



PANELIST: ADVOCATE J P HANEKOM

CASE NO: PSCB301 -13/14

AWARD DATE: 28 FEBRUARY 2014

In the matter between:

**PSA obo CRAFFORD**

**Applicant**

and

**DEPARTMENT OF CORRECTIONAL SERVICES NATIONAL**

**Respondent**

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**ARBITRATION AWARD**

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**DETAILS OF THE HEARING AND REPRESENTATION:**

1. This matter was set down for arbitration in on 7 February 2014 concerning a dispute about the interpretation and/or application of a collective agreement (Resolution 7 of 2000 – hereinafter referred to as the “Resolution”). Mrs. Mosectic, union official of PSA represented the Applicant. Mr. A. Luphondo, of Legal Services within the Department represented the Respondent. Both parties agreed and requested to argue the case on paper and that written closing arguments will be submitted on or before 14 February 2014. I would then issue my award on or before 28 February 2014.

**ISSUE TO BE DECIDED:**

2. Whether the Respondent correctly applied and interpreted the Resolution.

### **HISTORICAL BACKGROUND:**

3. The Applicant is employed as a Correctional Officer Grade I at Oudtshoorn Correctional Facility. The Applicant applied for annual leave for the period 9-31 May 2013.
4. 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 be calculated according to normal working days (Monday to Friday) in terms of the prescripts.
5. According to the way the Respondent calculated the Applicant's leave days it amounted to 21 leave days, whilst the Applicant's way of calculation amounted to 17 leave days. Accordingly the Respondent calculated 4 extra leave days that was taken off the Applicant's leave credits. The Applicant now request that 4 days leave be reinstated.

### **ARGUMENT BY THE APPLICANT:**

6. I have decided to summarise the Applicant's argument as far as I consider relevant for the purpose of my award.
7. 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.
8. In August 2012 the Minister for Public Service and Administration issued a 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 counteracted as working days which shall mean Monday to Friday.” According to the Applicant he applied in advance for leave on 1 April 2013 and therefore the leave determination should be read with the Resolution as such. Accordingly the Applicant submitted that the Respondent did not correctly apply the Resolution and therefore owes the Applicant 4 days’ salary to wit R3 909, 00 (R977, 38 per day x 4).

### **ARGUMENT BY THE RESPONDENT:**

9. Again I have again decided to summarise the Respondent’s argument as far as I consider relevant for the purpose of my award.
10. It was the Respondent’s argument that the Applicant’s dispute does not relate to the interpretation of the Resolution, but that of the Leave Determination and the directives on leave of absence in the Public Service. The arbitrator does not have jurisdiction to interpret the leave determination. In terms of paragraph 7.1(a) of the Resolution, the refining leave dispensation must be done at the council by way of collective bargaining, not by way of leave determinations.

### **ANALYSIS OF THE ARGUMENT:**

11. I have decided only to focus on those issues I consider relevant.
12. Paragraph 7.1 of the Resolution states:

#### **“Annual leave:**

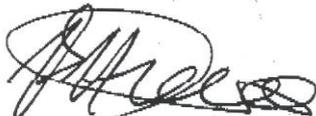
- a) The annual leave dispensation in this agreement shall provide a framework that may be further refined, subject to service delivery requirements of any sector.
- b) Employees shall accrue leave days per annual leave cycle, which shall be granted according to annexure A
- c) ... “

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."

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 annual leave planner in my view is simply to manage annual leave of all employees and does not constitute an application for leave. The employee must still apply for annual leave. 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 that 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. I was considered common cause that the Applicant applied for annual leave on 1 April 2013 and that the shift roster was is drafted approximately a week before the shift stars. Accordingly I am convinced that the Applicant applied for annual leave in advance and that paragraph 8.5 above applies. The Applicant’s leave days should therefore have been calculated from Monday to Friday totaling 17 days instead of 21 days.

**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 repay the Applicant the 4 leave days’ salary to wit R3 909,00 (R977,38 per day x 4) or reinstate the Applicant’s 4 days annual leave credits on or before **15 April 2014**.
  - (3) I make no order to costs.



ADV J P HANEKOM

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