

ARBITRATION WARD

Panelist: Khomotjo Daniel Matji _____
Case No.: PSCB 479-12/13
Date of Award: 7 July 2013 _____

In the ARBITRATION between:

JACOBUS JOHANNES NICOLAAS SWART

(Union / Applicant)

And

DEPARTMENT OF POLICE - NATIONAL

(Respondent)

Union/Applicant's representative: Mr. J.M. Gouws _____
Union/Applicant's address: P.O. Box 2629 _____
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DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was heard at the offices of the SAPS offices at Presidia Building; Paul Kruger & Pretorius Street, Pretoria on the 30th of April 2013. The respondent, South African Police Service, was represented by Colonel J van Rensburg, whilst the applicant, Mr. Jacobus Johannes Nicolaas Swart, was represented by Mr. J.M. Gouws, a practising attorney.
- [2] One (1) bundle of documents was entered by the parties into the arbitration paginated from to 134.
- [3] The parties agreed that no oral evidence will be led but that written heads of argument will be submitted on or before 30 May 2013. The heads of argument from the applicant's representative were received during the first week of June while the heads of argument from the respondent were only received at the end of the month of June.

PRELIMINARY ISSUE

- [4] None

BACKGROUND TO THE DISPUTE

- [5] Mr. Swart is a policeman in the South African Police Service since the 12th of January 1994. He was on incapacity leave since 2005 on the diagnosis of chronic post traumatic stress disorder and major depression and has been in and out of hospitals since then. Mr. Swart applied for temporary disability leave as a result of his absence from work due to illness and leave for the periods 1 November 2008 to 7 November 2008 and 15 February 2009 to 31 October 2010 was not approved as well as his application for early retirement due to ill-health. The respondent instructed the applicant to return to work on the 6th of March 2013 and to be placed in a low stress post.
- [6] Johan Gouws Attorneys on the 8th of November 2012 declared a dispute at the Council in Pretoria on behalf of the applicant concerning the interpretation and application of a collective agreement Resolution 7 of 2000. The matter came before Panelist V.S. Reddy for conciliation on the 28th of January 2013 and he issued a '*Certificate of Outcome*' in confirmation that the parties were unable to amicably resolve their differences during the conciliation phase of the dispute. The dispute was subsequently referred to arbitration.

ISSUE TO BE DECIDED

- [7] The issue to be decided relates to the interpretation and application of a collective agreement Resolution 7 of 2000 and more specifically, whether the applicant is entitled to occupational diseases leave with full pay for the whole period of his absence from work and for ill-health benefits in terms of the Government Employees Pension Law of 1996.

SURVEY OF EVIDENCE AND ARGUMENT

THE APPLICANT'S CASE

- [8] The parties agreed that no oral evidence shall be led and that written heads of argument would be submitted. The applicant's written heads of argument are hereto annexed as Exhibit A and constitutes an integral part of this award.
- [9] The essence of the applicant's arguments is as follows:-
- The dispute relates to the interpretation and application of a collective agreement namely Resolution 7 of 2000;
 - The dispute more specifically relates to the disapproval of the applicant's application for temporary incapacity leave and his application for ill-health retirement.
 - Applicant applied for temporary incapacity leave as a result of his absence from work whilst suffering and diagnosed from an occupational disease – post traumatic stress disorder;
 - The said illness has been endorsed by all the medical practitioners as well as the health risk manager as an occupational disease;
 - According to paragraph 7.6 of Resolution 7 of 2000 and National Instruction 2 of 2004 an employee who contracts an occupational disease is entitled to leave occupational diseases leave with full pay until he is fit to return to work or is discharged in terms of section 34 of the Police Act.
 - The employer has no discretionary power whether to grant the leave with pay or not but the clauses referred to above place an obligation on the employer to regard occupational diseases leave as sick leave with full pay;
 - The final report of the health risk manager dated 23 December 2012 was not taken into consideration by the respondent wherein it was recommended that the whole period of absence be regarded as sick leave with full pay,

- The applicant had also applied for ill-health retirement as a result of the fact that he was diagnosed with an occupational disease;
- The health risk manager assessed the medical reports and recommended that the applicant must be medically boarded and that his application for ill-health retirement be approved;
- The respondent has failed to apply its mind to the recommendation or refuses to accept the overwhelming medical evidence presented to the health risk manager;
- The respondent has a discretion whether to approve or disapprove the application for ill-health retirement but still acted contrary to the provisions of paragraph 7.5.2 of Resolution 7 of 2000 and Regulation 28 (4) (c).
- The relief sought is an appropriate order to the effect that the applicant is entitled to sick leave with full pay for the whole period of his absence from work as a result of an occupational disease and that the applicant is entitled to ill-health retirement/benefits in terms of the Pension Law of 1996.

THE RESPONDENT'S CASE

[10] As already mentioned above in respect of the applicant's case, the respondent's heads of argument are hereto annexed as Exhibit B and constitutes an integral part of this award.

[11] The essence of the respondent's arguments is as follows:-

- It is common cause that the applicant's application for temporary incapacity leave as well as his application for ill-health retirement was not approved by the respondent;
- The respondent has applied its mind properly in its decision not to approve the applicant's application for temporary incapacity leave and his application for ill-health retirement;
- According to the case of Schoeman and Minister of Safety and Security, the onus is on the applicant to prove that he has a *prima-facie* right to the relief sought. Therefore, the applicant is put to the proof to prove that he is entitled to the relief sought;
- Clause 7.5.1 of Resolution 7 of 2000 gives the National Commissioner the discretion whether to approve or decline an application for temporary incapacity leave. The word 'may' signifies that the employer has the discretion.
- According to clause 7.5.2 of Resolution 7 of 2000, if both the employer and employee are convinced that the employee is permanently unfit to do any type of work at his level or rank, the employee may proceed with an application for ill-health benefits in terms of the Pension Law of 1996.
- There is no consensus that the applicant is not fit for any type of work as the respondent still believes that he can work in a low stress post.

ANALYSIS OF EVIDENCE AND ARGUMENT.

- [12] It appears very clear from the medical reports and the report of the Health Risk Manager that the cause of the applicant's illness is the repeated exposure to traumatic scenes during occupational duties and more specifically, the traumatic incident which he was exposed to in October 2004 when he attempted to arrest a suspect and was attacked by an angry mob at Marabastad in Pretoria.
- [13] It is submitted on behalf of the applicant that he had applied for temporary incapacity leave whilst suffering from a post traumatic stress disorder which has been certified by all the medical practitioners including the health risk manager as an occupational disease. It appears to be common cause between the parties that the applicant had contracted an occupational disease because if it were not so, I have no doubt that the respondent would have vehemently challenged such an assertion in its heads of argument.
- [14] It is common cause that the temporary incapacity leave that the applicant had applied for was not approved for the periods of 1 November 2008 to 7 November 2008 and 15 February 2009 to 31 October 2010. It was the disapproval of the applicant's temporary incapacity leave which gave rise to the dispute on the interpretation and application of the collective agreement Resolution 7 of 2000. The applicant relied in particular to clause 7.6 of the Resolution for temporary incapacity leave and clause 7.5.2 for ill-health retirement.
- [15] Clause 7.5.2 provides that:- " a) 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 finalise the process set out in (b) and (c) below.
- b) The employer shall, within 30 working days, ascertain the feasibility of:-
 - i) alternative employment;
 - ii) adapting duties or work circumstances to accommodate the disability.
 - c) If both the employer and the employee are convinced that the employee will never be able to perform any type of duties at his or level or rank, the employee shall proceed with application for ill-health benefits in terms of the Pension Law of 1996.
- [16] Clause 7.6 which is the applicant's bone of contention provides that: - "a) Employees who, as a result of their work, suffer occupational injury or contract occupational diseases shall be granted occupational injury and disease leave for the duration of the period they cannot work." It was contended on behalf of

the applicant that since he had contracted an occupational disease, he was entitled to be granted occupational disease leave with full salary for the duration of the period that he could not work.

- [17] The respondent has scarcely referred me or responded to the applicant's claim of an entitlement to occupational diseases leave as provided for in clause 7.6 (a) of Resolution 7 of 2000. I am satisfied that the respondent had sight of the applicant's heads of argument and therefore had ample opportunity to respond to the applicant's claim properly. I have read the case of **Roland Schoeman v Minister of Safety and Security & Another (2244/2006) South-Eastern Cape Local Division**, to which I was referred by the respondent. It is a High Court decision but I am nevertheless indebted to the respondent's representative for this kind gesture.
- [18] Reference to clause 7.6(a) of Resolution 7 of 2000 in that judgment was only made *obiter* that the applicant in that case could not rely on the provision for occupational diseases leave as it is exclusively applicable to cases under Act No 130 of 1993. It appears clear to me from a proper interpretation of clause 7.6 of Resolution 7 of 2000 that (b) thereof, is applicable to an employee who suffered a work related injury involving a third party. There is no third party involved in the present case before me and if any claim of compensation has to be made, it will be squarely against the respondent.
- [19] Unlike in the Schoeman case *supra* where the employee's claim for payment of salary while not at work was dismissed as he could not prove an entitlement to that right, the applicant in the case before me contracted an occupational disease and in terms of clause 7.6(a) of Resolution 7 of 2000 is entitled to occupational diseases leave for the duration of his absence until he returns to work or is discharged on the grounds of ill-health. I am satisfied that the applicant has a *prima-facie* right to the claim of occupational diseases leave with full pay for the whole period of his absence from work as a result of illness.
- [20] I have been urged by the applicant in his heads of argument to refer to the National Instruction 2 of 2004. There is absolutely no reference to it in Resolution 7 of 2000. I had out of sheer curiosity took a glimpse at the National Instruction 2/2004 although it did not fall within the purview of Resolution 7 of 2000. Indeed my adventure paid of some dividends.
- [21] In terms of the National Instruction 2 of 2004, an employee who is absent from work due to an alleged occupational injury or occupational disease must complete and submit the documents required for temporary incapacity and the documents must be referred to the Health Risk Manager for verification and validation of the period of absence.

- [22] The reason given by the respondent in p56 of the bundle for the disapproval of certain periods of the applicant's temporary incapacity leave is that there are no medical certificates to validate for the period of absence. I have no doubt that the decision was informed by the National Instruction 2/2004 which I have reliably been informed that was intended to give effect to Resolution 7 of 2000.
- [23] It could not have been the intention of the authors of Resolution 7 of 2000 that an employee should be granted occupational injuries or diseases leave in the absence of documentation to validate such absence from work due to ill-health. The fact that the applicant suffered from an occupational disease does not mean that he is exempt from the requirement that medical certificate has to be submitted for the period of absence from work due to ill-health. The onus is on the applicant to prove that he has complied with the regulation. It is not sufficient merely to argue that the documents were given to the station.
- [24] It should not be difficult for the applicant to approach the medical practitioners who treated him during the periods in question to provide him with medical certificates. I could not find any support for the contention that the temporary incapacity leave was not approved because of the excessiveness of the period. That would clearly not have been in accord with 7.6(a) of Resolution 7 of 2000 which grants an entitlement to employees who contract occupational diseases to sick leave with full pay for the duration of their incapacity until they are fit to return to work or are discharged from service in terms of section 34 of the Police Act.
- [25] It is also common cause that the applicant has applied for early retirement due to ill-health and that the application was not approved. Resolution 7 of 2000 which is the subject matter of this determination is mostly dealing with leave and not ill-health benefits. Except for a scanty reference to ill-health benefits in terms of the Pension Law of 1996 under 7.5.2, there is no provision for ill-health benefits or early retirement in Resolution 7 of 2000 and consequently, I have no jurisdiction to determine the fairness or otherwise of the respondent's conduct concerning the application for ill-health benefits as it is outside the scope of my mandate.
- [26] Even if I may be wrong in my finding of jurisdiction, it appears clear to me that clause 7.5.2 of Resolution 7 of 2000 can only be relied upon by an applicant if there was consensus between the employer and employee that the employee is permanently unfit to perform any type of duties in his level or rank. The respondent is of the view that the applicant would be fit to perform in a low stress post and therefore clearly, in the absence of such consensus, the applicant's decision to proceed with an application for ill-health benefits was not in terms of paragraph 7.5.2.

[27] If the applicant is not satisfied that his application for ill-health benefits was treated fairly and strongly believes that the respondent did not apply its mind properly to the case, the route open to the applicant will be the unfair labour practice jurisdiction referred to in section 186 (2) (a) of the Labour Relations Act No 66 of 1995 (as amended).

[28] In conclusion then, having duly applied my mind to the facts and merits of the case before me, I on a balance of probabilities can come to no other conclusion other than that the respondent's interpretation and application of Resolution 7 of 2000 to the applicant's application for temporary incapacity leave was correct. The applicant is therefore not entitled to be granted the relief sought.

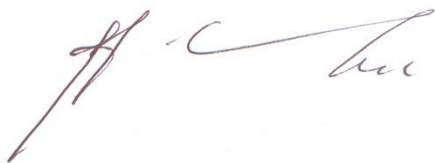
AWARD

[29] The applicant has failed to prove that he is entitled to the relief sought.

[30] The Council has no jurisdiction to determine the fairness or otherwise of the respondent's conduct relating to the applicant's application for ill-health benefits.

[31] The case is accordingly dismissed.

[32] I make no order as to costs.

A handwritten signature in dark ink, appearing to read 'K.D. Matji', is written over a faint, light-colored circular stamp or watermark.

K.D. MATJI

PSCBC - PANELIST