



ARBITRATION AWARD

Case Number: **PSCB425-14/15**

Panelists: **Malusi Mbuli**

Date of Award: **04-02-2015**

In the **ARBITRATION** between

MARY – ANN NHLAPO

Applicant)

And

DEPARTMENT OF HEALTH – EASTERN CAPE

(Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

1. The matter came before the PSCBC for arbitration in terms of section 24 (2) [24(5)] of the Labour Relations Act No 66 of 1995 ("the Act"). It was set down for an arbitration hearing at the Livingstone Hospital in Port Elizabeth on the 15th of January 2015.
2. The applicant, Mary – Ann Nhlapo attended the hearing and was represented by Mr. M. Randell an Attorney appointed by the applicant.
3. The respondent, Department of Health – Eastern Cape, also attended the hearing and was represented by Mr. P. Qwayiza an official of the respondent.
4. The matter proceeded on the 15th of January 2015, and was finalized on the same day but the parties agreed to file closing arguments on or before the 22nd of January 2015.

ISSUE TO BE DECIDED

5. I am required to determine whether or not the respondent has Interpreted and Applied clause 7.5 of PSCBC resolution 07 of 2000 and if so, I must determine the appropriate remedy.

EVIDENCE

6. The facts in this dispute were common and therefore the parties did not lead any evidence in this arbitration hearing but produced supporting documentation and filed arguments because the facts were common cause.
7. It then follows that the arbitration hearing was not recorded and the party's arguments and documents will form the record of this hearing.

ANALYSIS OF EVIDENCE AND ARGUMENT

8. In ***PSA obo De Bruyn v/s Minister of Safety and Security & others 2012 (33 IRJ 1822) (LAC)*** the Labour Appeal Court found out where an employee is dissatisfied with an employer's refusal to grant temporary incapacity and the procedure for granting and refusing temporary incapacity leave which is governed by a Collective Agreement of the Bargaining Council, that persons remedy lies in the referral of a dispute over the interpretation and application of the resolution to the Bargaining Council in terms of section 24 of LRA.
9. The applicant referred the matter to the PSCBC in terms of section 24 of the Act and the applicant's representative argued that the applicant who is a professional nurse applied for ten periods of temporary incapacity leave which periods were declined by the respondent.

10. He submits that the applicant was assaulted by her fiancé on the 29th of August 2008 and suffered extensive bodily injuries for which she was hospitalized and treated by her doctor and surgeons and her right arm was partially paralysed.
11. She was declared unfit to work from the 29th of August 2008 through to the 01st of October 2009. The temporary incapacity leave was later partially granted and the remainder was declined by the department.
12. He submits that the applicants requests that her temporary incapacity leave applications be approved and that the deductions made from her emoluments, characterized as "leave without pay" on account of decisions previously made declining her applications for temporary incapacity leave were unfair. Her ordinary leave to which she was entitled was also expunged.
13. The applicant claims that the provisions of the Collective Agreement of the PSCBC Resolution 7 of 2000 were not applied fairly and were prejudicial to her because the employer has not complied with both procedurally and substantively.
14. The applicant declared a dispute against the decision declining his temporary incapacity leave and the making of unlawful and unfair deductions from her emoluments. The respondent further deducted the amount from the applicant's salary to recover the money which in the opinion of the department ought not to have been paid during the period in question.
15. Where an employee's temporary incapacity leave is not granted the period is covered by way of unpaid leave, unless the employee has existing leave credits (annual leave or capped leave) that may be used.
16. The applicant pray that the Commissioner should make the following order:
 - that the respondent has failed to comply with the provisions of resolution 7 of 2000 in declining the applicant's application for temporary incapacity leave.
 - that the respondent is ordered to convert the periods of temporary incapacity leave referred to in the table in their documents.
 - that the respondent is ordered to refund all deductions made under the appealation "leave without pay".
 - that the respondent reinstates all leave confiscated by the department from the applicant from the applicant on account of the decisions declining the applicants application for temporary incapacity leave.
17. The respondent on the other hand argues that the respondent in so far as the interpretation and application of a collective agreement dispute is expected to comply with clause 7.5.1 (a) which provides that

- *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:*

(1) Her or his supervisor is informed that the employee is ill, and

(2) 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.

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

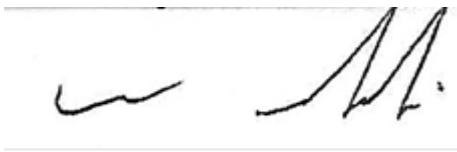
18. The respondent's representative argues further that the provision relating to temporary incapacity leave in resolution 7 of 2000 is not an extension of sick leave but meant to address the intentions of the parties to the resolution.
19. The applicant's case is that the employer has approved part of the applicant's application for temporary disability leave but has failed to approve other applications and to pay the amounts that were deducted from the applicant in respect of the temporary disability leave.
20. The respondent's representative submitted that the applicant has been away from work for a period of about 357 days between the period of the 28th of August 2008 to 29th January 2010. He further argued that the respondent has referred the matter to the Health Risk Manager for investigation and the Health Risk Manager gave opinion on the matter in line with the principles of fairness and the Labour Relations Act 66 of 1995.
21. He submits that the reason for the temporary incapacity of the applicant is not work related and that the resolution is applicable at the discretion of the employer to grant the applicant additional more days outside the Basic Conditions of Employment Act.
22. He also argue that the department acted fairly because he had all the rights to terminate the applicants services for incapacity illness and that it would be unfair for the applicant to expect the department to remunerate her whilst he has not rendered any service.
23. He argues further that the respondent has followed a fair process in determining the applicant's applications for temporary incapacity leave and that the decision was taken after the recommendations of the Health Risk Manager.
24. In considering whether the employer has interpreted and applied clause 7.5.1 of resolution 7 of 2000 of the PSCBC due regard must be made to the words used in the resolution itself in order to understand the true intentions of the parties to the agreement.

25. It is also worth mentioning at this stage that section 23 of the Labour Relations Act 66 of 1996 as amended provides that the legal status of a Collective Agreement is that it is binding on the parties to the Collective Agreement and also takes precedent over the provisions of the Act.
26. The parties to this Collective Agreement are therefore bound by the agreement and may not deviate from its provisions unless there is another agreement to that effect between them or the terms of their agreement are unlawful and unconstitutional.
27. Clause 7.5.1 (a) provides that :
- *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:*
 - (1) *Her or his supervisor is informed that the employee is ill, and*
 - (2) *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.*
28. The significance of the use of the word **may** in the resolution quoted above is that the granting of the temporary disability leave is not mandatory but may be granted at the discretion of the employer.
29. In this case the employer has considered the applicants application and decided to grant part of the leave applied for by the employee and reject the other portion. The employer has decided to grant this leave despite the fact that the applicant was not injured on duty.
30. The applicant has been away from work for a period of about a year between the period 28th August 2008 and 29th of January 2010 and despite that the employer has granted the applicant some of the temporary leave which the applicant applied for.
31. The respondent has investigated the applicants claim and application, referred the matter also to the Health Risk Manager for assessment and this is the reason for the delay in complying with the 30 period mentioned in clause 7.5.1 (a) and this is a valid reason for the delay.
32. The applicant in the circumstances was not prejudiced by the respondent's granting of part of her temporary disability leave and failure of the employer to grant another part or to pay back her money allegedly due to her from the approval or failure to approve temporary disability leave.
33. The respondent has exercised his discretion to grant temporary incapacity leave and that discretion has been exercised fairly.

34. In terms clause 7.5.1 of the resolution 7 of 2000 of the PSCBC it is not the duty of the council to consider temporary incapacity leave but the duty of the employer.
35. In the circumstances I therefore make the following award.

AWARD

36. The respondent Department of Health – Eastern Cape has correctly interpreted and applied clause 7.5.1 of resolution 7 of 2000 of the PSCBC.
37. The applicant is therefore not entitled to any relief.

A handwritten signature in black ink, appearing to be 'M. Mbuli', is shown within a rectangular box.

Signature: _____

Commissioner: **Malusi Mbuli**