



PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: Stephen Bhana _____

Case No.: **PSCB60-09/10** _____

Date of Award: 30 August 2010 _____

In the ARBITRATION between:

PSA obo Karin Haddow

(Union / Applicant)

and

Department of Justice and Constitutional Development

(Respondent)

Union/Applicant's representative: Gerry Theunissen _____

Respondent's representative: Colleen Bailey _____

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

The arbitration was held on 13 July 2010 at the Magistrate Court, Mossel Bay. Mr. Gerry Theunissen, a PSA representative, represented the employee, Karin Haddow. Ms. Colleen Bailey, a State Attorney, represented the respondent. Both parties submitted bundles of documents for consideration. The proceedings were recorded digitally and conducted in English.

THE ISSUE IN DISPUTE

Whether the respondent is in breach of Resolution 7 of 2000 i.e. the interpretation or application of a collective agreement as contained in Sections 24(2) and 24(5) of the LRA and more specifically had the respondent applied the provisions of clause 7.5.1 fairly in declining the Temporary Incapacity Leave (TIL) application.

THE BACKGROUND TO THE DISPUTE

The applicant is an admin clerk at the Mossel Bay Court She suffers from and is treated for major depression and multiple sclerosis. She had applied for temporary incapacity leave (TIL) for the periods 22 May 2008 to 13 June 2008, 30 June 2008 to 31 January 2009 and 2 February 2009 to 31 March 2009. The first period was approved and the latter two were declined.

The union averred that whilst the applicant complied with the requirements of applying for TIL, the respondent had not investigated her claims nor did it respond to the applications within the required timeframes. The union also averred that the respondent had not exercised its discretion fairly, had not given reasons for declining the TIL and had merely confirmed SOMA's recommendation. The union requested that the periods of TIL applied for be granted and the amount of R3 909.24 deducted to be reimbursed to the applicant.

The respondent declined to present an opening statement and both parties elected to only present arguments.

SUMMARY OF EVIDENCE AND ARGUMENT

The union argued that the applicant had met all the requirements of Clause 7.5 by notifying the respondent of her absence and providing medical evidence that she was significantly ill. The respondent, by merely following the SOMA recommendation, did not exercise its discretion fairly. Theunissen referred to other awards in support of his argument. The respondent was in breach of the resolution because it had exceeded the 30 day time limit. The applicant had to convert the declined TIL into annual leave and capped leave. The union requested that the declined TIL

periods be approved and the annual leave and capped leave converted be reimbursed to the applicant as well as the amount already deducted from the applicant.

The respondent agreed that one period of TIL had been approved and two others declined. Bailey further agreed that the two periods were considered together and that the reports for these periods were quite detailed about the applicant's depression and multiple sclerosis. Bailey argued that the applicant did not provide proof of treatment and medication. The applicant received the outcome of her applications some 6 months later.

Bailey claimed that the respondent had requested additional information which the applicant did not supply. The applicant had not submitted sufficient evidence of her illnesses. The investigation was done by SOMA. Bailey wanted the respondent's decision to be upheld.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

PSCBC Resolution 7 of 2000, par 7.5.1 reads as follows:

"a) An employee who 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 official 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."

It is common cause that temporary incapacity leave is not a statutory entitlement but can be applied for in cases where an employee's normal sick leave had been exhausted. It is also not an unlimited amount of additional sick leave at the employee's disposal, but can be granted at the employer's discretion

based on its investigations. It is further common cause that there had been no investigation or a final decision within 30 working days as per Clause 7.5.1 of the resolution.

In this matter the applicant had been diagnosed with two medical conditions that contributed to her incapacity. It is significant that SOMA approved her first application for TIL for depression but declined the further two applications for the same and an additional illness. SOMA conceded that the applicant had no history or indications of abusing sick leave. Instead it declined the last two applications on the basis that the evidence is insufficient or not supportive of such a long absence. There is no evidence that SOMA or the respondent requested further information or evidence which is what one would expect given the applicant's circumstances.

The report by SOMA had been signed by a Ms. R. Luger (B.Sc OT) and a Dr J.P. Mouton (MB ChB). There is no indication of these persons' expertise in mental disorders or MS, yet they decline the application because the applicant had not undergone electroconvulsive therapy, had not been hospitalized and had not been consulted by a second psychiatrist. It boggles the mind how two persons, with no apparent expertise in the applicant's particular ailments, can deliver opinions of this nature when she had been treated by mental health and other specialists. I have mentioned in previous awards that psychiatric illnesses are in general treated by specialists and are not comparable to less complex medical problems like a broken arm.

In light of the above, I find that the respondent had failed to apply the provisions of clause 7.5.1 in that it had not conducted an investigation timeously and had not considered the findings of its own investigation. In addition the SOMA investigation and evaluation is flawed in my opinion. The respondent cannot be said to have exercised that discretion fairly. In view of this, the employee should be given the benefit of the doubt as it is too late now to conduct a proper investigation. I am mindful that temporary incapacity leave is not an unlimited number of additional sick leave days available to an employee. I therefore deem it fair to order the respondent to grant the applicant the TIL for the periods 30 June 2008 to 31 January 2009 and 2 February 2009 to 31 March 2009 and to reimburse the amount of R3 909.24.

AWARD

The respondent is in breach of Resolution 7 of 2000.

The respondent must grant the applicant TIL for the periods 30 June 2008 to 31 January 2009 and 2 February 2009 to 31 March 2009 and return any annual leave days to her current leave allotment. The respondent must further reimburse the applicant the sum of R3 909.24. This must be implemented within 30 days of the respondent receiving this award.

A handwritten signature in black ink, appearing to read 'S Bhana', written in a cursive style.

Stephen Bhana

ARBITRATOR