



**IN THE PUBLIC SERVICE COORDINATING BARGAINING COUNCIL**

**HELD AT KIMBERLEY**

**ON 28 JANUARY 2014**

**IN THE MATTER BETWEEN:**

**PSA obo van Wyk J K**

**AND**

**DEPARTMENT OF CORRECTIONAL SERVICES-NORTHERN CAPE**

**PSCB 425-13/14**

**JURIDITIONAL RULING**

## **DETAILS OF HEARING AND REPRESENTATION**

1. The present dispute between PSA obo Mr. van Wyk J K (hereinafter referred to as the applicant) and The Department of Correctional Services- Northern Cape (hereinafter referred to as the respondent) was referred to Arbitration in terms of Section 24 (2) of Act no 66 of 1995, as amended (the Act). At the Arbitration hearing which was scheduled to be held at the Boardroom of the applicant in Kimberley on 28 January 2014, the applicant was self represented and the respondent was represented by Mr. J Khephe.
2. The parties were assisted at a pre-arbitration conference and a signed minute was handed up.
3. The applicant agreed to submit his founding argument by no later than 4 February 2014. The respondent was to oppose by no later than 11 February 2014. Should the respondent wished to answer such answer was to reach Council by no later than 18 February 2014. Hence being the last date of the arbitration.
4. The respondent failed to file a submission and the matter was considered in default.
5. Herewith brief reasons for my decision in terms of Section 138 (7).

## **THE ISSUE**

6. The issue to be decided by myself is whether the applicant is entitled to leave pay in terms of Resolution 2 of 2000, the unused annual leave for the 2012 cycle.
7. The applicant could not take leave in 2012 due to his medical incapacity. The applicant sought the payment of his unused leave but the respondent refused.

## **SURVEY OF SUBMISSIONS**

### **APPLICANT'S SUBMISSION**

8. The applicant contends that he was on temporary incapacity leave and could not apply for annual leave simultaneously therefore the respondent was to have arranged with him to reschedule his annual leave.
9. He suggested that as per the Determination and Directive on Leave of Absence in the Public Service, employees must be cautioned in time that if at the end of the leave cycle, they have not utilized such leave. The respondent failed to do so and decided to punish the applicant in forfeiting his leave.
10. He submitted further that in the Determination and Directive, if due to an employer's service delivery requirements, an employee's application for leave is denied and not rescheduled such leave must be paid out to the employee at the end of the 6 months period after the expiry of the relevant leave cycle.
11. He argued that the Basic Conditions of Employment Act no. 75 of 1997 (hereinafter referred to as the

BCEA) clearly stated that annual leave can be accumulated, although the Collective Agreement determines the opposite.

12. He concedes that the Collective Agreement did not make any provision for unique cases therefore the BCEA should also take into consideration to assist employees. There is no prescription in the BCEA, as to when an employee should take his/her leave or that leave will be forfeited.
13. He argued that if an employer's policy does indeed have a forfeiture policy then that policy would be less favourable than the BCEA and therefore is unacceptable.
14. He concluded that the respondent had acted incorrectly by forfeiting the applicant's annual leave. The prescript in the Determination and Directive on Leave of Absence in the Public Service in Clause 5.11 and 5.14 allowed for non forfeiture of annual leave and he drew my attention to Clause 7.1 (d) of Resolution 7 of 2000.

### **ANALYSIS OF SUBMISSIONS**

15. I am obliged towards the version of the applicant in the absence of the respondent's submission.
16. Clearly, the applicant suggests that the Collective Agreement makes no mention of accumulated leave and that I should apply the provisions of the Basic Conditions Employment Act no. 75 of 1997. I am not inclined to do same as my mandate extends to the Interpretation and Application of a Collective Agreement and not a statute of law.
17. It is not disputed that the applicant is entitled to annual leave for the 2012 leave cycle.
18. Resolution 7 of 2000 is headed "***Improvement in the Conditions of Service of Public Service Employees***". I am persuaded to read its literal meaning.
19. In Clause 7 the issue of annual leave is dealt with.
20. Clause 7.1 (a) provides that "the annual leave dispensation in this agreement shall provide a framework that may be further refined, subject to service delivery requirements of any sector". I am therefore inclined to consider the Determination and Directive on Leave of Absence in the Public Service issued on August 2012, as the further refined framework.
21. Clause 5.11 of the Determination provides that indeed "Employees must be cautioned timeously if, at the end of the delivery cycle, they have not utilised their leave entitlements." There is nothing before me to suggest that indeed the respondent had advised the applicant in respect of the above.
22. Moreover the above provision is not discretionary. It places the burden on the employer to inform the employee.
23. I am persuaded by the applicant's submission that he had indeed requested annual leave and received no response from the respondent.
24. The applicant is indeed entitled to annual leave being paid out to him.

## **REMEDY**

25. The applicant sought to be paid his annual leave in the amount of R 26 274.86. I find that it is indeed a reasonable request and therefore appropriate in the circumstances.

## **FINDING**

26. The respondent is to pay the applicant his annual leave in the amount of R 26 274.86 (twenty six thousand two hundred and seventy four rand and eighty six cents) only.

27. The above amount is to be paid directly into the applicant's bank account into which the applicant's salary is ordinarily paid by no later than 15 March 2014.

28. There is no order as to costs.

**Signed at Kimberley on this 20<sup>th</sup> day of February 2014**

A handwritten signature in blue ink, appearing to read 'Shiraz Mahomed Osman'.

**PSCBC COMMISSIONER  
SHIRAZ MAHOMED OSMAN**