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ARBITRATION AWARD

Panellist/s: **Michael Marawu**
Case No.: **GPBC 839/2020**
Date of Award: **05-July-2021**

In the MATTER between:

NUPSAW obo Nkasayi, T and 21 others
(Union / Applicant)

and

Department of Environment, Forestry & Fisheries and DPSA
(Respondent)

Union/Applicant's representative:	Mr M Mdledle (NUPSAW Representative)
Union/Applicant's address:	Forestrust Building Hammerschlag Street Cape Town, 8000
Telephone:	084 304 0170
Fax/Email:	msimelelom@daff.gov.za
1st Respondent's representative:	Mr L Motsepe (DAFF Official)
Respondent's address:	Forestrust Building Hammerschlag Street Cape Town, 8000
Tel:	082 807 6129
Fax/Email:	lmotsepe@environment.gov.za
2nd Respondent's representative:	Ms C Sekgoele / L Modise (DPSA Official)
Respondent's address:	Private Bag X916 Pretoria 0001
Tel:	(012) 336 1063 / 084 586 7969 / 066264 7140
Fax/Email:	Claudia.sekgoele@dpsa.gov.za / modise.lestatsi@dpsa.gov.za

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was held at the premises of the department of Environment, Forestry and Fisheries in Cape Town from February 2021 and concluded on 07 June 2021. The parties were further given until the 21 June 2021 to submit written closing arguments and necessary calculations promised in this matter.

2. The Applicants were represented by a trade union (NUPSAW) official, Mr Msimelelo Mdledle, the Department of Environment, Forestry and Fisheries by Mr Lesley Motsepe and the Department of Public Service and Administration was represented by Ms Claudia Sekgoele. The arbitration proceedings were digitally recorded.

ISSUE TO BE DECIDED:

3. I am required to determine fairness in respect of the employer's interpretation and/or application of the Council's Collective Agreement relating to the claimed sea going allowance benefit of 27 employees, who worked at sea (offshore) from 2018 to 2019.

BACKGROUND

4. The Applicants in this matter are twenty seven (27) employees of the Department of Environment, Forestry and Fisheries, who are claiming that they all had to work at sea and were not paid necessary sea going allowance benefit in full for the period covering 01 April 2017 to 31 March 2019.
5. The Applicants have since challenged the Respondent's failure to pay the claimed sea going benefits, after numerous internal engagements about the same issue over a significant number of months.

SURVEY OF SUBMISSIONS AND ARGUMENTS

THE APPLICANTS' CASE

6. **Mr Msimelelo Mdledle (NUPSAW Representative)** submitted on behalf of the applicants in this matter a list of 27 employees that were not paid the full rate applicable within the department for working at sea over the period of 01 April 2017 to 31 March 2019.

7. He explained that in terms of the GPSSBC Resolution 1 of 2009 (Collective Agreement) and based on the determination made on the Council's arbitration award under case number: GPBC 486/2018, the department of Environment, Forestry and Fisheries was required to adjust sea going allowance flat rate to **R1078.36** from 01 April 2017 and **R1148.45** on 01 April 2018 to 31 March 2019.

8. The department did not pay the required rate of the sea going allowance to its 27 members as from 01 April 2017 to 31 March 2019, instead it paid below the required rate and lesser than the other employees cited in the above arbitration award (GPBC 486/2018), without a reasonable explanation or valid reasons.

9. The amounts that were not paid to the union's 27 members were submitted all reflected on the list provided, referring to claimed amounts for each employee in respect of 2018 to 2019 financial cycle. The amounts varied according to employee's service periods at sea over the period of the claim.

THE RESPONDENTS' CASE

10. **Mr Lesley Motsepe (DEFF Representative)** submitted on behalf of the department of Environment, Forestry and Fisheries that the matter was deferred to the department of Public Service and Administration (DPSA), as the main decision maker on such policy issues. He was made aware that the DPSA had sought legal opinion to give necessary guidance and proper resolution of this pending claim.

11. He did not necessarily dispute the amounts claimed or the case presented on behalf of the 27 department's employees, however the authority rests with the DPSA to given direction and necessary resolution, in the circumstances.

12. **Mr Mkhululi Mntuyedwa (DPSA's Director: Labour Relations and Dispute Management)** indicated that there is an ongoing process dealing among other things with the issue of the sea going allowance benefits to be adjusted and reviewed, at the Council's collective bargaining chamber. He did not necessarily believe that the resolution of the matter should be conducted outside the current ongoing collective bargaining process and required space to be given for the process to unfold.

13. He further stated that the issues raised in the applicants' claim are to be addressed upon conclusion of the collective bargaining process currently underway.

14. **Ms Claudia Sekgoele (DPSA Official)** stated that the department was currently ceased with thorough investigation and proper calculations of the amounts to be considered for the employees' sea going allowance claim. She sought a period not longer than two weeks from the 7th June 2021 to consolidate work undertaken and provide final figures on the necessary calculations to be presented from the DPSA's perspective in this regard.

15. The figures to be presented would be based on the calculations provided in terms of the relevant Resolution(s) and the Council's Collective Agreement. The DPSA needed to satisfy itself with proper calculations and fair determination of the relevant figures to be presented in this matter, in order to give due direction to all affected employees, in the circumstances.

ANALYSIS OF SUBMISSIONS AND ARGUMENTS

16. Most of the issues in this dispute were largely common cause, except for specific figures and amounts to be considered, wherein the parties were mainly relying on different assumptions and arguments. For instance, there was no dispute that the twenty seven employees (sea going officials) did work at sea (offshore) over the period from 01 April 2017 to 31 March 2019, doing work which makes the eligible for the sea going allowance. Where the parties dispute rested in this regard, was mainly on the second respondent representative's (Ms Claudia Sekgoele) contention that she had to provide the DPSA's own verified calculations in respect of the 27 employees, which were not made available to date.

17. The first respondent's representative (Mr Lesley Motsepe) also submitted that the sea going allowance benefits had to be approved and budgeted through the DPSA processes, in order for the 27 employees' sea going allowance claim to be concluded. However, both respondents could not dispute that the 27 employees were paid at a lower level than the one provided for in terms of the GPSSBC Resolution and the arbitration award issued under case number: GPBC 486/2018.

18. The respondent's failure to quantify the actual outstanding sea going allowance amounts worked for by the 27 employees during the period from 01 April 2017 to 31 March 2019, makes it even more probable that the applicants' version is the correct one in this regard. The respondent had all the resources at its disposal as well as necessary obligation to regulate employees' sea going allowance payments and keep proper records thereof.

19. However, the respondents' arguments presented in this arbitration were more about waiting on the on-going collective bargaining process and verified calculations to be provided, which were ultimately not presented. In ***Arries v Commission for Conciliation, Mediation and Arbitration & Others***, Nel AJ held:

    "I accordingly first considered how our courts generally have approached the question of interfering with a discretion which has been exercised by another party. Then I looked at how this has been approached in the employment jurisprudence. A consideration of this question discloses that there are limited grounds on which an arbitrator, or a court, may interfere with a discretion which had been exercised by a party competent to exercise that discretion … It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised.

    "Taking this proposition further, and applying what our courts have said in this regard to the employment field, I am of the view that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner (see Rex v Zackey 1945 AD 505 at 513; Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398; Ex parte Neethling& others 1951 (4) SA 331 (A) at 335D; Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A) at 781J and 783C; Shepstone H & Wylie & other v Geyser NO 1998 (3) SA 1036 (SCA) at 1045A).

    "This approach, I believe, is consistent with the test applied by judges sitting in the Labour Court and commissioners of the CCMA when considering the principles applicable to interference with an employer's decision ..."

20. With respect it is my conclusion that, failure by the Respondent to process payment of the applicants' outstanding portion of the applicable payable sea going allowance rates over the period of 01 April 2017 to 31 March 2019, amounts to an unfair application of the employer's discretion and falls in the realm of capricious discretion exercised with insubstantial reasoning.

21. Based on the evidence presented before me, I am of the view that taking into account the convincing calculations of outstanding amounts presented on behalf of the 27 applicants (from 01 April 2017 to 31 March 2019), there are no valid grounds proffered to justify the respondents' failure to process outstanding payments, as claimed.

22. I therefore order that the applicants' outstanding payments must be processed with retrospective effect from 01 April 2017 to 31 March 2019 and the first respondent March (DEFF) to ensure that all outstanding sea going allowance amounts that should have accrued to the applicants over the above period (01 April 2017 to 31 March 2019) are restored.

23. Based on the evidence presented before me, I am persuaded that the applicants' claimed outstanding sea going allowance amounts for the period covering 01 April 2017 to 31 March 2019 is due and should be payable to the 27 employees, as follows:

No	Financial Year	Persal Nr	Name	Amount Due in Rand Value
1	2018/2019	17553113	Z. Kube	911,17
2	2018/2019	19009437	G. Camelio	3364,32
3	2018/2019	19363851	B. Pitoyi	1682,16
4	2018/2019	21990794	N. Andrews	2102,70
5	2018/2019	22011480	L. Lombard	1962,52
6	2018/2019	22201106	T. Nkasayi	911,17
7	2018/2019	22201114	B. Mtengwana	841,08
8	2018/2019	22442545	D. Van Niekerk	1892,43
9	2018/2019	22685294	Y. Magwaca	3504,50
10	2018/2019	22685855	E. Khan	2453,15
11	2018/2019	22950605	B. Jwete	2733,51
12	2018/2019	22951415	K. Jacobs	1892,43
13	2018/2019	23403462	Z. Ndinisa	1892,43
14	2018/2019	23466618	B. Toko	1892,43
15	2018/2019	26419092	W. Arends	3224,14
16	2018/2019	26464748	W. Mein	2453,15
17	2018/2019	50626256	H. Taljaard	981,26
18	2018/2019	51253852	H. Vermeulen	911,17
19	2018/2019	53535391	N. Gantana	981,26
20	2018/2019	70102953	P. Weston	3224,14
21	2018/2019	71162526	X. Teyise	981,26
22	2018/2019	12766488	C. Wilke	919,93
23	2018/2019	12766500	D. van Zyl	6684,83
24	2018/2019	21265461	M. Nkwenkwe	6346,07
25	2018/2019	21929084	A. Louw	417,62
26	2018/2019	21967407	R. Williamson	5545,87
27	2018/2019	23461870	C. Williamson	712,58

AWARD

24. The applicants' claim in respect of the outstanding sea going allowance claimed for the period covering 01 April 2017 to 31 March 2019, has been substantiated.

25. The applicants must be compensated with an amount of R61419.28 (***sixty one thousand, four hundred and nineteen, twenty eight cents)***.

26. The above amount must be paid to the applicants (based on amount due to each of the 27 employees), by no later than 30 July 2021.

Michael Marawu

Name:

GPSSBC Arbitrator