

ARBITRATION AWARD

Case Number: PSCBC605-09/10
Senior Commission / Panellist: Martinus van Aarde
Date of Award: 18-Oct-2010

In the **MATTER** between

PSA obo S. S. Jonase

(Applicant)

and

Department of Justice & Constitutional Development

(Respondent)

Applicant's representative: Mr. A. J. L. Greeff

Applicant's address: C/o: PSA

PO Box 7673

BLOEMFONTEIN, 9300

Telephone: (051) 403 1300

Telefax: (051) 403 1315 / 9

E-mail: —

Respondent's representative: Adv. N. Khoza

Respondent's address: Department of Justice & Constitutional Development

167 Andries Street

8th Floor Maroka Heights

PRETORIA, 0001

Telephone: (012) 357 8773

Telefax: (012) 357 8320

E-mail: —

1. Details of hearing / representation

The case was set down for an arbitration hearing on 18 October 2010 (10h00) at Bloemfontein, Department of Justice & Constitutional Development (7th Floor, Boardroom). Mr. Jaco Greeff: Official PSA represented the Applicant (Jonase). Adv. N. Khoza: Legal Officer represented the Respondent (DJCD). The proceedings were recorded (CD on file).

2. Issue(s) to be decided

The main issue in dispute relates to an application in terms of the **Labour Relations Act 66/1995 section 24** re the interpretation/application of a collective agreement (Resolution 7/2000) which deals with family responsibility leave.

3. Background to dispute

3.1 The Applicant in this matter is Mr. S. S. Jonase who is in the employment of the Respondent in the capacity of Deputy State Attorney (Bloemfontein).

3.2 The Applicant lodged a dispute (LRA 7.11) on 16/03/2010 on the basis that "his application for family responsibility leave (3 days) was reversed by HQ to vacation leave in relation to his late brother in law". The case was set down for conciliation on 23/04/2010. The dispute was declared unresolved and a certificate of non-resolution was accordingly issued in terms of **section 135(5)/LRA '95**. The Applicant then filed a Request for Arbitration on 30/04/2010.

4. Survey of Evidence / Argument

4.1 The parties presented one witness each and furthermore submitted a bundle of documents marked Annexure A & B. The Applicant himself tendered direct evidence and the Respondent called Mr. V. Mabaso: Assistant Director: Directorate Service Benefits (HQ).

4.2 Applicants' case

The Applicant's case briefly boils down to the following—

- 4.2.1 the Applicant (a Xhosa-male) is married to a daughter of the Phenduka-family;
- 4.2.2 by operation of (custom) law he becomes a full member (son) of the Phenduka-family whilst his wife becomes the daughter of his/the Jonase-family. Within these family-clans there are no distinctions between father and mother, brother or sister-in-law: they are regarded as his/her father/mother, brother or sister by operation of (cultural) law;
- 4.2.3 his brother-in-law passed away on 10 April 2009 and the funeral was held on 21-24/04/2009. On 20/04/2009 he filed an application for family responsibility leave for the period on 21-24/04/2009 (Annexure B.1). This application was recommended by his Supervisor (Mr. I Gough) and according to him approved by the HOD (Mr. Sello);
- 4.2.4 as there was uncertainty as to whether he qualified for responsibility leave or not, he also called HR (HQ). According to Mr. Bouman/Me. A. Reynecke and accountant A. Ordell he qualified for the family responsibility leave. Apparently, HQ later reversed this approval to vacation leave (debited his leave credits accordingly);
- 4.2.5 Applicant/Mr Greeff submitted that—
 - (a) he is entitled to family responsibility leave in terms of Resolution 7/2000 (clause 2.2.4) read with the Public Service Leave Policy (clause 7.7.3) – Annexure A.pp.14-16;
 - (b) the Respondent failed to execute their duty with due care considering “the employee’s cultural responsibilities” and/or failed to afford the Applicant the opportunity to make a proper representation/motivation in this regard;
 - (c) the Panellist/Council must reverse the decision taken by the Respondent.

4.3 Respondent's case

The Respondent's arguments simply boils down to the fact that a brother-in-law does not fall within the ambit of clause 2.2.4/the employee was not entitled to family responsibility leave in circumstances alike, and, the final approval of such applications rests with HR (HQ).

5. **Analysis of evidence / argument**

Having heard the arguments of both parties, I will now address the material issues separately—

5.1 Resolution 7/2000 (clause 22) read as follows—

- “22.1 Employees shall be granted 3 days leave per annual leave cycle for utilisation if:*
- 22.1.1 The employee's spouse or life partner gives birth to a child; or*
 - 22.1.2 The employee's child, spouse or life partner is sick.*
- 22.2 Employees shall be granted 5 days leave per annual leave cycle for utilisation if:*
- 22.2.1 The employee's child, spouse or life partner dies; or*
 - 22.2.2 An employee's immediate family member dies.*
- 22.3 The number of family responsibility leave days taken according to 22.1 and 22.2 above shall not exceed five (5) days in an annual leave cycle, unless special circumstances warrant further leave at the discretion of the Head of Department.*
- 22.4 Immediate family member for purposes of this provision means the employee's parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling. The granting of family responsibility leave must be taken with due consideration of the employee's cultural responsibilities. Where the latter discretion is exercised, Heads of Departments must limit the total period of family responsibility leave to a maximum of 5 days.*
- 22.5 Employees who have used all their family responsibility leave may, subject to the approval of the Head of the Department, apply to:*
- 22.5.1 use available annual leave; or*
 - 22.5.2 use up to 184 calendar days of unpaid leave.” (emphasis added)*

5.2 Clause 7.7.3/PS Leave Policy contains similar provisions (however, it does not contain an equivalent for clause 22.4/Resolution 7/2000). Same applies equally to the **Basic**

Conditions of Employment Act 75/1997, section 27(2) – most probably the statutory source of the in-house provisions/collective agreement.

5.3 Mr. Greeff/the Applicant firstly argued that Resolution 7/2000 (clause 22.4) is vague in the sense that the provisions are silent on the question whether a direct family member/immediate family member includes natural members and/or family members by operation of law by marriage (custom-/civil) and thus also includes brothers-/sisters-in-law. According to argument, the provisions should be interpreted broadly to include a 'sibling' as brother-/sister-in-law.

5.3.1 In questions alike, the general principles to be applied is to give meaning in the ordinary/literal sense.

5.3.2 Reading the text as a whole, it is firstly clear that the drafters of the said Resolution /Policy-statement (or for that matter our legislator) only makes provision for direct/immediate family members by naming who will be regarded to benefit from these provisions. I believe that if the drafters intended to include other members by operation of law they would have expressly stated so. The provisions are thus narrowly defined, however, legislation (**section 27/BCEA '97**) makes provision to broaden the scope, especially as to the number of paid leave days in question. By collective agreement the maximum days per leave cycle is limited to a maximum of five (5) days in lieu of family responsibility leave (unless further leave is granted in terms of clause 22.5). Secondly, to adopt a broader interpretation does not make any real sense within the employment/economical environment. The question is where will we draw the line if to be extended by operation of law (marriage/and possible separation).

5.3.3 Me. Khoza also referred me to the following case law which held that a brother-in-law is not *per se* included in the definition of (immediate) "family". See **Rex v**

Muller 1943 CPD 236; R v Black 1914 EDL 549. What the Applicant is requesting is that the Council/Panellist must now step into the shoes of the parties to the collective agreement and to broaden same to include alternatives to the definition of 'immediate family' who can henceforth also qualify for family responsibility leave. This question can best be addressed at the negotiation table.

5.4 Mr. Greeff/Applicant furthermore relied on clause 22.4 ("... the granting of family responsibility leave must be taken with due consideration of the employee's cultural responsibilities..."). In terms of argument, the Respondent failed to consider same properly. It was furthermore argued that "it is the responsibility of the Respondent to enquire into the matter before a final decision is taken".

5.4.1 Firstly, I must point out that I cannot align myself with the Applicant's argument that it is "the responsibility of the Respondent to enquire/approach the employee to enquire whether the leave application contains aspects of cultural issues". Having regard to the pro forma leave form (Annexure B.1) it is incumbent on the employee to "provide evidence" when applying for family responsibility leave. It is unsure whether "evidence required" refers to a death-/birth certificate etc. or also to a "motivation/request to consider cultural issues". In any event, I am not convinced that there rests a positive obligation on the employer to enquire into each and every application to determine whether there indeed are any other-/cultural issues at stake. From a simple administrative point of view this practice appears to be highly unlikely/questionable. The 'cultural considerations' in itself can also be highly complex, e.g. a Xhosa-person reverting to Muslim-religion.

5.4.2 Secondly, the 'discretion' referred to in par. 22.4 in my opinion, refers to the 'discretion of the HOD' referred to in clause 22.3. That is to say to the number of days required in the specific circumstances. Obviously, this can also differ considering whether the employee already took family responsibility leave in the 2-

year cycle or even considering the distance to travel to attend the event.

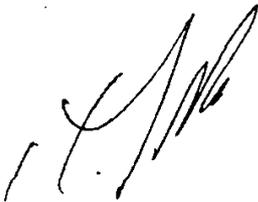
5.4.3 Lastly, having regard to Annexure B.1 (Leave Application) it is quite clear that the Applicant's Supervisor (Mr. Ian Gough) only recommended the application. However, the HOD (Mr. Sello) never signed (approved/disapproved) the application at all. The Applicant's contention that his 'approved leave was later reversed by HQ' does not hold any water. The question also comes to mind as to where lies the final authority/approval. Does it now means that if a leave application was approved by the HOD, HR (HQ) does not have any final say if there was a *bona fide* mistake. I do not believe so – HR still needs to capture the data on the leave-system and when an obvious error was made in terms of the policy, they certainly need to take corrective action.

6. Award

In case PSCB605-09/10 the following Award is rendered—

6.1 The Applicant is not entitled to family responsibility leave in terms of Resolution 7/2000 (clause 22) in circumstances of a non-direct/-immediate family member (e.g. brother-/sister-in-law).

6.2 No order as to cost is made.



Signature: _____

Senior Commissioner: **Martinus van Aarde**

Sector: **Justice**