



ARBITRATION AWARD

Panellist/s: Karen Kleinot
Case No.: PSCB619-15/16
Date of Award: 31 May 2016

In the ARBITRATION between:

PSA obo C J Brandt _____
(Union / Applicant)

and

Department of Correctional Services –Western Cape _____
(Respondent)

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DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for arbitration on 20 May 2016. Both parties were agreed to submit documents and argument as the facts are common cause. Parties agreed to submit these documents on 27 May 2016. To date 30 May 2016 only the Applicant has submitted a bundle and arguments. The respondent indicated that it appeared that the matter involving Mr. Brandt would be settled.

ISSUE TO BE DECIDED

2. The issue that must be decided is the application and interpretation of Resolution 7 of 2000.

BACKGROUND TO THE ISSUE

3. Mr. Brandt was employed by the Department of Correctional Services since 30 November 1983. The Applicant applied for long period Temporary Incapacity Leave for the period 27 August 2015 until 30 September 2015, 39 days. This was declined and the 28 days leave was recovered from his annual leave. In the event that he is successful the repayment of the 28 days annual leave is sought as Mr. Brandt has taken early retirement.

SURVEY OF EVIDENCE AND ARGUMENT

4. Documents were submitted as well as argument as most of the facts were agreed to. Mr. Brandt held the position of Co-ordinator security at Van Rhynsdorp Correctional Centre. On 31 March 2016 he went on ill health retirement.

5. Mr. Brandt was referred to a psychiatrist by a psychologist Marlaine Pienaar and Mr. J van der Merwe from EAP. It was submitted that Mr. Brandt has a history of depression and stressed precipitated by work stress. He is on medication and has been admitted to Sereno and Claro Clinic on five occasions, three times in 2015. It was argued that work stress causes his relapse.

6. On 1 April 2014 Mr. Brandt was placed at Community Corrections to allow for a break from working inside the prison and again on 1 August 2014. On 22 July 2015 Mr. Brandt consulted a psychiatrist and was booked off from 22 July 2015 until 30 September 2015. He was diagnosed with major depression and post traumatic stress disorder. He was also hospitalized.

7. The HRM declined the TIL applications as the medical evidence was insufficient to show that he was impaired for this amount of time. Further that there was no indication that he could not perform his accommodated duties and that he did not report any impairment in personal and social functioning or

impairment at home. The HRM report reflects that Mr. Brandt has used 281 days of incapacity leave on the basis of this condition and this outweighs the maximum amount of recovery time as per the MDA.

8. Mr. Brandt referred a grievance and indicated that his condition had not changed and is continuing treatment. The application was referred on 18 August 2015. Further motivation was attached in the form of a note from the psychiatrist. It was reflected in the psychiatrist's report that Mr. Brandt performed well outside the prison at Community Correctional Services in Vredendal and only when he was told to report back for duty at the end of December 2014 did he become anxious and stressed and this has impacted on his personal life and work. The report of 11 August 2015 further states that Mr. Brandt fears going back to work and doing something that he would regret which may involve other people. The psychiatrist recommends that he apply for ill health retirement as the PTSD and major depression has made a return to work impossible. The functional assessment by the occupational therapist states that this was a screening and not a functional capacity evaluation at the work site. The report from Mr. van der Merwe of EAP specifies that the symptoms intensified and this was accompanied by an intensification of treatment but this did not alleviate the symptoms. A recommendation is made for ill health retirement. Mr. van der Merwe reiterates that Mr. Brandt cannot return to work in the prison due to his PTSD and depression. He applied for retirement and this was approved. A grievance was lodged on 30 September 2015 but was unsuccessful.

ANALYSIS OF EVIDENCE AND ARGUMENT

9. The issue before me is whether resolution 7 of 2000 has been correctly interpreted and applied. The clause in question is clause 7.5 (b). The full clause is as follows:

a) An employee whose normal sick leave credits in a cycle have been exhausted and who, according to the relevant practitioner, requires to be absent from work due to disability which is not permanent, may be granted sick leave on full pay provided that:

i) her or his supervisor is informed that the employee is ill: and

ii) a relevant registered medical and/or dental practitioner has duly certified such a condition in advance as temporary disability except where conditions do not allow.

b) The employer shall during 30 working days investigate the extent of inability to perform normal official duties, the degree of inability and cause thereof. Investigations shall be in accordance with item 10 (1) of Schedule 8 of the Labour Relations Act 66 of 1995.

c) The employer shall specify the level of approval in respect of applications for Temporary Incapacity/ Disability Leave.

10. In this case an application was made for long period TIL on 1 August 2015 this was declined on 28 September 2015. It was argued that this was contrary to the Collective Agreement and the Determination of Leave of Absence which stipulates that the employer must within 30 days after receipt of the application either approve or refuse TIL. From the documents and argument before me it appears that the Respondent did not inform the Applicant within 30 days as to outcome of the TIL application.

11. It was also argued that the Department did not exercise its discretion in a fair manner. One of the key factors in declining the application was the finding by the HRM that there was no impairment in terms of Mr. Brandt's functioning at work. The application was declined on the basis that there was no impairment on a personal or social level. The letter declining the application states "In conclusion, you are able to function adequately at your home and social setting and with optimal treatment, the HRM is of the opinion that you would be able to function adequately, albeit in accommodated position".

12. Examining these reasons and with the evidence before me, certain questions arose, if there was no functional assessment (p67) at Mr. Brandt's work place how could the statement be made that there is no impairment when the reports from the psychiatrist and psychologist as well as the EAP counselor state that Mr. Brandt can no longer work on the prison property and that this is a trigger to the major depression and post traumatic stress disorder. Further the reports spell out that working with colleagues is another trigger as Mr. Brandt does not trust them. The reports intimate that Mr. Brandt poses a possible threat to himself or the workplace and this was not considered by either the HRM or the management. I accept that Mr. Brandt performed adequately at community corrections. It appears that he was placed there for a year but was then instructed to return to work at the prison thus triggering a relapse. This return to work instruction does not take into account the core stressor of the prison environment or that this has caused the relapse. Considering that there was no functional assessment of Mr. Brandt within the working environment the conclusion reached by the HRM and then the management is arbitrary and unfair.

13. In order to understand the reports and evidence before me I consulted Kaplan & Sadock's 'Synopsis of Psychiatry Behavioral Sciences/ Clinical Psychiatry', eighth edition p292-299; this explains the multiaxial diagnosis provided by Dr Levett. The first Axis I consists of the clinical disorder and is specified as major depression, severe and post traumatic disorder, Axis II refers to personality disorders which are listed as nil, Axis III lists physical disorder in addition to the psychiatric disorder as insulin resistance, Axis IV is used to code "the psychosocial and environmental problems that significantly contribute to the development or

exacerbation of the current disorder' the report reflects "repeated exposure to trauma at work, uncertainty regarding Ill health retirement"; .Axis V is a global assessment of functioning an overall functioning of the patient over time, this is scored 31 -40. The scoring states as follows" "Some impairment in reality testing or communication (e.g. speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas such as work or school, family relations, judgment, thinking, or mood (e.g. depressed man avoids friends neglects family and in unable to work...)" This does not to my mind imply that Mr. Brandt is able to function adequately at work. The reports from the psychologist and psychiatrist indicate that Mr. Brandt is compliant with the medication and treatment. It also reflects that there has been little improvement over a two year period thus the statement that with optimal treatment Mr. Brandt would be able to function at work does not take account of these factors and is arbitrary.

14. Consequently I find that for the following reasons the Respondent has not applied or interpreted resolution 7/ 2000 correctly in that the thirty day time period was not adhered to, the discretion was exercised in an arbitrary manner as certain factors that trigger the disorder were not considered and no function assessment was made of Mr. Brandt's functioning in the work place.

Remedy

15. Mr. Brandt has since retired and the 28 days cannot be re-allocated to him. Mr. Brandt was earning R285 588, 00 per annum divided 365= R782, 43 x 28 days = R21 908, 12.

AWARD

16. The Respondent has incorrectly applied and interpreted Resolution 7/2000. The Respondent is to pay the Applicant, Mr. Brandt the sum of R21 908, 12 by no later than 1 July 2016.



Panelist/s Karen Kleinot