



# ARBITRATION AWARD

**CASE NO: PSCB 9-09/10**  
**PANELIST: JOYCE TOHLANG**  
**DATE 30 APRIL 2010**

In the **ARBITRATION** between

**T D DE WAAL**

**Applicant**

**AND**

**SOUTH AFRICAN POLICE SERVICES**

**Respondent**

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## ARBITRATION AWARD

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### 1. DETAILS OF THE HEARING AND REPRESENTATION

1.1 The matter was scheduled for arbitration on the 27<sup>th</sup> July 2009. The applicant attended and was represented by Mr. Gouws, a practicing attorney. The respondent was represented by senior superintendent Janse van Rensburg.

1.2 The parties submitted bundles of documents and agreed to submit written heads of argument. The applicant will submit his arguments on the 15<sup>th</sup> September 2009. The respondent would file its response on the 22<sup>nd</sup> September 2009. The applicant to reply on the 23<sup>rd</sup> September 2009.

1.3 The written heads of argument were submitted.

## **2. ISSUE TO BE DECIDED**

2.1 The dispute relates to the interpretation and application of Resolution 7 of 2000 as amended by Resolution 5 of 2001 read in conjunction with National Instruction 2 of 2004.

2.2 Whether the applicant is entitled to sick leave with full pay whilst suffering from an occupational disease.

2.3 Whether or not the applicant is entitled to ill health retirement benefits

## **3. BACKGROUND TO THE ISSUE**

3.1 The applicant is employed by the respondent and it appears that the applicant applied for ill health retirement. This application was not granted and the applicant lodged a grievance which was not satisfactorily resolved.

3.2 The applicant referred a dispute of application and interpretation to the Council. The dispute was conciliated and it remained unresolved at conciliation.

The applicant requested that the dispute be resolved through arbitration.

#### 4. SURVEY OF THE EVIDENCE

4.1 As indicated above the parties submitted bundles of documents and written heads.

4.2 On behalf of the applicant it was submitted that the applicant was exposed to traumatic and gruesome experiences in the execution of her duties and she developed an illness, Post Traumatic Stress Disorder.

4.3 The applicant's treating Psychiatrist, the independent Psychiatrist as well as the occupational therapists and the Health Risk Manager confirmed that the applicant was suffering from Post Traumatic stress Disorder.

4.4 It was submitted that the applicant applied for temporary incapacity leave and ill health retirement.

4.5 Her application for temporary incapacity leave was partially disapproved.

4.6 Her application for ill health retirement was not approved.

4.7 It was submitted that the applicant was not satisfied with the decision of the employer and she submitted a comprehensive grievance.

4.8 It was further submitted that the applicant's application was not disapproved in compliance with Schedule 8, items 10 and 11 of the Labour Relations Act.

4.9 It was submitted that Clause 7.6 of Resolution 7 of 2000 provides as follows:

“Employees who, as a result of their work suffer occupational injuries or contracts occupational disease shall be granted occupational injury and disease leave for the duration of the period that they cannot work”.

National Instruction 2 of 2004, Paragraph 6 thereof provides that:-

An employee who sustains an occupational injury, or contracts an occupational disease , is entitled to occupational injury and diseases leave with full pay , from the time that he or she becomes unable to work –

- (i) Until he or she can resume their duties; or
- (ii) Until he or she is discharged from the Service after an inquiry as contemplated in Section 34 of the Act.

4.10 It was submitted that the applicant was declared unfit for duty as from 9 February 2007. She was absent from 2007 to January 2009 when she was informed that her ill health retirement application was disapproved.

4.11 It was submitted that the provisions of Clause 7.6 are peremptory and that the respondent does not have discretion.

4.12 The applicant further referred to Clause 4( 5) of the National Instruction 2 /2004 provides that:

- (a) An employee whose degree of incapacity has been certified as permanent, shall with the approval of the National Commissioner be granted paid permanent incapacity leave for up to 30 days or for such additional number of working days as

may be required by the service to enable the service to determine the fitness of the employee for continued employment in the service.

- (b) The service must within 30 working days from the commencement of the permanent incapacity leave, ascertain whether it would be feasible to retain the service of the employee by-
- placing the employee in the alternative post, or
  - Adapting the duties or work circumstances of the employee to accommodate the incapacity of the employee.

4.13 It was submitted that the respondent finalized the applicants ill health retirement application on the 8<sup>th</sup> January 2009 and decided that she must resume her duties in a half day low stress position. The National Instruction stipulates that she is entitled to paid sick leave until the service has determined her fitness to continue employment.

4.1 In relation to whether the applicant is entitled to ill health retirement she relied on the provisions of Clause 7.5.2 of Resolution 7 of 2000 which provides as follows.

“If both the employer and the employee are convinced that the employee will never be able to perform any type of duties at her or his level or rank the employee shall proceed with the application for ill health benefits in terms of the Pension Law 1996”

4.14 Mr. Gouws argued that the facts presented, the agreements, Acts as well as the regulations endorse that the applicant’s application for ill

health retirement is a mutual process, which included the applicant at all relevant stages even during the investigation process.

- 4.15 Further that the respondent did not apply the Resolution correctly in that the applicant was not part of the decision making process. She was not allowed to state her case before a decision could be made.
- 4.16 It was submitted further that the collective agreement stipulate that the employer and the employee must be in consensus regarding the fact the he shall never be able to perform any type of duties at his or her level or rank. The employer excluded the applicant from the process.
- 4.17 It was submitted that the respondent did not apply its mind to the recommendation by the treating Psychiatrist Dr. H. Smith that the applicant be placed on ill health retirement.
- 4.18 The respondent failed to inform the employee and the treating doctor of the date of the consideration of the application for ill health retirement. The employee and the doctor are entitled to be present at such a sitting of the Medical Board.
- 4.19 Mr. Gouws submitted that the respondent did not comply with the provision of Item 10 and 11 of schedule 8 (Code of Good Practice)
- 4.20 It was submitted that the Collective agreement stipulates that the employer and the employee must reach consensus regarding the fact that she cannot be able to work. It was submitted that the respondent did not act in good faith as it excluded the applicant from the process.

- 4.21 It was submitted that the medical evidence stipulates that the applicant has contracted an occupational disease which resulted in long term illness and absence from work. Further that medical boarding was recommended.
- 4.22 The independent therapist appointed by the respondent concluded that the applicant's successful reintegration in the police is unlikely and remote.
- 4.23 The Health Risk Manager concluded that the applicant's motivation to work within the SAPS appears to be very low and that she may resist any attempts to return to her workplace.
- 4.24 The respondent disregarded the reports and attempted to place the applicant at Klerksdorp Police station as a shift commander.
- 4.25 It was submitted on behalf of the applicant that the respondent arbitrarily decided that the applicant must resume her duties and that the conduct of the respondent is not in compliance with the provisions of the Collective Agreement read with the relevant Acts and regulations.
- 4.26 On behalf of the respondent it was submitted that the Health Risk Manager is a medical assessor appointed to examine and make recommendations to the National Commissioner on all applications for incapacity leave, ill health retirement and injuries on duty employees. The health risk manager is independent and falls under the auspices of Alexander Forbes.
- 4.27 The applicant was assessed by the Health Risk Manager and the report indicates that the applicant does not qualify for ill health

retirement. The Health Risk Manager recommended that the applicant's services be retained. The respondent retained the applicant's services and complied with the recommendations of the Health Risk manager.

4.28 It was submitted further that the respondent in deciding whether to grant the applicant's application for ill health retirement considered the findings and recommendations of the Health Risk manager as well as the reports of the treating doctor and the employee was indeed placed in a low stress post as shift commander. There is no evidence that as shift commander the applicant is exposed to any traumatic situations. It was submitted that there is no basis for the applicant to claim that she is entitled to ill health retirement and leave in terms of Clause 7.6. of the Collective Agreement. Thus the applicant's claim should be dismissed.

## **5. ANALYSIS OF THE EVIDENCE AND ARGUMENT**

5.1 The issue that I have to determine in this case is whether the respondent failed to apply and interpret correctly the provisions of Resolution 7 of 2000 in particular clause 7.5.2. and Clause 7.6.

5.2 It is common cause that the applicant was absent from work from 2007 to 2009 and that the applicant applied for "incapacity leave" for that period. Further that the applicant applied for ill health retirement. The application for temporary incapacity leave was partially approved but the application for ill health retirement was not approved.

5.3 Mr. Gouws relied on the provisions of clause 7.6 of the Resolution and submitted that the provisions of this clause are peremptory and that the

respondent does not have discretion. The respondent on the other hand submits that it has discretion on whether to grant or not to grant leave.

5.4 The provisions of Clause 7.6 are peremptory and if the employee can prove that she could not work on during a particular period she should be granted sick leave on full pay. The Health Risk Manager in its report indicates that there was no evidence before it that the applicant was during the period where her application is not approved unable to do meaningful work.

5.5 The fact that one has been diagnosed as suffering from Post Traumatic Stress does not in itself mean that an employee **cannot work**.

5.6 Accordingly in the absence of proof that a person could not work, a vital requirement for this kind of leave is then lacking and leave cannot be granted.

5.7 The fact that the applicant once instructed to resume duties could work is an indication that she could work albeit in a low stress environment and thus she could not have satisfied that vital requirement.

5.8 On behalf of the applicant it was submitted that the respondent flouted the provisions of Clause 7.5.2 (c).

5.9 In determining whether the respondent failed to apply the Resolution correctly it is important to consider the whole clause which provides that-

Clause 7.5.2 (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 finalize the process set out in (b) and (c) below

(b) The employer shall within the 30 working days, ascertain the feasibility of:-

- (i) Alternative employment or
- (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 her or his level or rank the employee shall proceed with the application for ill health benefits in terms of the pension laws of 1996.

5.4 Clause 4(5) of the National Instruction 2 /2004 provides that:

(c) An employee whose degree of incapacity has been certified as permanent, shall with the approval of the National Commissioner be granted paid permanent incapacity leave for up to 30 days or for such additional number of working days as may be required by the service to enable the service to determine the fitness of the employee for continued employment in the service.

(d) The service must within 30 working days from the commencement of the permanent incapacity leave, ascertain whether it would be feasible to retain the service of the employee by-

- placing the employee in the alternative post, or

- Adapting the duties or work circumstances of the employee to accommodate the incapacity of the employee.

(e) If the service is satisfied that the employee would never be able to perform official duties at his or her level or rank steps must be immediately taken to initiate the process of considering his or her medical retirement and the process must if possible be finalized within six months. If the process cannot be finalized within six months a written report, setting out the reasons for the delay must be submitted to the Divisional Commissioner Personnel Services.

5.10 On behalf of the applicant it was argued that collective agreement provides a mutual consent process that includes both the employer and the employee.

5.11 Mr. Gouws argued that the respondent failed to apply the Resolution correctly in that the agreement provides for mutual consent process. I do not agree with this contention. Clause 7.5.2 (c) deals with a situation where both parties agree that an employee cannot perform duties at her level or rank. The clause provides what should then happen. The word “if” clearly indicates that the process provided for in that sub clause would apply ***if*** (*my emphasis*) if there is such an agreement.

5.12 In this case there is no agreement, in that the applicant believes that she cannot perform duties at her level and rank. The respondent on the other hand based on the findings and recommendations of the Health Risk Manager is of the opinion that the applicant can still work. Thus the respondent in this case invoked the provisions of Clause 7.5.2 (b) of the Resolution.

- 5.13 The applicant chose to take only extracts from the report of the Health Risk Manager that would advance her case. I submit that the report cannot be considered piece meal and should be read in totality. In this case the Health Risk Manager concluded that the applicant did not qualify for ill health and that she should be placed in a position which is not functional.
- 5.14 I accordingly find that Clause 7.5.2 of the resolution envisages a situation where if an employee is found to have a permanent degree of disability the employer would investigate with the view of ascertaining the feasibility of alternative employment or adapting the duties. If this cannot be done due to the condition of the employee and medical assessment which is part of the investigation indicates that the situation cannot be dealt with in terms of sub clause (b) , both parties would then be convinced and agree that the employee cannot function and the employee would then proceed to apply for ill health retirement.
- 5.15 On behalf of the applicant it was submitted that the Resolution should be read with Items 10 and 11 of the Code of good Practice. It was submitted that the provisions of these items together with the provisions of Regulation 28 (4) (c) of SAPS Regulations endorse that consideration of ill health retirement is a mutual process.
- 5.16 Items 10 and 11 of the Code of Good practice should be read in context. Item 1 of the Code sets out the purpose of the Schedule. It provides as follows:
- “This Code of Good Practice deals with the key aspects of dismissal for reasons related to conduct and capacity...
- 5.17 Thus the Code is aimed at setting guidelines to be followed before an employee may be dismissed; bearing in mind that one of the underlying principles of social justice is job security. With this in mind it is important

that no employee should be dismissed without being afforded an opportunity to be heard.

5.18 When one reads Item 10 it is clear that it places a duty on the employer to investigate all alternatives short of dismissal. Due to the fact that it would not be fair to dismiss an employee without a hearing Item 10 (2) provides that the process of investigation should include the employee.

5.19 Item 10(4) indicates that particular consideration should be given to employees who are incapacitated by work related illness. The courts have indicated that the duty on the employer to accommodate the employee is more onerous in these circumstances.

5.20 Item 11 also places a duty on the employer to accommodate the employee with the view of ensuring that the employee continues to work.

5.21 The irony of the situation in this case is that, whereas the employer is willing to adapt the functions of the employee and to follow the recommendations of the Health Risk Manager, it is the employee who does not want this protection provided by these items.

5.22 I find that the provisions of Item 10 and 11 do not endorse a process of mutual participation where the employee does not wish to continue working, when there are alternative positions and her work can be adapted to accommodate her.

5.23 The Health risk Manager in the report clearly considered the reports of the applicant's doctor and pointed out deficiencies in the manner in which her condition was managed and made recommendations.

5.24 I accordingly find that on the evidence the employer applied the provisions of the Resolution correctly with regard to ill health.

**6 AWARD**

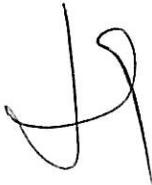
6.1 I find that the respondent applied an interpreted the collective agreement correctly.

6.2 The application is dismissed.

6.3 No order as to costs

**Done and signed on this the 30 APRIL 2010**

**JOYCE TOHLANG**

A handwritten signature in black ink, appearing to be 'JT' with a stylized flourish.

**ARBITRATOR**