



ARBITRATION AWARD

Case No.: **PSCB 531 -13/14**

Date of Award: 31 July 2014

Panelist: Khomotjo Daniel Matji

In the matter between:

POPCRU OBO NS RAMAANO

(Unions / Applicants)

And

DEPARTMENT OF POLICE - NATIONAL

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was heard at the offices of the Department of Police – National, situated at the corner of Pretorius and Paul Kruger Streets in Pretoria on the 23rd of June 2014. The respondent, Department of Police Services, was represented by Colonel Janse van Rensburg, whilst the applicant, Mr. Ngoako Samuel Ramaano, was represented by Mr. E.J. Clouw.
- [2] Two (2) bundles of documents were submitted into the arbitration marked as follows: Bundle A > Applicant's bundle of documents indexed and paginated from 1 to 167 and Bundle B > Respondent's bundle of documents paginated from 1 to 84.
- [3] There was no viva-voce evidence heard but the parties made oral statements and agreed to submit written heads of arguments to reach the Council by no later than 18 July 2014. The parties failed dismally to submit their heads of argument within the agreed time-frame. The applicant's heads of argument were only received on 21 July 2014 and that of the respondent on 24 July 2014.

PRELIMINARY ISSUE

- [4] None.

ISSUE IN DISPUTE

- [5] The issue in dispute is the interpretation and application of Resolution 7 of 2000 concerning the temporary incapacity leave of the applicant, Mr. NS Ramaano.

SURVEY OF EVIDENCE AND ARGUMENTS

THE APPLICANT'S CASE

- [6] The respondent was made aware of the applicant's ill-health long time ago and nothing was done since 2003 and it is therefore wrong and unfair to deduct leave without pay from the applicant. The applicant had submitted all the required documentation and medical reports concerning his ill-health. The respondent did not investigate the matter to determine the nature of the illness, the cause thereof and the degree of the incapacity as laid down in Schedule 8 of the Labour Relations Act.

- [7] The applicant was surprised when the respondent started to deduct leave without pay from his salary in 2009. The respondent failed to follow the correct procedure as per PSCBC Resolution 7 of 2000. The respondent also failed to apply the DPSA Directive when deducting money from the applicant which requires compliance with Schedule 8 of the Labour Relations Act and Resolution 7 of 2000.
- [8] The Health Risk Management failed to investigate the matter within 30-days after the date of submission of the medical certificates, medical reports and the incapacity sick leave forms. The respondent also failed to subject the applicant to a medical check-up by its own medical practitioners if it doubted the veracity and accuracy of the medical reports submitted by the applicant. The applicant has since returned to work and doing his normal duties as a result of good medication which has boosted his immune system.
- [9] There was no written report given to the applicant citing reasons for rejecting his incapacity leave application. There was no slightest hint given by the respondent to the applicant that the medical reports he had submitted would not be acceptable. The applicant complied with clause 7.5.1(a) of Resolution 7 of 2000 by submitting the medical reports and such was never disputed or challenged by the respondent.
- [10] However, the respondent failed to comply with 7.5.1 (b) of Resolution 7 of 2000 by not investigating the matter and informing the applicant of the outcome but resorted to just deducting the leave without pay from the applicant's salary which is not covered by sections 10 to 16 of the Prescription Act, No. 68 of 1969 which deals with the collection of debts.
- [11] Resolution 7 of 2000 does not lay down minimum or maximum periods and the employer was obliged to comply with its provisions. The discretion to grant or to refuse a temporary incapacity application leave should be exercised properly, rationally and fairly which was not the case in this particular instance and renders the whole case unfair as there was no timeous communication with the applicant.
- [12] The relief sought by the applicant is an order directing the respondent to repay an amount of R57 884.46 which the respondent has wrongfully deducted from the applicant's salary without following the correct incapacity leave procedures, Prescription Act, Promotion of Administrative Justice Act and the Constitution of the Republic of South Africa Act, No 108 of 1996 (as amended).

THE RESPONDENT'S CASE

- [13] It is common cause that the applicant's application for temporary incapacity leave was not approved by the respondent for the periods mentioned by the applicant in his bundle of documents. It is the respondent's submission that it had applied its mind properly to the application of the applicant for temporary incapacity leave.
- [14] In the case of *Roland Schoeman v Minister of Safety and Security & Another* it was held in the South Eastern Cape Local Division that:- " I have the world's sympathy for the Applicant but I have to come to an objective conclusion on the evidence before me. The onus is on the Applicant to prove a prima facie right for the relief sought."
- [15] Clause 7.5.1 of Resolution 1 of 2000 gives the National Commissioner the discretion to decline or grant leave even if the respondent could have failed to comply with the time frames stated in the collective agreement. The Resolution does not entitle the Applicant to unlimited sick leave. The Health Risk manager recommended that the application for temporary incapacity leave should not be approved and the Department followed that recommendation.
- [16] It is the respondent's submission that the Applicant bears the onus to prove on a balance of probabilities that he is entitled to be granted the relief sought.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [17] A dispute over the interpretation of a collective agreement exists when the parties disagree over the meaning of a particular provision and a dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to a particular set of facts or circumstances.
- [18] When interpreting collective agreements arbitrators should follow the judgment of the LAC in *North East Cape Forests v SAAPAWU & others* (2) 1997 (18) ILJ 971 (LAC)¹:
- "A collective agreement in terms of the Act is not an ordinary contract and the context within which a collective agreement operates under the Act is vastly different from a commercial contract. Froneman DJP has indicated that the primary objects of the Act were better served by a "practical approach to

the interpretation and application of collective agreements rather than by reference to purely contractual principles.” This is not to say however that the ordinary principles of interpretation of contract are never appropriate when interpreting and applying collective agreements. In Northern Cape Forests the Court merely stressed that the interpreter should ask the further question whether an interpretation yielded by these principles accords with the objectives of the LRA. The fact is that a collective agreement is a written memorandum which is meant to reflect the terms and conditions to which parties have agreed at the time that they concluded the agreement. The courts and arbitrators must therefore strive to give effect to that intention. Thus the Courts frequently apply the ‘parole evidence’ rule – that is that evidence outside the written agreement itself is not generally permissible when the words of the memorandum are clear - when interpreting collective agreements.”

[19] The dispute is about the interpretation and application of clause 7.5.1 of Resolution 7 of 2000, a collective agreement concerning improvement in the conditions of service of public service employees concluded in the Public Service Co-ordinating Bargaining Council. The clause provides as follows:-

“7.5.1 Temporary Incapacity Leave:

- 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 duties, the degree of 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 employer shall specify the level of approval in respect of applications for disability leave.”

[20] It is common cause that the applicant took intermittent and broken sick leaves between 2003 and 2007 and was absent from duty on those days. It appears to be common cause that sick notes and medical certificates were submitted covering the period of the applicant’s absence due to ill-health. The applicant exhausted the 36 days normal sick leave days he was entitled to in all the sick leave cycle.

[21] The applicant was never informed whether his application for temporary incapacity leave was approved or not. It is submitted on behalf of the applicant that he was under the impression that the application was approved because he did not receive information to the contrary. However, all his dreams were shattered in 2009 when the respondent started to deduct leave without pay from his salary for the periods that he was absent due to ill-health since 2003.

[22] The respondent stated in its heads of argument that the application was submitted to the Health Risk Manager who recommended that the applicant’s temporary incapacity leave application should not be

approved and the respondent decided to follow the recommendation. It was the consideration and non-approval of the applicant's application for temporary incapacity leave that gave rise to the dispute currently before Council.

- [23] The respondent relied entirely on the judgment of the South Eastern Cape Local Division in the matter between Roland Schoeman v Department of Safety and Security & Others where the judge stated that although he had the world's sympathy for the Applicant but he had to come to an objective conclusion on the evidence before him. It was held that the onus rests with the employee to prove a prima facie right for the relief sought.
- [24] It is therefore the respondent's contention that the applicant must prove that he has a right to claim that the amount of R57 884.46 wrongfully deducted from his salary as sick leave without pay be refunded to him. The respondent boldly asserts in its submission that clause 7.5.1 of Resolution 7 of 2000 gives the National Commissioner of the SAPS a discretion to grant or to decline leave even if the respondent could have failed to comply with the time-frames stipulated in its provisions.
- [25] Although it is true that the Resolution gives powers to the employer to grant/approve additional sick leave to employees referred to in clause 7.5.1, I could not find from the plain reading of clause 7.5.1 where the employer could exercise the discretion conferred by the resolution with impunity. My view in this regard is that rights which employees may have either arise *ex-contractus*, *ex lege* or from collective agreements.
- [26] A collective agreement may create new rights for employees or even abolish or repeal existing rights. Clause 7.5.1 was not just inserted *ex-abundante cautela* but was inserted clearly for the purpose of creating rights for employees provided they satisfied the requirements stipulated therein. Although the word 'may' is often understood as implying not peremptory, but the context in which the word is used in the Resolution will leave the employer with no option but to grant additional leave if the provisions of the Resolution and the accompanying directives have been complied with.
- [27] Therefore clearly, the applicant had a prima-facie right arising from clause 7.5.1 of Resolution 7 of 2000 to additional sick leave. The defence or valid reason that the employer could give under those circumstances for refusing to grant additional sick leave will be failure by the employee to comply with the requirements of clause 7.5.1 (a). Both parties are ad-idem that the applicant has submitted all the medical certificates and reports about his illness.

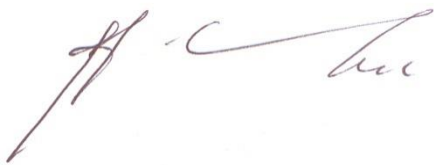
- [28] It is common cause that the respondent failed to comply with the provisions of clause 7.5.1(b) which requires that an investigation must be conducted/held during 30 working days to determine the nature and extent of the inability, the cause thereof and the degree of inability in accordance with the provisions of item 10 of Schedule 8 in the Labour Relations Act.
- [29] A collective agreement is binding on all the parties who are signatories to it and all the members of the parties to the collective agreement. The State as employer in the public service is bound by collective agreements concluded in the Public Service Co-ordinating Bargaining Council. Failure to comply with the provisions of a collective agreement by a party bound thereby will clearly amount to breach of the collective agreement.
- [30] Mr. Clouw referred me to an arbitration award of Arbitrator John Cheere Robertson in the matter between SAPU obo PJ McLeod and South African Police Service in case no PSCB 433-12/13 dated 30 May 2014. The facts in that case were almost similar to the case currently before the Council.
- [31] I had not only found the award of my brother Robertson good in law but was also persuasive. The learned arbitrator relied on the Labour Appeal Court judgment of **PSA OBO De Bruyn V Minister of Safety and Security & Others (2012) 33 ILJ 1822 (LAC)**. It is clear from the authorities relied upon by the arbitrator that the discretion to grant or refuse temporary incapacity leave must be exercised properly, rationally and fairly.
- [32] I agree wholeheartedly with my brother that the discretion to grant or refuse temporary incapacity leave must be exercised properly, rationally and fairly and should not have a retrospective effect resulting in unfair consequences and must be accompanied by reasons. Further that it must be in accordance with the purpose and provisions of Resolution 7/2000 which in this instance requires that the employer shall conduct investigations in accordance with item 10 of Schedule 8 of the LRA.
- [33] It is also true that the Health Risk Manager is appointed to advise and make recommendations to the employer in respect of applications for incapacity leave but the responsibility for taking such decisions within the time-frames stipulated in the collective agreement rests on the employer. In casu, the respondent has failed to act within the agreed time frames laid down in Resolution 7 of 2000.
- [34] Finally, the recovery of salary paid to the applicant by way of monthly deductions many years later while waiting for the outcome of his incapacity application and the fact that the decision has a retrospective effect amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an

employee. It is manifestly unfair to recover overpayment from an employee for salary paid while awaiting outcome of his incapacity application unless the application is declined within 30 days or unless an employee has been ordered to return to work and failed to do so.

- [35] The inescapable conclusion at which I have arrived is that the respondent has interpreted the provisions of clause 7.5.1 of Resolution 7 of 2000 incorrectly and which later resulted in the incorrect application of the Resolution. In the circumstances, I am satisfied that the applicant has made out a strong case and is entitled to a remedy in terms of section 24 and 138(9) of the Labour Relations Act.

AWARD

- [36] The respondent, Department of Police, has failed to comply with the provisions of clause 7.5.1 of Resolution 7 of 2000 when considering the temporary incapacity leave of the applicant.
- [37] The respondent is therefore ordered to refund the applicant Ngoako Samuel Ramaano, in the amount of R57 884.46 which was wrongfully deducted from his salary to recover overpayment.
- [38] The respondent must comply within thirty (30) days of receipt of the award.
- [39] I make no order as to costs.



K.D. MATJI _____
COUNCIL ARBITRATOR