



Panelist: Adv W F Maritz

PARTICULARS OF PROCEEDINGS

1. The arbitration was scheduled to be heard on 20 May 2011.
2. Adv A Gerber (SAPU) appeared for the applicant and Col J van Rensburg appeared for the respondent.
3. The proceedings were conducted in English and were not recorded.
4. The parties tendered documentation and requested an opportunity to file written argument pursuant thereto. The final submissions came to hand on 28 June 2011 after an extension for filing the submissions had been agreed between the parties.

THE ISSUE IN DISPUTE

5. The interpretation and application of PSCBC 7 of 2000 as amended related to an application for incapacity leave.

THE BACKGROUND TO THE DISPUTE

6. The applicant applied for incapacity leave for the period 13 March 2007 to 26 April 2007. The period 13 March to 27 March 2007 was approved and the period 28 March to 26 April was not approved.
7. The reasons given in respect of the period not approved were that the period was excessive; no further hospitalisation was required and there was insufficient evidence on file.

SUMMARY OF SUBMISSIONS ADVANCED

8. On behalf of the applicant it was submitted that the decision of the National Commissioner was flawed in that the application was not finalised until March 2009 which was far in excess of the 30 days that the respondent was allowed in terms of para 7.5.1(b) of the Resolution which reads:

7.5.1 b) The employer shall, during 30 working days, investigate the extent of the inability to perform normal official duties, the degree of inability and the cause thereof. Investigations shall be in accordance with item 10(1) of Schedule 8 of the Labour Relations Act of 1995.

9. The applicant further relied on the submission that there is no reference in the Resolution about a limitation of sick leave in respect of any particular inability and that, accordingly, there is no basis for a finding that the period was excessive.
10. It was submitted further that the Resolution only required that the application be accompanied by a certificate from a registered medical practitioner and did not require that to be from a psychiatrist.

11. The respondent submitted that it was clear from the papers that the case of the applicant had been thoroughly considered and that the National Commissioner was entitled in exercising his discretion to rely on the report of the *Health Risk Manager* as an independent medical assessor.

ANALYSIS

12. I find no support for the argument related to the time taken to consider the application. According to the documentation tendered the application for the leave was received on 29 January 2009 (the best part of two years after the applicant was allowed to proceed on leave) and a decision was thereafter expeditiously given.
13. I have the impression that there is some confusion between what is required for the initial application and procedure when considering the merits of the application.
14. When an application is made for temporary incapacity leave it must be accompanied by a medical certificate which must comply with clause 7.5.1 of the Resolution and I accept that that certificate can be done by any registered medical practitioner and it is apparent from the cases I have been called to deal with that, provided that the applicant is certified as unfit in that certificate, she would be allowed to proceed on conditional leave without further ado but subject to a full consideration on the issue as to whether the leave should be granted on full pay or not.
15. If, after assessment, the National Commissioner comes to the conclusion that leave on full pay is not justified then any other leave due to the applicant would be utilised and, where there is a shortfall, unpaid leave could be allowed and any remuneration already paid could be recovered from the applicant.
16. The assessment as to whether the application falls under clause 7.5 and what the level of accommodation should be is made subsequent to filing the initial application.
17. In considering whether the leave will be on full pay or not it is obvious that the onus to adduce evidence to enable the National Commissioner to exercise his discretion is on the applicant. In that regard the opinion of the medical practitioner that had put the applicant off in the first instance must, obviously, be taken into account but, it is clear from the use of the words “... *has duly certified such a condition in advance ...*” [my accent] that that opinion is only the first salvo and it is clear from 7.5.1 b) that the National Commissioner has to investigate the situation further before he exercises his discretion.
18. The applicant’s representative has contended that, as there is no reference in the Resolution of any need for psychiatric evidence or to capping the number of days that may be allowed for any ailment, the

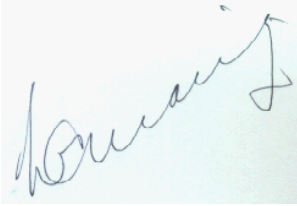
National Commissioner, in going beyond what is specifically required there, has erred in his interpretation and, consequently, his application of the Resolution.

19. The Resolution is silent as to precisely what the National Commissioner should have regard to before he exercises his discretion but this apparent hiatus is covered by National Instruction 2/2004 which creates a so called “*health risk manager*” which is appointed to “*examine and make recommendations to the National Commissioner on all applications for (inter alia) incapacity leave*”
20. The National Commissioner is bound to follow the dictates of the Instruction and therefore obliged to have regard to the recommendations made by the *Health Risk Manager*.
21. I have not been referred to the procedures to be followed by the *Health Risk Manager* and must assume that he has a free hand to call on what evidence is required for him to produce an informed recommendation.
22. As I understand the submissions on behalf of the applicant it is this evidence solicited by the *Health Risk Manager* that is objected to but, although the National Commissioner must follow the National Instruction, it is not a collective agreement and I have no jurisdiction in terms of section 24 of the Act to consider the validity of the National Instruction or to consider the actions the *health risk manager* performed in terms of his appointment.
23. It is clear that the National Commissioner must call upon the *Health Risk Manager* to make recommendations as to the basis on which he must exercise his discretion. On the basis of the *audi alteram partem* rule it is arguable that an applicant should have had an opportunity to challenge any evidence adverse to her cause before the recommendation is made to the National Commissioner but in my opinion I am not called upon to consider that phase of the proceedings which relates to the fairness of the decision of the National Commissioner. The process before me relates only to the interpretation of the resolution and its application.
24. In that regard I find no fundamental fault with the manner in which the National Commissioner dealt with the matter.
25. As to my reservations about considering the actions of the Health Risk Manager I note the following from the head note in *Minister of Safety & Security v Safety & Security Sectoral Bargaining Council & Others* (2010) 31ILJ 1813 (LAC- 2/09). “*...In this matter the dispute that was before the SSSBC was a dispute concerning the fairness or otherwise of the refusal to approve the application for a transfer and the application of the collective agreement was an issue in the dispute; it was an issue that had to be resolved in order to resolve the real dispute. The court accordingly concluded that the SSSBC had no jurisdiction to arbitrate the dispute concerning the fairness or otherwise of the decision not to approve the transfer of the employee.”*

26. It would seem to me that this supports my view that a consideration of the phase relating to the recommendations falls outside my brief.

AWARD

1. The PSCBC has no jurisdiction to consider the fairness of the phase relating to the recommendation made to the National Commissioner.
2. The National Commissioner acted correctly in interpreting and applying the Resolution.
3. The application by the applicant is dismissed.

A handwritten signature in blue ink, appearing to read "W F Maritz", is written on a light blue background.

Adv W F Maritz
Arbitrator
PSCBC Panelist