



Commissioner: ANAND DORASAMY

Case No.: PSCB 49-09/10

Issued: 28 APRIL 2010

In the ARBITRATION between:

PSA O.B.O. HUSSELMAN R S APPLICANT

and

DEPARTMENT OF CORRECTIONAL SERVICES-NATIONAL RESPONDENT

Applicant's representative : MR V HARIPARSAD
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DETAILS OF HEARING AND REPRESENTATION

1. This arbitration hearing took place on the 9 April 2010 at the Department of Correctional Services offices, North Field, Glencoe. Mr V Hariparsad of PSA represented the applicant.
2. At the initial hearings the respondent attended the proceedings but on the penultimate and final hearing it did not attend.
3. I was satisfied that the Respondent was properly notified of the hearing and in my discretion decided to proceed with the hearing.
4. The proceedings were conducted in English and mechanically recorded. The matter was conciliated on the 3 July 2009 and remained unresolved. The matter was set down for the 23 November 2009 but did not proceed because the respondent's representative did not attend because he experience problems with his car and the respondent tendered the wasted costs for the day.

The hearing commenced on the 25 February 2010 with the applicant concluding its evidence and the matter adjourned with the wasted costs of the day being reserved.

On the 24 March 2010 the matter did not proceed and the wasted costs were reserved.

On the 9 April 2010 the respondent did not attend and the applicant requested that written closing arguments be forwarded to me. The applicant submitted its written closing arguments on the 20 April 2010.

ISSUE TO BE DECIDED

5. Whether the respondent had interpreted and applied sections 24(2), [24(5)] of the collective agreement in terms of resolutions 7 of 2000 and 15 of 2002 correctly in declining his temporary incapacity leave for the periods 21 November 2006 until the 29 December 2006 a total of 27 days and the 15 February 2007 until 28 March 2008 a total of 279 days. Further and should my finding favour the applicant what relief may be appropriate in the circumstances.

SUMMARY OF THE EVIDENCE

APPLICANT'S OPENING STATEMENT

6. The applicant challenges the interpretation and application of the Resolution 7 of 2000 a collective agreement in that the employer had not done what it was supposed to do in terms of its own rules. The employer failed to revert to the applicant within 30 days of the application and to inform her of the decision to approve or decline the application.
7. There are two periods that are challenged. The first period being from the 21 November 2006 until the 29 December 2006 a period of 27 days. The second from the 15 February 2007 until the 28 March 2008 a total of 279 days. The applicant was informed of the employer's decision in respect of the first application on the 17 July 2008 and the second on the 27 January 2009.
8. The applicant seeks that the decision of the employer be set aside and that the applicant be granted leave on full pay and that no further deductions be made against her salary for both periods.

RESPONDENT'S OPENING STATEMENT

9. The respondent seeks that the decision of the employer be endorsed because the decision was justified and there was correspondence between the employer and employee.

APPLICANT'S EVIDENCE

RHODA SYBIL HUSSELMAN

A synopsis of the Applicant's evidence is as follows:-

10. In 2006 she was employed at the area commissioner's office in Glencoe doing filing, all administrative and register work. She was on IOD leave from 2004 to 2006.

After that she was still not well and applied for the re-opening of the IOD and she was asked to apply for incapacity leave.

She applied for incapacity leave and it was only after five months that she was informed that it was rejected. The letter indicated that it was week-end related and that was the reason for the rejection. When she received the letter she returned to work around the 29 March 2008.

11. She was not happy and immediately put in a grievance but received no response and put in a repeat grievance. Again nothing happened. She cannot bend or sit for long periods.
12. She received a letter on the 17 February 2009 that she had to repay for the period that she was paid and for which leave was rejected. In January 2009 she started paying back an amount of R 500.00 which was increased to R 1 000.00 and thereafter to R 3 000.00. She had a meeting with corporate services and indicated that she was not in a position to pay R 1 000.00 per month. From 2009 to present an amount has been deducted from her salary.
13. At present she is still unwell and has applied for medical boarding. She has applied three times and the last one some four months ago and she has had no response thus far.
14. She is currently not at work. On the 13 January 2009 she fell again and opened an IOD and is still at home and being treated by her doctor. She seeks that her monies be returned as she cannot work.
Under cross-examination she stated:
15. The IOD was applied for in 2004 to 2006. When her IOD time had expired her doctor booked her off sick permanently. In that period she was paid and no deductions are being made for that period.
16. The doctor gave her certificates and she submitted them to the department. The neurosurgeon issued her with a permanent sick note. She feels that the delay in responding by the employer had prejudiced her because her forms were initially lost that she re-applied.

SPECIAL NOTE

After the applicant had concluded its case the respondent had applied for the matter to be adjourned to study the applicant's bundle of documents and prepare its response.

17. The evidence of the Applicant was challenged when the applicant testified but the respondent did not attend to provide a version as to the reason the application was opposed.

CLOSING ARGUMENTS

18. The matter was adjourned for the applicant to submit written closing arguments which it did on the 20 April 2010. The applicant's submission is copied verbatim.

DETAILS OF REPRESENTATION

19. The applicant was represented by Mr V. Hariparsad, Labour Relations Officer from PSA. The respondent was represented by Mr Hlatswayo from the Department of Correctional Services. (25 February 2010)

BACKGROUND

The applicant is employed as a Correctional Officer and is based at Glencoe Management Area. The dispute is an interpretation and/or application of the Collective Agreement - PSCBC Resolution 7 of 2000. The applicant's Temporary Incapacity Leave was declined for the periods:

21 /11 /2006 to 29 /11 /2006 a total of 27 days - short term

And

15 /02 /2007 to 28 / 03 /2008 a total of 279 days - long term

APPLICANT'S SUBMISSION

At the first sitting of the arbitration on 23 November 2010, the respondent's Adv. S.E.Ndlovu failed to appear.

He communicated telephonically with the Honourable Commissioner and the applicant's representative, he explained that he had a breakdown with his motor vehicle, passed the Mooi River Toll Plaza and that he will not be able to attend the arbitration and that he was prepared to tender the wasted costs incurred. The Honourable Commissioner adjourned the arbitration, noting that the Respondent will have to bear the wasted costs in terms of the PSCBC rules. The arbitration was, for the second time, set down for the 25 February 2010. The arbitration commenced at 09:00.

The respondent was represented by Mr Hlatswayo. The applicant had concluded its evidence and was duly examined by the Respondent. The matter was adjourned, at the request of the respondent, so that he may be given the opportunity to prepare and hand over a bundle of documents to the applicant. The Honourable Commissioner adjourned the hearing, so that the applicant's representative could study the documents to be used by the respondent and to take instructions from the applicant. The matter was then set down for the 24 March 2010.

On the 24 March 2010 the hearing commenced at 09:00, Adv. S.E.Ndlovu, the respondent's representative contacted the Honourable Commissioner and advised him that he was under the impression that the matter was set down for the 25 March 2010. Mr Mkhabela represented the respondent thereafter and applied for a postponement, he left the decision of wasted costs to the Honourable Commissioner. The applicant's representative addressed the Honourable commissioner, stating that he was in discussion with Mr Hlatswayo who informed him that he had no documents to hand over as previously agreed and that the matter may be resolved.

The Honourable Commissioner after considering the submission granted the postponement, on the following understanding:

- The respondent pay for the wasted costs.
- Indicate to Council by the 1 April 2010 if settlement was reached.
- Should settlement be reached, the settlement agreement would be finalised at the Honourable Commissioners office in Durban.

- Should the matter not be settled then the matter must be set down for the 9 April 2010.

On the 9 April 2010, the hearing commenced at 09:00, the applicant was represented by Mr V.Hariparsad, and the respondent was absent. The Honourable Commissioner attempted to ascertain the whereabouts of the representative, but to no avail. It was then agreed that the Applicant's representative will forward his closing arguments to the Honourable Commissioner, the hearing was there after closed.

APPLICANT'S SUBMISSION - A

20. Mrs Husselman testified as follows :-

1. She commenced employment with the respondent on 7 February 1974 and is currently a Correctional Officer Grade One.
2. She fell at work and hurt her lower back in November 2004 and had severe pain and was under ongoing treatment for the condition.
3. She was on I.O.D. leave for a long period due to this.
4. She underwent surgery in September 2005, where prosthetic discs were placed; she has since been under medication because of pain.
5. She applied for ill health retirement, which has been declined.
6. She applied for Temporary Incapacity Leave - Short Period in November 2006, for the period 21 November 2006 to 29 December 2006 on the prescribed form and attached the medical certificate, this was conditionally approved.
7. The Department failed to respond to her in terms of the Resolution 7 of 2000, within 30 days, regarding her application.
8. The Department informed her of the decision to decline her Temporary Incapacity Leave for the said period in August 2008, eighteen months later.(see page 24 of applicants bundle)
9. The Department had converted the said period to leave without pay and has proceeded and deducted from her salary.

10. She applied for Temporary Incapacity Leave - Long Period in February 2007, for the period 15 February 2007 to 28 March 2008 on the prescribed form and attached the medical certificate, this was conditionally approved.
11. The Department failed to respond to her in terms of the Resolution 7 of 2000, within 30 days, regarding her application.
12. The Department informed her of the decision to decline her Temporary Incapacity Leave for the said period in January 2009, nine months later. (see page 28 of applicants bundle)
13. During the period in question she had submitted monthly medical certificates to the Department, as per their request.
14. The Department has converted the said period to leave without pay and has proceeded to deduct from her salary, monthly.
15. She is currently on I.O.D. leave and receiving medical treatment for her condition.
16. She has also re-applied for medical board and has not had a response to date.
17. She is being treated by Dr Fourie - General Practitioner, Dr J Scheltema - Neuro Surgeon and Mrs Jenny Miller - Occupational Therapist.

APPLICANT'S SUBMISSION - B

1. It is submitted that Paragraph 7.5.1. (b) of PSCBC Resolution 7 of 2000 requires that the “employer Investigate within 30 days the extent of inability to perform normal duties...”
2. The DPSA’s directive on leave further stipulates that “The Head of Department must within 30 days after receipt of both the application form and medical certificate ... approve or refuse the Temporary Incapacity Leave granted conditionally.
3. PSCBC Resolution 7 of 2000 specifies that where an employee has exhausted normal sick leave and is deemed by a relevant medical practitioner to require to be absent from work due to disability which is

not permanent, may be granted sick leave on full pay provided that: (a) his supervisor is informed that the employee is ill; (b) a relevant registered medical practitioner has duly certified such a condition on advance.

4. In PSA obo Swart and the Department of Correctional Services (2206) 27 ILJ 653 (BCA) the Arbitrator prescribed as follows; “Thus while the employer has a discretion whether or not to grant leave, the employee has a right that the employer exercise that discretion properly by conducting an investigation within a prescribed time frame. Non-compliance is a breach of the Collective Agreement.
5. The Honourable Commissioner’s attention is drawn to the following cases, wherein awards have been made against the Department of Correctional Services, in respect of the Interpretation and Application of Resolution 7 of 2000:-

PSA obo Muir and DCS	PSCB 239-06/07
PSA obo JC RICHARDS and DCS	PSCB 132-06/07
PSA obo THEUNISSEN and DCS	PSGA 50-06/07
PSA obo NARAINDATH R and DCS	PSCB 199-08/09

21. RELIEF

1. The Department must credit Mrs Husselman with Vacation Leave in lieu of any such deducted from her Leave Credit.
2. The Department must refund all deductions made against Mrs Husselman’s salary in lieu of her Temporary Incapacity Leave.
3. The Department must refrain from making any deductions against Mrs Husselman’s salary in lieu of her temporary Incapacity Leave.

ANALYSIS OF EVIDENCE AND ARGUMENT

22. In order to remain within the scope of section 138 (1) of the Labour Relations Act the relevant provision of the applicable resolutions have been read with the applicable leave provisions. Further as I have only one

version before me and there is no indication except the applicant submitting that the employer had invoked alternatively utilized the provisions of the resolutions forming the collective agreement incorrectly the version of the applicant would prevail.

23. In arriving at the aforesaid finding and in having regard to section 23 of the Basic Conditions of Employment Act and determining that the employer had paid the applicant for the duration of the period in question I conclude that it would be unfair for the employer to prejudice the employee by retrospectively making deductions against her salary and the debiting of her capped and other leave without consulting and obtaining her permission.
24. In the absence of any counter evidence from the Respondent I have to accept the evidence of the applicant. In accepting such evidence as probable, I accordingly make the following award:

AWARD

25. The respondent had interpreted and applied sections 24(2), [24(5)] of the collective agreement in terms of resolutions 7 of 2000 and 15 of 2002 incorrectly in declining the applicant's temporary incapacity leave for both the periods namely the first period being from the 21 November 2006 until the 29 December 2006 a period of 27 days and the second from the 15 February 2007 until the 28 March 2008 a total of 279 days.
26. The respondent must restore the applicant's capped and other leave deducted in respect of the aforesaid periods.
27. The respondent must refrain from making any deduction against the applicant's salary in lieu of her temporary incapacity leave.
28. The respondent must refund any deductions if any made against the applicant's salary in lieu of her temporary incapacity leave. The refund if any must be made within THIRTY (30) DAYS of the date of the award. Should the amount to be refunded to the applicant still be in dispute then

upon submission by the applicant in respect of the amount claimed, the award will be varied to quantify the amount claimed.

29. The respondent must tender the wasted costs from the first sitting up to and including the 9 April 2010. The Bargaining Council will determine the wasted costs including the costs of the interpreter.

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CCMA Commissioner: ANAND DORASAMY

28 APRIL 2010

(AWARD HUSSELMAN)