ARBITRATION AWARD

Panellist/s: Karen Kleinot
Case No.: PSCB764-14/15
Date of Award: 17 December 2015

In the ARBITRATION between:

PSA obo Ms R L G Moabi

(Union / Applicant)

and

Department of Health –Free State

(Respondent)

Union/Applicant's representative: Mr. J Greef
Union/Applicant's address:

Telephone: 051 4031300
Telefax: 051 4031315

Respondent's representative: Mr. L Mapena
Respondent's address:

Telephone: 051 408 1220
Telefax: 051 408 1993

DETAILS OF HEARING AND REPRESENTATION

1. The matter was heard on 11 December 2015 at Bophelo House in Bloemfontein. Both parties were present; Mr. Greef from the PSA represented the Applicant, Ms Moabi. Mr. L Mapena represented the Department of Health. The proceedings were recorded. A bundle of documents was submitted.

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. The Applicant applied for Temporary Incapacity Leave on three occasions. The applications were submitted within the five day time frame. When the Applicant received notification that the temporary incapacity leave was declined in February 2015 and December 2014 a dispute was referred. The Applicant suffers from epilepsy and applied for the leave as a result of seizures suffered on the day. The Applicant is seeking to reclaim the deductions made to her salary regarding the Temporary Incapacity Leave that was declined.

SURVEY OF EVIDENCE AND ARGUMENT

4. There was no evidence led. It appeared during the opening statements and clarification as to the issue that the facts were common cause.

ANALYSIS OF EVIDENCE AND ARGUMENT

5. 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.

6. In this case the Respondent declined the Temporary Incapacity Leave applied for 30 October -31 October 2014, 20-22 August 2014 and 20 May -23 May 2014. For the periods in October and August the Respondent declined the application on 4 February 2015. For the period in May 2014 the Respondent declined the application on 9 December 2014 and then deducted the amount of R1063,53 from the Applicant's pay.

7. The Applicant has argued that the Respondent has not complied with the 30 days period in clause 7.5. It is argued by the Respondent that they have conducted an investigation within the 30 days and have thus complied with clause 7.5. It is further argued that the investigation report does not have to be shared with the Applicant and there is no time frame within which to provide a response to the Applicant. The investigation is in terms of Item 10 of the Code of Good Practice which sets out the factors that an employer must investigate. The Applicant argued that it was nonsensical to have an investigation and not share the investigation or outcome with the Applicant as it has a direct bearing on the application.

8. When considering the argument and applying it to the facts of this case a purposive approach has been taken regarding the interpretation and application of Resolution 7 of 2000. As an arbitrator I have arbitrated disputes involving TIL applications over several departments. The practice in TIL applications is that the employee applies for Temporary Incapacity Leave in the event that his or her sick leave cycle has been exhausted. Thereafter the application along with the information provided by the medical practitioner is sent to a Health Risk Manager who looks at the norms in terms of disability for various illnesses and the average time for recovery as well as the judicious use of sick leave. In this case none of this information is before me. This is what constitutes the investigation and the report.

9. The Respondent agreed that it had not complied with the 30 days and had not given an outcome of the investigation. Whilst I accept that the Respondent has to investigate the matter and that a report is not

given there is no evidence that the Respondent actually investigated the matter, as there is no report before me or proof of such done by the Health Risk Manager. The reports are in practice normally sent to the department for review and then the outcome is sent to the employee. In this case again this issue was not touched on and the only inference that can be made is that a report was sent to the Respondent resulting in an outcome letter. It is not clear when this report was sent. It is unreasonable to expect an employee to wait for six months to receive an outcome on the application when time frames are specified in the resolution and PILIR for the submission of applications. To allow for six months to pass without feedback and then to deduct money prejudices the Applicant. This is the stance taken by the court in: <u>The Public Service Association of South Africa, obo Gouvea, HC vs PSCBC The Department of Land Affairs D751/09,</u> where the court held as follows" [*20] …a report was issued by the Health Risk Manager declining the application for a periodical temporary incapacity leave for 4 December 2007 to 30th June 2008. This report sought to have a retrospective effect. <u>The consequence of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee</u>."* This talks to the application of the 30 days, in that the 30 days in this case was not applied reasonably or correctly in that the clause talks to investigating a matter within 30 days of the application and the Code of Good Practice talks to holding a meeting and discussing the outcome; whether it is adapting work or refusing an application. It is correct that the Applicant has an opportunity of appealing which was not utilized in this instance. Nonetheless the Respondent did not comply with an outcome to the Applicant within 30 days of the application and this constitutes an incorrect application and interpretation of clause 7.5 of Resolution 7 of 2000.

Remedy

10. The Applicant seeks repayment of the amount of R1063, 53. This is granted.

<u>AWARD</u>

11. The Respondent has incorrectly applied and interpreted Resolution 7/2000. The Respondent is to pay the Applicant, Ms. R G L Moabi the sum of R1063, 53 on or before 11 January 2016.

Panelist/s Karen Kleinot