government Bargaining Council & Others (2012) 33 ILJ 353 (LAC)*
 - Grogan, Workplace Law, p361

AWARD

29. I find, based on the principles of fairness and equity, that paragraph 7.1 read together with paragraph 7.6 be interpreted and applied in such a manner that :
- i. The 26 annual leave days the applicant had to his credit on the day of the accident, and which he forfeited, be re-instated and credited to the leave record of the applicant and rescheduled
 - ii. Such rescheduling should be implemented immediately by the respondent to be utilised by the applicant subject to the service delivery requirements of the respondent.

- iii. In the event that the applicant could not utilise the annual leave towards the end of the current cycle, due to the service delivery requirements of the respondent, the respondent should pay him for such annual leave not utilised.

Signed and dated at PRETORIA on this 11th day of March 2013.

Signature:

A handwritten signature in blue ink, appearing to read 'W. Koekemoer', is written over a horizontal line.

Panellist/s:

WILLEM KOEKEMOER