PSCBC

PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION AWARD

Case Number: ***PSCB 718-13/14***
Commissioner: ***Kelvin Kayster***
Date of Award: ***05 August 2014***

In the **ARBITRATION** between

Tait L.

(Union/Applicant)

And

Department of Health – Eastern Cape

(Respondent)

Union/Applicant's representative: ***Mr. M. Randell***
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Respondent's representative: ***Mr. P. Qwayiza***
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DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing in this dispute was scheduled for 27 June 2014 in Port Elizabeth. The matter was referred to the PSCBC as a dispute relating to the interpretation/application of PSCBC Resolution 7 of 2000.

2. The Applicant is Ms. L. Tait, an employee in the service of the Respondent. The Applicant was represented by Mr. M. Randell of Michael Randell Attorneys.

3. The Respondent is the Department of Health and was represented by Mr. P. Qwayiza.

4. The parties agreed that the facts of the dispute are common cause and that they would present the case by means of an agreed stated case and then exchange written closing arguments on 07 and 14 July 2014. I received written arguments from both parties, but have not received any replying submissions by 21 July 2014 when I commenced with this award.

ISSUE TO BE DECIDED:

5. The matter was referred to the PSCBC as a dispute relating to the interpretation/application of PSCBC Resolution 7/2000, as amended. The Applicant referred this dispute to the PSCBC after the Respondent declined her applications for ill-health retirement. I am called upon to determine whether or not the Respondent correctly applied the said collective agreement.

BACKGROUND TO THE ISSUE:

6. The background of the dispute is common cause. As stated, the parties submitted an agreed stated case. In brief, The Applicant is a senior porter and had been in employment of the Respondent since 1990. She has been under psychiatric treatment for major depression, generalized anxiety and bipolar mood disorder since 1992, and had also been admitted to a psychiatric institution. She applied for temporary incapacity leave (TIL) on a few occasions, and also for ill-health retirement in 2006 and 2012. Both applications for ill-health retirement were declined. The applicant was informed in writing on 18 October 2013 that the applications have been declined. The letter is dated 06 August 2008.

7. The Respondent instructed the Applicant on 27 February 2012 to return to work, but due to her condition and the fact that she had been booked off by her psychiatrist Dr. Taylor, she was unable to work. The Respondent made deductions from her salary with effect from 01 November 2011 until 09 July 2012 when she returned to work to have her salary reinstated. She was however still booked off work.

8. The Applicant was not required to be examined for a second opinion by another medical practitioner. Her applications for ill-health retirement were supported by the required medical reports. She is currently receiving salary, but deductions are made for leave without pay. Her salary notch is R87 330-00.

9. The Applicant seeks an order that her application for ill-health retirement be approved on account that Res 7/2000 was not complied with, and that she be entitled to apply for ill-health benefits. She further requested that the Respondent be directed to initiate the process of her ill-health retirement and benefits within 30 days, and that the status quo remains until the processes are finalised.

SURVEY OF ARGUMENTS:

Applicant's submissions:

10. The Applicant submitted that the Respondent took approximately 6 years to consider her first application for ill-health retirement, and in respect of her second application lodged in 2012, the Respondent took 11 months to consider it. She submitted that the relevant medical reports clearly reflect that she has not been fit for work since she was diagnosed as permanently disabled in 2008. Despite the medical records neither the Respondent nor the Health Risk Manager (HRM) required the Applicant to consult another doctor for a second opinion. As long ago as 05 May 2011 a psychologist urged the Respondent to conclude the matter by approving her application for ill-health retirement. On 30 May 2011 Dr. Taylor pronounced that it is unsafe for her to continue working.

11. The Applicant argued that the Respondent failed to exercise its discretion properly and failed to take into account relevant information and also failed to follow laid down procedures. The inordinate delay was unreasonable and constituted an arbitrary exercise of discretion with unfair consequences to the Applicant. The Applicant further argued that that the Respondent was required within 30 days to investigate the matter with a view to alternative placement, but failed to do so and never requested additional time within which to deal with the applications for ill-health retirement. Neither did the Respondent require the Applicant to consult another doctor, which suggests that the Respondent accepted the Applicant's medical evidence, proclaiming her to be permanently disabled.

12. The Applicant accordingly seeks an order that her ill-health retirement be approved and also that those applications for TIL that were declined, be approved.

Respondent's submissions:

13. The Respondent argued that the reasons advanced in the Applicant's applications for ill-health retirement is based on an incorrect assumption, because she is not required to work in isolation at night as she alleged in the applications. The Respondent further argued that the first application for ill-health retirement

was correctly declined, because the HRM found that she was not totally and permanently disabled to perform her tasks or alternative occupation. The Respondent also submitted that her second application for ill-health retirement is still being processed.

14. The Respondent further outlined the process that the HRM is supposed to follow in considering an application for ill-health retirement, and argued that all the steps were indeed complied with. The Applicant was also duly informed of the outcome of her application, and the reasons for the decision. She was advised to return to work, and her salary was frozen when she failed to comply. In conclusion the Respondent argued that the Applicant is fit to work and can be accommodated with her condition.

ANALYSIS:

15. Herewith brief reasons for my ruling. The Applicant submits that the Respondent failed to comply with the provisions of the collective agreement PSCBC Resolution 7/2000 in that it unfairly declined her applications for ill-health retirement. The parties submitted 4 combined bundles of documents consisting of approximately 330 pages. I deem it necessary to mention that my task was made considerably difficult by incorrect referral to page numbers in both parties' closing arguments. It seems that the numbering of documents in my bundles is not the same as those bundles in possession of the parties.

16. It is common cause that the Applicant duly applied for ill-health retirement due to her long history of treatment for major depression, generalized anxiety disorder and bipolar mood disorder. It is common cause that her psychiatrist Dr. Taylor has declared her permanently disabled on a range of medical reports and certificates during or about 2008. Her condition was confirmed by her psychologist Mr. Minnaar.

17. In terms paragraph 5 of the agreed statement of case the Applicant applied for ill-health retirement in 2006 and 2012. Paragraph 6 states that both the applications for ill-health retirement were declined. However, the Respondent submitted in his closing arguments that only the first application was declined, and that the Respondent is currently processing her second application for ill-health retirement. It begs the question whether or not the referral of this dispute to the PSCBC was premature. Be that as it may, the Respondent did not refer me to any documentary proof that the second application is in the process of being considered, and I shall accept the submission in the agreed statement of case that two applications for ill-health retirement have been declined.

18. Clause 7.5.2 of Resolution 7/2000 stipulates that employees whose degree of disability has been certified as permanent shall, with the approval of the employer, be granted a maximum of 30 working days paid sick leave, or such additional number of days required by the employer to finalize the prescribed process.

It then requires the employer to, within 30 working days, ascertain the feasibility of alternative employment; or to adapt duties or work circumstances to accommodate the disability. In the event where both the employer and the employee are convinced that the employee will never be able to perform any type of duties at his or her level or rank, the employee shall proceed with application for ill health benefits in terms of the Pension Law of 1996.

19. The Respondent submitted a letter addressed to the Applicant dated 26 November 2007 in which she was advised that her application for ill-health retirement dated 30 January 2007 had been declined. In terms of paragraph 6 of the agreed statement of case the Applicant was only informed on 18 October 2013 about the refusal of the applications for ill-health retirement. It suggests that the letter of 26 November 2007 was not dispatched to her at the time, but only in 2013. This is clearly a serious violation of clause 7.5.2 of the Resolution 7/2000 as outlined above. None of the prescribed steps were followed. The Respondent merely argued that the applications were fairly considered in terms of due process and had been declined. The Respondent failed to comment on the extensive delay.

20. I therefore find the Respondent's argument disingenuous in the extreme. It is however my view that a failure to comply with the time limit does not necessarily entitle the Applicant to the relief she is seeking. The Applicant still needs to show on balance that she qualifies for the relief she is seeking and how she was prejudiced by the Respondent's failure to comply with the time limit.

21. The parties referred to several applications for temporary incapacity leave that have been declined and resulted in the Applicant's absence being converted to leave without pay. The Applicant also hinted in closing arguments that a finding to the effect that the collective agreement was violated, would also presuppose that her applications for TIL were wrongly declined. The dispute before me is (in terms of the referral form) not about the applications for TIL, and I would accordingly overstep my jurisdiction if I make a finding on it. However, it is clear that the Respondent's excessive delay in considering the applications for ill-health retirement directly resulted in the applications for TIL being declined, and her absence being converted to leave without pay. I am therefore satisfied that the Applicant was indeed prejudiced by the excessive delays.

22. It is common cause that both the psychiatrist Dr. Taylor and psychologist Mr. Minnaar declared the Applicant permanently unfit for duty and strongly recommended ill-health retirement. The Respondent never required the Applicant to consult other practitioners for a second opinion. Neither is there any indication that alternative placement was considered. It therefore stands to be argued that the Respondent accepted the medical evidence of the aforementioned practitioners and by virtue of its conduct accepted that the Applicant's condition was such that she was unfit to fulfill her duties.

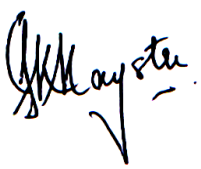
23. I am therefore not convinced that in declining the applications for ill-health retirement, the Respondent has exercised its discretion fairly and reasonably. I find that the Applicant has shown that the Respondent failed to apply the provisions Resolution 7/2000 fairly and correctly, and that she was prejudiced as a result.

24. The Applicant is seeking an order that her ill-health retirement be approved, and a ruling that she be entitled to proceed with an application for ill-health benefits in terms of the Pension Law of 1996. I do not believe that I have the authority as arbitrator to approve an application for ill-health retirement. – See in this regard *Combrink v SAPS* [2010] 11 BALR 1127 (PSCBC) where the arbitrator found that such a dispute falls outside the scope of section 24(2) of the LRA. He held that although on the face of it a refusal may seem unfair, the proper remedy for an employee wishing to challenge the exercise by the delegated authority of his discretion was an application for review by a competent court. See also *Department of Justice and Constitutional Development v Johnson N.O. & Others* (Labour Court case C36/2010). I do however have the authority to consider if collective agreements were complied with, and to grant competent relief to remedy any non-compliance with collective agreements. The yardstick in labour issues is based on the principle of fairness. Fairness dictates that the employer's discretion should be exercised fairly and in compliance with legal prescripts. The fact that the Respondent did not exercise its discretion fairly is sufficient ground for the Respondent's decision to be set aside. I accordingly consider it fair to set aside the decision by the Respondent to decline the Applicant's applications for sick leave, and order that it be considered afresh and fairly.

AWARD:

25. The Department of Health failed to comply with the provisions of PSCBC Resolution 7 of 2000.

26. The Department of Health is directed to consider Ms. Tait's application for ill-health retirement afresh fairly and furnish her with feedback on or before 15 September 2014.



Signature: _____

PSCBC Panelist: **Kelvin Kayster**