IN THE EDUCATION LABOUR RELATIONS COUNCIL

Case No PSES694-19/20

In the matter between

PSA obo Africa Mgaleli Applicant

and

Department of Higher Education & Training
Respondent

ARBITRATOR: JOHN CHEEERE ROBERTSON

HEARD: 12 August 2020

DELIVERED: 12 August 202

JURISDICTIONAL RULING

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1 This matter was set down for arbitration on 12 August 2020 by way of a zoom hearing. Mr G Seakamela (PSA) represented Mr Afrika Mgaleli (applicant). Mr V Gidigidi represented the Department of Higher Education & Training (respondent). The hearing was recorded. The parties are referred to as in convention.

2 The respondent raised an objection *in limine* to the effect that the ELRC had no jurisdiction to entertain the applicant's dispute as referred (an unfair labour practice relating to benefits) on the basis that the dispute related to remuneration. Further,

the respondent argued that the applicant had referred the dispute incorrectly and should have referred it as one concerning the interpretation or application of ELRC Collective Agreement 8/2001.

3 The applicant disagreed as to the nature of the dispute and argued that the collective agreement provided that where an employee acted in a higher, vacant and funded post he was entitled to an acting allowance. They did not have a dispute regarding the interpretation or application of the collective agreement 8/2001, but with the non-payment.

4 After hearing the parties, I ruled that the ELRC had jurisdiction to hear the applicant's dispute as referred. These are my written reasons.

5 The applicant is *dominus litis* and may refer the dispute as an unfair labour practice relating to benefits on the basis of the decision in *Apollo Tyres SA (Pty) Ltd v CCMA and others*[1] in that the entitlement derived from a collective agreement / ex contractu[2].

6 By way of analogy, with regard to the LAC matter of *HOSPERSA obo Tshambi v the Department of Health: KZN* (2016) 37 ILJ 1839 (LAC)(Tshambi) the applicant's dispute concerns an unfair labour practice relating to benefits. In Tshambi the LAC pointed out that it is not so that simply because a right may derive from a collective agreement, that this meant it was a section 24 dispute. E.g. in Tshambi there was no indication in the record that the respondent disputed that the collective agreement provides that an employee on suspension is entitled to full pay, or that the respondent disputed that the collective agreement bound itself and the appellant.

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[1] (2013) 34 ILJ 1120 (LAC) [50]

[2] See *Apollo Tyres SA (Pty) Ltd v CCMA and others, where the Labour Appeal Court held that: In my view, the better approach would be to interpret the term benefit* ***to include*** *a right or entitlement to which the employee is entitled (ex contractu or ex lege including rights judicially created****) as well as*** *an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment "benefit" in section 186 (2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right* ***o****r granted in terms of a policy or practice subject to the employer's discretion.*

In the circumstances, the court asked itself what the dispute about the collective agreement could have been i.e. there was no apparent dispute relating to the collective agreement. The salient facts were that an employee was suspended without pay. Had the arbitrator interrogated the applicant's categorization of the dispute, which was disputed by the respondent, it would have become apparent that the true dispute / nature of dispute was an unfair labour practice relating to suspension (s186 (2)(b) of the LRA), referred out of time. The fact that an express right to be paid during suspension derived from a collective agreement did not change the nature of the dispute; rather it was simply evidence of the right. More so that the Labour Relations Act 66 of 1995 creates several special remedial processes to address different kinds of rights assigning some to particular fora, and others to be dealt with in accordance with particular procedures, one of which is a class of unfair labour practices as contemplated in section 186(2). On the basis of the true dispute, i.e. an unfair labour practice, the applicant could not succeed, unless the Bargaining Council had jurisdiction, the late referral was condoned and then subject to proof of their claim.

RULING

7 The respondent, the Department of Higher Education & Training's application is dismissed.

8 The Education Labour Relations Council (ELRC) does have jurisdiction to hear the dispute referred by the applicant, PSA obo Africa Mgaleli, to the ELRC, under case reference ELRC694-19/20EC

JOHN CHEERE ROBERTSON

12 August 2020