



PANELIST: ADVOCATE J P HANEKOM

CASE NO: PSCB405 -13/14

AWARD DATE: 25 FEBRUARY 2014

In the matter between:

PSA obo SWARTZ

Applicant

and

SOUTH AFRICAN POLICE SERVICE

Respondent

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION:

1. This matter was set down for arbitration on 28 January 2014 concerning a dispute about the interpretation and/or application of a collective agreement (Resolution 7 of 2000 – hereinafter referred to as the “Resolution”). Mr. A. Fisher, union official of PSA represented the Applicant. Mrs. Mahloromela, of Legal Services represented the Respondent. The Applicant and Respondent agreed to argue the case on paper and to submit written argument respectively on 4 February 2014 and 11 February 2014. I would then issue my award on or before 25 February 2014.

ISSUE TO BE DECIDED:

2. Whether the Respondent correctly applied and interpreted the Resolution.

HISTORICAL BACKGROUND:

3. The Applicant is employed as a Captain in the South African Police Service stationed at Provincial Firearms Unit: Western Cape. The Applicant exhausted his sick leave credits and applied for long term Temporary Incapacity Leave (TIL) for the period of 12 March 2012 to 29 June 2012, due to a back operation. The TIL application was partly approved. The period 27 March 2012 to 29 June 2012 was not approved by the Respondent.
4. The decision by the Respondent to decline the TIL application for the above period was made by Brigadier N.P. Nethengwe on or about 19 September 2012. The Applicant only received the outcome on or about 21 January 2013. The Applicant thereafter decided to register a formal grievance on 12 April 2013. According to an email dated 11 July 2013 the Applicant was informed that there was no request from his side to take the grievance to step 3 of the grievance process and therefore the file has been closed. The Applicant accordingly referred the matter to the council on 27 September 2013 and a certificate of non- resolution was issued on 14 October 2013. Applicant thereafter referred the matter to arbitration on 5 November 2013.

ARGUMENT BY THE APPLICANT:

5. I have decided to summarise the Applicant's argument as far as I consider relevant for the purpose of my award.
6. It is the Applicant's argument that the Respondent did not correctly apply and interpreted the Resolution. Applicant signed a consent paper for the employer to have access to all medical information as required. Respondent therefore should have obtained the necessary medical information from the Applicant's medical practitioner. The Respondent further did not investigate the matter within the 30 day period as required by the Resolution.
7. Accordingly it was the Applicant's submission that the TIL application be approved and that monies deducted from the Applicant's salary be refunded.

ARGUMENT BY THE RESPONDENT:

8. Again I have again decided to summarise the Respondent's argument only as far as I consider relevant for the purpose of my award.
9. It was the Respondent's argument that the Applicant does not have an automatic right to TIL. In terms of paragraph 7.5.1 of the Resolution the employer "may" grant TIL under certain conditions. The Respondent's policy on Incapacity Leave and Ill Health Retirement (PILIR) also requires an employee to submit the necessary medical evidence.
10. The Respondent first submitted that it's inundated with TIL applications and therefore cannot decide these matters within the 30-day timeframe.
11. In terms of national instruction of 2004, paragraph 3(f) states that "A medical certificate serves as a recommendation for the granting of sick leave for the period of absence. Sick leave may be refused if the National Commissioner is of the opinion that there are sufficient grounds to do so. If the extend of an illness or incapacity is not described on the medical certificate, the period of absence may in the discretion of the National Commissioner, be converted to annual leave, if the employer has sufficient annual leave or capped leave to his or her credit and if not as unpaid leave". Accordingly the Respondent submitted that the Applicant failed to present enough evidence to show that the Respondent did not correctly apply its discretion when it decided not to approve the Applicant's TIL application. The Respondent cited arbitration awards and case law in support of its argument.

ANALYSIS OF THE ARGUMENT:

12. I decided to focus only on those issues I consider relevant.
13. Paragraph 7.5.1(a) - (c) of the Resolution clearly states as follows "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/his supervisor is informed that the employee is ill;
- ii) 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 employee shall, during thirty (30) working days, investigate the extent of the inability to perform normal official duties, the degree of the inability and the cause thereof. Investigations shall be in accordance with item 10(1) of Schedule 8 in the Labour Relations Act of 1995.
- c) The employee shall specify the level of approval in respect of applications for disability leave.”

14. If I revert to the facts of the instant case it is clear that the Applicant suffered from back problems and he had his first back operation in April 2011. The Applicant thereafter continued to suffer from back problems, which also affected his gait of his right leg. It was further apparent from Dr. C. Botha (neurosurgeon) doctor certificate dated 7 May 2012 submitted together with the Applicant's TIL application that the Applicant has to go for a back operation on 23 March 2012 and that he will be unfit for duty until 30 June 2012. TIL application completed and signed by Dr. Botha on 28 June 2012 clearly indicated that a MRI scan of Applicant's vertebrae indicated a massive central disc problem and that the Applicant must take care of his back. The common cause documentary evidence does not indicate that the Respondent referred the matter to a Health Risk Manager (HRM) and I therefore assume that the Respondent clearly relied on the National Instruction referred to above decline the TIL application. It is not within my powers to interpret the National Instruction, but the Resolution. Be it as it may, it is my view that the Respondent also did not follow the National Instruction as the extent of the incapacity is clearly described in the neurosurgeon's medical certificate referred to above. Under the circumstances I am of the view that the Respondent did not correctly apply the Resolution to investigate the matter properly. One can just imagine if the Applicant had to return to work and caused further injury to his back and the consequences thereof?

15. It is so that the Applicant does not have an automatic right to TIL and therefore have to present a *prima facie* case as to why he is entitled to TIL. Applicant therefore had to provide the necessary medical evidence to support his application for TIL. The Respondent in the instant case decided to decline the application without investigating the extent of the inability and the reason why it was necessary for the

Applicant to be off sick for such a long period of approximately 3 months. Under the circumstances one would have expected the Respondent to request the Applicant for further detailed medical evidence in support of his application, which did not happen. To my mind there was not sufficient grounds neither in terms of the National Instruction nor in terms of the Resolution to refuse the TIL application of the Applicant. I therefore find that the Respondent did not correctly exercise its discretion to refuse the sick leave and that it failed to properly consider the application when it simply followed the National Instruction 2 of 2004. The Applicant submitted new medical evidence (Dr C Botha's report dated 29 Aug 2013) that did not form part of the TIL application and the grievance process. Under the circumstances the matter requires further investigation. I am not a medical expert to say that the Applicant was indeed fit for work during the period concerned. Therefore the matter should be referred to an HRM for its recommendation.

AWARD:

16. In the premises I make the following award:

- (1) I find that the Respondent did not correctly interpret and applied the Resolution in respect of the TIL application. I order the Respondent to reconsider the TIL application of Applicant for the period 27 March 2012 to 29 June 2012.
- (2) The Applicant must provide the Respondent with new detailed medical evidence from his neurosurgeon before 15 March 2014 in order for the Respondent to review or reconsider the Applicant's TIL application.
- (3) I make no order as to costs.



ADV J P HANEKOM