



PANELIST: ADVOCATE

J P HANEKOM

CASE NO: PSCB338-12/13

AWARD DATE: 5 FEBRUARY 2013

In the matter between:

PSA obo VAN DER MERWE

Applicant

and

DEPARTMENT OF TRANSPORT AND PUBLIC WORKS

Respondent

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION:

1. This matter was set down for arbitration on 15 January 2013 concerning a dispute about the interpretation and/or application of collective agreement. The Applicant's case involved two disputes and the Council issued a consolidation ruling on 30 November 2012 when the disputes in case PSCB333-12/13 and PSCB338-12/13 were consolidated. The notice of set down did not reflect so. I will however deal with both disputes in my award. In case PSCB333-12/13 the dispute relates to the non-payment of subsistence and a travel allowance in terms of Resolution 3 of 1999

(hereinafter referred to as the “First Resolution”). Case PSCB338-12/13 relates to a dispute about vacation leave in terms of Resolution 7 of 2000 (hereinafter referred to as the “Second Resolution”).

2. Ms. Mosetic, union official of PSA represented the Applicant. Ms. M Stoffels of the Department of the Premier represented the Respondent. The leading of evidence was concluded in one day and digitally recorded. At the conclusion of the hearing both parties agreed and requested to submit written closing arguments by 22 January 2013 after which I would issue my award on or before 5 February 2013.

ISSUE TO BE DECIDED:

3. Whether the Respondent correctly applied and interpreted the First and Second Resolution.

EVIDENCE AND ARGUMENT BY THE APPLICANT:

4. The Applicant testified and submitted documentary evidence and written argument in support of her case. I have decided to summarise her evidence and argument as far as I consider relevant for the purpose of my award.

Applicant:

5. The Applicant testified that she started employment with the Respondent in 1996 and is currently employed as an accounting clerk (level 6) at the Ceres office.

Case PSCB338-12/13 in respect of the Second Resolution:

6. The Applicant testified that she applied for three days leave (28 June 2011 until 30 June 2011 – 3 days) on 2 June 2011 which leave was approved by her supervisor, Assistant Manager, JH Welgemoed on 7 June 2011.
7. According to the Applicant she still had three days leave left from her previous leave cycle, which she had to take within 18 months otherwise she would forfeit the leave. Therefore the Applicant applied for the three days leave at the end of June 2011. She also applied for annual leave, in her new leave cycle, which started on 1 July 2011.
8. On 27 June 2011, the day before the Applicant was supposed to go on leave, she received a letter from her supervisor that was placed on her desk with the instruction to perform an urgent audit. She had to gather certain information and make certain copies. According to the Applicant the same letter was pushed underneath her office door when she arrived at work the next morning on 28 June 2011.
9. The Applicant further stated that she considered this as urgent work and was of the view that she would not be able to finish this instruction and the end of the month audit in time to go on leave on 28 June 2011 as she would only return after two weeks. Therefore she had to come to work on 28 June 2011 to perform this instruction and to complete her month-end duties. Month-end duties are not something which you could finish ahead of time. Further she was disciplined in the past for not following instructions.
10. During questioning the Applicant admitted that she did not know that she could apply that her leave be paid out. She was also not given a form that her leave was

disapproved. She also did not communicate with her supervisor to explain her situation as they have a problem to communicate.

Case PSCB338-12/13 in respect of the First Resolution:

11. The Applicant further stated that she was required to attend a workshop in July 2011 of which she only heard a week before her leave started. The Applicant made her own arrangements as to accommodation, which she normally did in the past.
12. The first day after the Applicant returned from leave she had to leave for Cape Town on that same day after they finished work. Once she and her supervisor arrived in Cape Town he informed her for the first time that he booked accommodation for them at a hotel. Only then did the Applicant inform her supervisor that she made arrangements to stay with children in Bellville.
13. Her supervisor (J Welgemoed) then informed the Applicant that he would try to cancel the accommodation. The following day Welgemoed informed the Applicant that he only managed to cancel the last three days of accommodation due to short notice. Accordingly the Applicant submitted a subsistence and travel claim for four days and was only paid for three days due to the one day's accommodation that could not be cancelled.

CLOSING ARGUMENT:

14. Ms. Mosetic for the Applicant submitted that the Applicant's annual leave for the three days was not processed on the Persal system and therefore the 3 days leave should be paid out to the Applicant, seeing that the Applicant received instruction from her supervisor to complete an audit. This was understood by the Applicant to

be in terms of the employer's service delivery requirements.

15. In respect of the subsistence and travel allowance, Mosetic submitted that Welgemoed should have known about the Applicant's private arrangements or should have confirmed with the Applicant before he made the booking at the hotel and therefore the Applicant should be reimbursed with the R286, 00 which was deducted from her subsistence and travel claim.

EVIDENCE AND ARGUMENT BY THE RESPONDENT:

16. The Respondent led the evidence of JH Welgemoed and also submitted documentary evidence in support of its case. Again I have decided to summarise the evidence and argument as far as I consider relevant for the purpose of my award.

JH Welgemoed ("Welgemoed"):

17. Welgemoed testified that he is employed as Assistant Manager at the Ceres office and acts as Applicant's supervisor.

In respect of the Second Resolution:

18. Welgemoed testified that the determination on leave in the public service issued in July 2009 by the Minister for Public Service and Administration (hereinafter referred to as the "Leave Determination") in paragraph 5.5 and 5.9 has set out similar requirements as the Second Resolution that an employee must take her leave not later than 6 months after the expiry of the relevant leave cycle. Therefore the Applicant was notified and a note was made on the original of the application of leave form that the Applicant was not entitled to take the three days leave during the new

leave cycle.

19. Welgemoed could not recall that he left a letter on the Applicant's desk on 27 June 2012 to complete an instruction. According to him he gave the Applicant a verbal instruction. Welgemoed also send an email to the Applicant in that regard on 28 June 2011 at 07h50 in which he requested a certain audit. His explanation to this was that he forgot that the Applicant was supposed to go on leave. That same morning once Ms Hector told Welgemoed that the Applicant was at work and supposed to be on leave, he immediately went to the Applicant to inform her that she is not supposed to be at the office. Welgemoed further took the matter up with the Human Resource Office (Mrs. Muller) where after he again informed the Applicant that she is not supposed to be at work and that she will not be able to reclaim the three days leave at a later stage. Mrs. Muller also informed Welgemoed not to chase the Applicant away or to give her any further instructions. The instruction given to the Applicant was finalised by Welgemoed himself.
20. During cross-examination Welgemoed denied that he pushed a letter underneath the Applicant's office door. He further denied that the so-called letter on the Applicant's desk the previous day. The Applicant never approached him to explain her problem or requested that the leave be cancelled. The audit that he requested the Applicant to do was something that anybody else could have done as it merely required someone to gather certain information and make the necessary copies. Welgemoed further contested the possibility that he would have given the Applicant written warning if she failed to do the necessary audit.

In respect of the Second Resolution:

21. Welgemoed testified that he made the necessary adjustment to the Applicant's subsistence and travel claim in that the Applicant only qualified for three days instead of four days. It was due to the non-cancellation of the first day when they attended the workshop. Respondent therefore incurred fruitless and wasted costs for that day. Welgemoed did however inform the Applicant that she could not claim for the first day.
22. Welgemoed further stated that he normally does the accommodation bookings for the office when they have to attend workshops. He tried to get hold of Applicant more than once on her cell phone, but the Applicant failed to answer her phone or to return his call. Therefore he deemed it necessary to make the necessary booking.
23. During cross-examination Welgemoed stated that if the Applicant wanted to stay with her family she should have asked him for permission. Further when questioned about the Applicant's private arrangements in the past, Welgemoed responded that the Applicant did not attend many courses in the past and it was not long ago that the Applicant also attended a course where she stayed at the hotel.

ANALYSIS OF THE EVIDENCE AND ARGUMENTS:

24. I have decided only to focus on those issues i consider relevant for the purpose of my award.

In respect of the Second Resolution:

25. It was common cause between the parties that the Applicant had to take the three days leave otherwise she would have forfeited the leave. The Applicant did not utilize

the leave as she came to work during that period. Further the leave was not processed as such. The parties are however in dispute as to the Applicant's entitlement to the three days leave.

26. The Applicant and Welgemoed corroborated one another in various respect even though they differ totally from each other on some issues, for instance in respect of how the instruction was given. To my mind regardless thereof I cannot say that the one is a better witness than the other. Both were honest to make certain concessions as to what they could not remember and the communication problem between them. Under the circumstances I have two versions before me that I will further deal with hereunder.
27. Paragraph 7.1(d) of the Second Resolution stated as follows: "The remaining days shall be utilized 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." Further the determination on leave in the public service issued in July 2009 by the Minister for Public Service and Administration (hereinafter referred to as the "Leave Determination") in paragraph 5.5 and 5.9 contains similar requirements. It clearly means that an employee must take his or her leave not later than 6 months after the expiry of the annual leave cycle. If not the leave will be forfeited or will fall away. Paragraph 5.9 however states that if the employer's operational requirements do not allow an employee to take the outstanding leave within the time period and the employee's application for leave is denied because of operational requirements then such leave must be paid out to an employee on written request.
28. In my view the leave determination is simply there to qualify the Second Resolution. It is merely a guideline to explain the Second Resolution when it comes to the entitlement to leave. In my view there is no uncertainty as to how to interpret

paragraph 7.1(d) referred to above. When the employer's rational requirements do not allow an employee to take leave before it expires, such leave shall be paid out to the employee. It is clear from the Applicant's evidence that she deemed it necessary to come to work contrary to Welgemoed's evidence that he did not instruct the Applicant to work during those days. The Applicant did not contest it during cross-examination that Welgemoed more than once told the Applicant that she is not supposed to be at work and that she is going to forfeit that leave if she continues to work. The Applicant did not respond to that and did not communicate with the employer as to the operational requirements. It is clear from Welgemoed's testimony that the work could have been done by anybody else. It was my inference from the Applicant's testimony that she decided on own accord to take the responsibility to come to work and it was not due to operational requirement by the employer who refused to grant her leave in respect of the instruction. It is a precondition in terms of leave determination policy that the employer should have refused the leave before the leave can be paid out, which was not the case in the instant matter. Therefore I am convinced that the employer did correctly apply the Resolution in respect of the instruction. Welgemoed when questioned by the Arbitrator also confirmed that there was a communication problem between the Applicant and himself. According Welgemoed Applicant would never come and see him in person to discuss problems. The Applicant would rather send an email to communicate. The few times when the Applicant did speak to Welgemoed she would speak to him with disrespect or would challenge his level of authority and powers.

29. However in respect of the month end audit, it was the Applicant's uncontested evidence that the work cannot be finished before hand and needs to be done at the end of the month. It coincidentally happened that the 3 days leave was at the end of the month. This evidence was not challenged by the Respondent and Welgemoed did not testify that someone else could do the month end audit. Seeing that the

Applicant did not return to work the Monday due to annual leave, she could not postpone the month end audit until her return from leave and was therefore compelled to finalise that work in time. It was therefore my inference of the evidence as a whole that the Applicant was required to perform the month end audit due to operational requirements and that she was therefore entitled to one day's pay.

In respect of the First Resolution:

30. It was common cause between the parties that the Applicant attended a four day workshop and that Welgemoed booked accommodation at a certain hotel for the four day period. The Applicant did not inform Welgemoed in advance that she would make private arrangements. She assumed that Welgemoed would consider that to be the case. Welgemoed on the other hand tried to get hold of the Applicant in respect thereof but could not get a timeous response.
31. It was my inference from Welgemoed's testimony that he thereafter made the necessary accommodation arrangements seeing that the Applicant previously stayed at the same hotel when she attended another workshop. The Applicant did not report to him as to private arrangements. Applicant also did not have his permission to make her own private arrangements. To my mind one would have expected the Applicant to communicate with her supervisor. Clearly there was a lack of communication between the Applicant and Welgemoed. To my mind the Applicant should have asked herself as to why Welgemoed tried telephonically to get hold of her during her leave. In my view the Applicant should have returned his call or give Welgemoed a missed call.
32. The First Resolution deals with remunerative allowances and benefits. Paragraph 1 of the First Resolution states that "the trade unions and the employer enter into the

agreement, entitled “Agreement on Remuneration, Allowances and Benefits” which is attached to this Resolution, on the following terms.” Now in terms of paragraph XII of this annexure sub-paragraph 3.2 states as follows: “If an employee must take an official journey that lasts for 24 hours or longer, for each day or part of a day on the journey she or he may claim either:

- a) Reasonable actual expenditure on accommodation plus an allowance of R37,00 a day, or
- b) An allowance of R121,50 per day”

The last mentioned amount was subsequently amended to R286, 00 per day by Ministerial Determination with effect from 1 April 2011.

There is nothing unclear as to the interpretation of these provisions. Ordinary words must be given their ordinary meaning. That means that an employee will be entitled either to the expenses of actual accommodation during the workshop or an allowance per day. In the instant case the Applicant assumed that the employer would know that she was going to make use of a private arrangement. It was the undisputed evidence of Welgemoed that the Applicant only attended a few workshops. It was therefore not a case where the Applicant frequently had to do her own travel arrangements. Recently she attended a workshop where Welgemoed made the necessary arrangements. Under the circumstances I am of the view that the Applicant could not simply assume that the employer would be aware of her private arrangements. Welgemoed made the accommodation arrangements after he could not get hold of the Applicant and he could afterwards only manage to cancel the last three days of the accommodation arrangement. It is therefore clear that the employer acted reasonably under the circumstances and as a result incurred fruitless and wasted costs as far as the first day's accommodation at the hotel was concerned. In my view it was mainly due to the Applicant's fault. Applicant should

have made proper communication with her supervisor in this regard. I therefore cannot see how the Applicant can be entitled to claim for the actual expenditure that could not be cancelled as well as a daily allowance. Under the circumstances I find that the employer correctly applied the provisions of the First Resolution and that the Applicant is therefore not entitled to the daily allowance.

AWARD:

33. In the premises I make the following award:

- (1) I find that the Respondent correctly interpreted and applied the First Resolution.
- (2) I further find that the Respondent correctly interpreted and applied the Second Resolution in respect of the instruction.
- (3) I further find that the Respondent incorrectly interpreted and applied the Second Resolution in respect of the work related to the month end audit.
- (4) I therefore order the Respondent to pay the Applicant one day's salary, for the work that she performed on 30 June 2011 in respect of the month end audit, on or before **15 March 2013.**
- (5) I reserve jurisdiction if there is a discrepancy between the parties as to the calculation of monies.
- (6) I make no orders to costs.



ADV J P HANEKOM