

AWARD

Panellist/s: Zolashe Lallie
Case No.: PSCB44-10/11
Date of Award: 11 October 2010

In the ARBITRATION between:

PSA obo GERBER
(Union / Applicant)

And

THE DEPARTMENT OF HEALTH – WESTERN CAPE
(Respondent)

Union/Applicant's representative: Mr. Kapp
Union/Applicant's address: P.O. Box 1837
Cape Town

Telephone: 021 409 7365
Telefax: 021 409 7399

Respondent's representative: Mr. Collop
Respondent's address: PO Box 2060
Cape Town

Telephone: 021 483 5089
Telefax: 021 483 3952

DETAILS OF THE HEARING AND REPRESENTATION:

[1] This arbitration was held at the offices of the Department of Health of the Western Cape province in Cape Town on 16 September 2010. The Applicant Mr CP Gerber (Gerber) was represented by Mr J Kapp (Kapp), an official of the PSA (the union). The Respondent was represented by Mr R Collop (Collop) one of its employees. The proceedings were digitally recorded.

BACKGROUND TO THE DISPUTE

[2] The Union referred a dispute to the PSCBC in terms of section 24 of the Labour Relations Act 66 of 1995 (the LRA) pertaining to the interpretation and/or application of Resolution 7 of 2000 (the collective agreement). The dispute could not be resolved at the conciliation stage and the union requested that it be arbitrated. The parties agreed to file closing arguments on 20 September 2010, I however received the last set of arguments via e-mail two days later.

THE ISSUE TO BE DECIDED:

[3] I have to determine whether the Respondent acted in breach of Resolution 7 of 2000 by its refusal to grant the Applicant's applications for Temporary Incapacity Leave (TIL) for the period 11 February 2009 to 13 February 2009, 19 March 2009 to 20 March 2009, 25 May 2009 to 29 May 2009 and 9 September 2009 to 11 September 2009.

SURVEY OF EVIDENCE AND ARGUMENT

[4] The Applicant has been in the employ of the Respondent for over 20 years. He was an ambulance man. After sustaining a back and a neck injury in the course of duty and after undergoing three back operations the Applicant's doctor recommended that he performs light duty. In response to the recommendation the Respondent placed the Applicant at the Tygerberg Control Centre where he is one of the control operators. He had to undergo an operation to remove gallstones. He consequently was on sick leave from 8 to 25 January 2008, a total number on 14 working days.

[5] The Applicant's TIL applications which were declined by the Respondent were for the following ailments:
On 11 to 13 February 2009 he was booked off for pharyngitis/ sinus.
On 19 to 20 March 2009 he was booked off for back pain.
On 25 to 29 May 2009 he was booked off for back/ neck pain.

On 9 to 11 September 2009 he was booked off for influenza.

[6] Mr Petersen (Petersen), the Applicant's supervisor testified that he informed members of his staff including the Applicant, from time to time, to use their sick leave responsibly. He further stated that he told his subordinates about the dangers of exhausting their sick leave including the reality that TIL was not a right but a privilege which was extended to employees at the discretion of the employer. He explained that it was difficult to meet the Applicant speedily because the Applicant worked shifts and he could sometimes see the Applicant once in a period of two weeks. He conceded that he gave the Applicant the letter informing him that he had one day of sick leave credit left for the 2007 to 2009 sick leave cycle on 7 October 2009.

[7] The Applicant denied that Petersen warned him that his sick leave was getting exhausted. He also denied that he was warned about the dangers of exhausting sick leave. He however testified that he noted his sick leave credit monthly from his salary advice. He stated that he was genuinely ill each time he was on sick leave and he submitted medical a certificate on every occasion he was on sick leave.

[8] The gist of Collop's argument was that the Applicant's TIL application was declined by the Health Risk Manager, SOMA. It was reassessed by the Respondent and was again declined. He lodged a grievance for the Respondent's refusal to grant his TIL application and the decision declining his TIL application was upheld. He argued that the Applicant's back problem was aggravated by his playing and coaching jukskei, a sport which caused the Applicant to throw a heavy pin over a long distance. It was also argued on behalf of the Respondent that the Respondent did not act unfairly in refusing the Applicant's TIL application in that it acted swiftly and investigated the basis of the Applicant's application within the required time limits. The intention of creating the TIL, Collop argued, not to extend employees' sick leave.

[9] The essence of Kapp's argument is that the Respondent is aware that the Applicant has back problems as a result of two back injuries he sustained at work which led to the Applicant undergoing two back operations. He further argued that the Respondent refused to allow the Applicant to work the eight hour shift which was recommended by the Applicant's doctor although it was aware of his back problem. He also argued that were it not for the gallbladder operation which caused the Applicant to be on sick leave for 14 days, the Applicant would have had the 13 days leave credit to cover the 13 days which form the basis of this dispute. He said PILLAR is for employees who find themselves in the position the Applicant is in. It was argued on behalf of the Applicant that the Respondent failed to fairly exercise its discretion whether to grant the Applicant's TIL application.

ANALYSIS OF EVIDENCE AND ARGUMENTS

[10] TIL is governed by clause 7.5.1 of the collective agreement which provides as follows:

“7.5.1 Temporary disability leave:

- a) 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 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.
- c) The employer shall specify the level of approval in respect of applications for disability leave.”

[11] It is common cause that the Applicant complied with clause 7.5,1(a) of the collective agreement in that after his leave credits were exhausted he informed his supervisor that he was ill and submitted certificates from his medical practitioners. Petersen was unable to specifically state the time at which he told the Applicant that his leave credit was running out and to warn him about the dangers of exhausting his leave credit. He could only generalize on the issue. I therefore have to accept the Applicant’s version that Gerber did not discuss the issue of the Applicant’s sick leave with him before his leave was exhausted because the Applicant presented clear and unequivocal evidence on the issue. It is common cause that Gerber gave the Applicant a letter warning him that he had a day’s sick leave credit on 7 October 2009. It is also common cause that the Applicant made two TIL applications on 11 June 2009 and another two on 18 September 2009. In the letter which the employee was given on 7 October 2009 after he had submitted all his TIL applications he is advised as follows in paragraph 2:

“It is strongly advised that should you apply for incapacity leave, that you submit sufficient and detailed medical evidence justifying the granting of incapacity leave. Incapacity leave is not simply validated by the mere submission of a medical certificate (although a medical certificate is compulsory). Medical evidence submitted should indicate the reason for the absence, treatment administered, changes to treatment and your response to this treatment, periods of hospitalisation, radiological reports and pathology reports which will justify the granting of incapacity leave. In the case of surgery, the nature of surgery performed must be indicated”.

[12] The Applicant was informed in a letter dated 23 October 2009 and given to him on 13 November 2009 that his TIL applications were unsuccessful. For the period 11 to 13 February 2009 the Respondent decided that TIL is reserved for conditions of a serious nature that render temporary disability. Routine conditions were found not to justify the validation of incapacity leave as there is no objective evidence concluding that the Applicant was significantly incapacitated from productive employment during this period. The reasons given for the remaining period were that the supporting medical lacked substantial information regarding his diagnosis, specific symptomatology and the severity thereof, treatment received during and following his absence, and/ or the impact of his condition on his overall vocational ability. His claim of significant occupational incapacity was not considered to have been substantiated.

[13] I have considered the evidence and submissions on behalf of both parties carefully including the ailment which caused the Applicant to be on sick leave on 11 to 13 February 2009. I have considered that he was on sick leave for 14 days because he had to undergo a gallbladder operation. I accept that he was not told before moving his TIL application for that period of the dangers of exhausting his sick leave credit. He was further not told before he made his application that he had to furnish objective evidence proving that he was significantly incapacitated from productive employment during the period. It however very clear from the wording of clause 5 of the collective agreement that TIL was created for the benefit of employees who owing to temporary disability were unable to perform their duties. In the circumstances I am inclined to agree with the Respondent that for the period 11 to 13 February 2009 the Applicant was not on sick leave owing to a temporary disability. He is therefore not entitled to be of sick leave with pay for the said period.

[14] I have considered the versions of both parties regarding the period 19 to 20 March 2009, 25 to 29 May 2009 and 9 to 11 September 2009 (the remaining period). It is clear that the letter in which the Applicant was advised by the Respondent that he had one day's sick leave credit and about the consequences of exhausting his sick leave credit intended to have been delivered to the Applicant before he made his TIL applications. It was however delivered to him more than three months after he made his first TIL application and after he had made his last TIL application. The letter also informed the Applicant about the information he had to supply should he apply for TIL. When the Respondent received the Applicant's TIL applications it lacked vital information because the Respondent failed to inform the Applicant before he made his TIL applications of the information that he was required to include. When the Respondent received the Applicant's TIL applications it had a duty to inform the Applicant that he had not provided vital information and to give the Applicant reasonable time to provide the information before determining his application and concluding that his applications for the remaining period were unsuccessful for lack of such information. It is true that TIL is not a right but is granted at the discretion of the Respondent. The employer has a duty to exercise its discretion whether to grant a TIL application judiciously. The Respondent's failure to inform the Applicant of the

information it required when determining his TIL applications before hand and declining his applications for lack of such information leads me to conclude that the Respondent failed to exercise its discretion judiciously in determining the Applicant's TIL applications for the remaining period.

AWARD:

- I. The Respondent acted in terms of Resolution 7 of 2000 in refusing the Applicant's temporary incapacity leave application for the period 11 to 13 February 2009.
- II. The Respondent breached Resolution 7 of 2000 in refusing the Applicant's temporary incapacity leave for the period 19 to 20 March 2009, 25 to 29 May 2009 and 9 to 11 September 2009.
- III. The Respondent's decision refusing the Applicant's temporary incapacity leave for the period 19 to 20 March 2009, 25 to 29 May 2009 and 9 to 11 September 2009 is set aside and the Respondent is ordered to record the period referred to in this paragraph as temporary incapacity leave with full pay

Dated and signed in Port Elizabeth on this the 11th day of October 2010.

Z LALLIE

Panelist