



ARBITRATION AWARD

Case No.: PSCB 289-08/09
Date : 12 August 2010
Panelist: Carlton Johnson

In the matter between:

PSA OBO C AMOS

(Union / Applicant)

and

DEPARTMENT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing was held at the offices of the Department of Justice and Constitutional Development in Cape Town on 29 January 2009 and 30 July 2010. The proceedings were digitally recorded. The applicant was represented by Gerry Theunissen of the PSA and Advocate Bailey of the State Attorney's office, appeared for the respondent.
2. The parties relied on written argument only and no oral evidence was considered. Although the applicant party initially called Dr George as a witness his testimony was not considered due to the fact that his evidence was not completed.

THE ISSUE IN DISPUTE

3. I must decide whether the respondent had improperly exercised its discretion by declining the applicant's application for temporary incapacity leave.

SUMMARY OF EVIDENCE AND ARGUMENT

THE APPLICANT'S CASE

4. The applicant submitted that the dispute relates to two applications for temporary incapacity leave. The first application pertains to the period 1 July 2008 to 15 August 2008 whilst the second application relates to the period 16 August 2008 to 12 September 2008. According to the applicant the respondent provided no feedback despite the fact that the applications were submitted within the time period. The applicant's salary was stopped on 1 August 2008 and she also did not receive any salary for September 2008. The salary was subsequently reinstated with back pay. The respondent recovered R 27 061.00 on 1 November 2008 and R 9 020.33 in January 2009 in respect of the period that the applicant was book off work. The applicant's salary was stopped before the respondent had exercised its discretion in respect of the temporary incapacity leave application.
5. Clause 7.5.1 of the collective agreement states that an investigation should be conducted, expeditiously. The applicant submitted an award of Commissioner Sarah Christie where she ruled that the investigation should be conducted within 30 days. The applicant further argued that SOMA had recommended that temporary incapacity leave be granted. According to the applicant the respondent failed to properly exercise its discretion and it therefore request the commissioner to order the respondent to repay the monies that were deducted. In addition the applicant claims three months payment in respect of compensation.

THE RESPONDENT'S CASE

6. The respondent submitted that the present referral only relates to the period 1 July 2008 to 15 August 2008. The stop on the applicant's salary was due to an error on the system. Although the application for temporary incapacity leave was submitted timeously, the fact is that applicant had failed to submit the correct forms and relevant medical information. Following the first arbitration hearing it was decided that the correct forms should be submitted. Subsequently SOMA recommended that the application be granted. It

is accepted as common cause that SOMA had provided two reports. The respondent did not accept that the applicant could be assessed one year after suffering from the particular medical condition. Ultimately it falls within the scope of the respondent's powers to make a final decision. The investigation was conducted by an independent body and the respondent had exercised its discretion fairly in the circumstances.

ANALYSIS OF EVIDENCE AND ARGUMENT

7. It is necessary to record at this stage that I will deal only with the application for the period 1 July 2008 to 15 August 2008. Having regards to the referral form it is evident that the second period does not form part of the present dispute and as such the arbitrator lacks the necessary jurisdiction to pronounce on the matter.
8. In terms of Resolution 7 of 2000 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 under certain conditions. The employee must inform the employer that he/she is ill and a relevant registered medical practitioner should certify such a condition in advance as a temporary disability. For the applicant to succeed with this application he/she must prove that the Respondent did not apply its mind when it considered the application for incapacity leave.
9. It is accepted as common cause that the respondent has discretion to deal with an application for temporary incapacity leave by either accepting or rejecting the recommendation made by SOMA. The person exercising the discretion must do so fairly and reasonably. If it is established that respondent had properly and fairly exercised its discretion, the decision to decline the application must stand. In such circumstances the arbitrator is not permitted to interfere with the decision taken by the delegated authority. However if the applicant can prove that the respondent had not complied with the relevant procedures it is indicative of the fact that the delegated authority had not fairly exercised its discretion. The onus is on the applicant to prove that respondent had failed to exercise its discretion in a fair and reasonable manner.
10. Having carefully considered the material evidence I am of the view that respondent had fairly exercised its discretion. There is no evidence to suggest that the delegated authority had not applied its mind to the facts. Although the second report from SOMA recommended that the application for temporary incapacity leave be granted, I accept the respondent's version as more probable, that it is not appropriate to rely on a medical diagnosis that was made one year after the fact. In this regard I am strongly influence by the fact that no expert medical evidence was presented to indicate that the diagnosis could be accepted, despite the fact that it was made one year after the particular illness.

11. I find that there to be a rational connection between the decision and the material that served before the delegated authority and as such the decision must stand. I find that the delegated authority had fairly and reasonably exercised its discretion. I must emphasise that employees are not entitled to temporary incapacity leave but instead the resolution merely provides employees with the right to make an application for the "benefit". Whilst there were some delays in bringing the matter to finality, I cannot ignore the fact that applicant contributed to this situation by failing to submit the correct documentation. It seems to me that both parties contributed to the delay and in the circumstances it would be patently unfair to penalise the respondent. In any event I am not convinced that applicant had suffered any prejudice, due to the delay. I say this in view of the fact that the applicant, in accordance with the decision of the delegated authority, was not entitled to temporary incapacity leave in the first place. In the circumstances I find that the respondent had not breached the provisions of the collective agreement.

AWARD

12. The matter is dismissed based on the reasons as stated.

A handwritten signature in black ink, appearing to read 'Carlton Johnson', written over a horizontal line.

PANELIST: CARLTON JOHNSON