PSCBC

PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

IN THE PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

CASE NO. PSCB 96-09/10

In the arbitration between:

R.M. DHANRAJ First Applicant

S. DHANRAJ Second Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES Respondent

ARBITRATION AWARD

Date of arbitration	:	January and April 2010
Case Number	:	PSCB 96-09/10
Venue	:	Area Commissioner's Office, Empangeni
Date of award	:	25 May 2010
Issue	:	Interpretation or Application of a Collective Agreement

R. Lyster

Arbitrator

BACKGROUND, VENUE AND REPRESENTATION

The matter was held over two days in January and April 2010. Applicants were represented by L. Naidu and Respondent by Mr S. Ndlovu. The hearing took place at the Area Commissioner's office in Empangeni.

ISSUE

The Applicants referred their dispute in terms of Section 24 of the Labour Relations Act i.e. interpretation and application of a Collective Agreement i.e. Resolution 7 of 2000 relating to temporary incapacity leave.

The parties handed in a signed pre-arbitration minute which read as follows:

"The parties to the above dispute convened at the Area Commissioner's office in Empangeni on 7 October 2009 for the purposes of arbitration. The parties decided to hold a pre-arbitration meeting to narrow the issues in dispute. The parties agreed on the following:

1. The First Applicant R. Dhanraj and Second Applicant S. Dhanraj are correctional services officers employed by Respondent.
2. It is the First Applicant's version that she suffered severe sexual harassment and threats from a Senior Manager Mr D. Mohan also employed by Respondent as from 17 September 2007.

3. Such threats were made to both Applicants and their family causing both Applicants to be diagnosed with post traumatic stress disorder.

4. Applicants used up their sick leave and their annual leave and were refused temporary incapacity leave.

5. The Applicants took unpaid leave and suffered loss of salary to the extent of R65 000, 00 and R25 000, 00 respectively as well as having to pay private doctors and specialist bills.

6. The Applicants requested Respondent to treat the issue as one of an occupational injury or illness in terms of the Compensation for Occupational and Diseases Act.

7. The Respondent's view is that without conceding that the Applicants suffered from post-traumatic stress disorder, Respondent submits that Applicants did not follow correct procedures with regard to an IOD claim in terms of the COID Act and did not comply within the time frames laid down by the Act and that therefore the Applicants did not qualify for special leave as per Resolution 1 of 2007 and Resolution 7 of 2000 of the PSCBC and in terms of the PILIR DPSA manual. "

The issue I am called upon to decide is whether:

1. Respondent ought to have reported the matter to the COID Commissioner when Applicant made such request.
2. Respondent should be ordered to refund the monies deducted from both Applicants salaries in respect of unpaid leave pending a decision of the COID Commissioner.
3. Respondent should have granted special leave in terms of Resolution 1 and Resolution 7.

EVIDENCE

This matter was originally set down for hearing on 7 October 2009 in Empangeni. On that date Mr S. Ndlovu for the Respondent was unprepared and did not have witnesses available and he requested that the matter be adjourned. The Applicant's opposed the adjournment. I granted the adjournment but in order to use the time available in a fruitful manner I directed that the parties should have a pre-arbitration meeting and the parties then proceeded with the pre-arbitration meeting facilitated by myself with the result that the abovementioned pre-arbitration minute was produced. The matter was then adjourned until 21 January 2010.

On that day Mr Ndlovu for the Respondent was again unprepared and brought no witnesses with him and he requested that the matter be adjourned. The Applicants opposed the adjournment. I ruled that the matter should proceed and that in order to make effective use of the time available that evidence should be heard from the Applicants at least, taking into the account that this was the matter in which the onus rested upon Applicants in any event. Mr Ndlovu continued to argue that the matter should not go ahead. At that point he advised that the boardroom in which we were then sitting had been booked by other parties and that we would have to vacate the boardroom. We accordingly vacated the boardroom. I then requested Mr Ndlovu to request the Area Commissioner to make another room available.

After sometime Mr Ndlvou returned and advised that the Area Commissioner had advised him that no room was to be made available to the parties because the dispute in this matter had arisen in Umzinto on the South Coast and that he would not allow any matter emanating from outside of his jurisdictional area to take place in his office.

Mr Naidu on behalf of the Applicants then made enquires with the Area Commissioner's staff and an administrative member of staff then reported to me that the Area Commissioner was not present, that she knew of no such directive that he had made that no out of area case should be heard at his offices and she in fact made his personal office available to the parties to continue with the arbitration.

The arbitration then proceeded in the Area Commissioners office.

I advised Mr Ndlvou that I did not believe his statement made to me that the Area Commissioner had advised him that the matter should not go ahead in his office and I advised Mr Ndlovu that I believed that he had fabricated this statement in order to attempt to gain an adjournment of the arbitration.

Mr Ndlovu then responded by making an application for my recusal stating that I was biased in favour of the Applicant. I heard arguments for and against my recusal and, after having found no legal basis whatsoever to recuse myself I refused the application for recusal.

I then proceeded to hear evidence from the First Applicant Mrs Rehno Dhanraj. She said that in September 2007 at her workplace, one of her superiors Director Mohan, who had been sexually harassing her for several months prior to September 2007, threatened to shoot her and himself and dismiss Second Applicant, unless she agreed to have a sexual relationship with him. He then telephoned the Second Applicant and repeated the same thing to him. Applicant then reported the incident to the Area Commissioner in their area i.e. Umzinto. She said that the incident had severally traumatized her because she had been harassed by him for a lengthy period before this. She then decided to lodge an injury on duty claim and did so personally in the staff office at her place of work, requesting an application form. The staff member in charge told her that the incident was not an IOD. This was on 17 September 2007. The Applicant then consulted a medical doctor and psychologist and on 20 September made a written application to have the matter regarded as an IOD. A further written request of this nature was made to the Area Commissioner, Umzinto on 7 October 2007. Both written applications i.e. dated 20 September and 7 October 2007 were acknowledged in writing by Respondent. She said that as far as she was aware the Respondent had taken no steps whatsoever to process the application for IOD. She said that in the meantime both she and her husband the Second Applicant had been booked off and were hospitalized for work related stress and depression and were booked off until December 2007.

In the meantime the staff officer to whom the initial written request had been made on 20 September, Mrs Ngingana gave the Applicants temporary incapacity leave forms to fill in, because Applicants had used up their allotted sick leave. The temporary incapacity leave forms were duly filled in and handed to the staff office.

She said that on her return to work in 2008 Director Mohan continued to harass and threaten her, culminating in an incident on 4 May 2008 when he publicly humiliated her whilst members were on parade. Applicant then again made written requests for the matter to be treated as an injury on duty and on 15 April 2008 the Area Commissioner for the Durban Management Area addressed a letter to the Applicants advising that there was no evidence that they had suffered injury on duty and their request for injury on duty was disapproved.

The Respondent then commenced to deduct R7 000, 00 per month from the Applicants' salaries. The deductions continued until 2009, resulting in R65 000, 00 being deducted from First Applicant and R20 000, 00 from Second Applicant.

She said that in terms of the Respondents own HR policies which she referred to at page 66 of Applicants bundle, the procedure to be followed when reporting an injury on duty was that the employee had to report the alleged accident to the supervisor immediately on or before the end of the shift and the Area Commissioner had to report the injury within two (2) working days to the head office and the head office would report it to the Compensation Commissioner within seven (7) working days in accordance with Section 39 of the COID Act. In cases of diagnosed occupational disease the employee had to report to the head of personnel within ten (10) working days and the head office would report it to the Compensation Commissioner within fourteen (14) working days in accordance with Section 58 of the Act.

She said that she had reported everything in the prescribed time and had specifically asked the staff officer Mrs Ngingana to give her the G11 form to enable her to properly process the IOD application and said Mrs Ngingana had told her that she had not suffered an IOD and did not qualify and refused to give her the form. She said that if the Respondent had properly processed the IOD forms then the First and Second Applicants would have been paid and their medical bills would have been attended to by the Respondent.

She made reference to the DPSA manual dated April 2005 and to the portion headed Application of COID Act to the Workplace: A Guide for Government Departments, and Clause 2.1.2 thereof which reads as follows:

"(a) The employer is obliged to report any injury / disease or alleged injury/ disease to the Compensation Commissioner by completing the relevant forms. Any injury/disease must be reported to the Compensation Commissioner whether the employer agrees or not with the employees claim to be injured / contracted to a disease whilst on duty. It is incumbent upon the Compensation Commissioner to decide upon the liability that emanates from the claim.

(b) Departments are cautioned that failure on their part to report to such an accident within a reasonable time to the Compensation Commissioner may result in them being held responsible for the full costs attached to such a claim."

The witness also made reference to paragraph 5 of the same manual and to Clause 1.1 thereof which reads as follows:

"1.1 An employee who as a result of his/her work sustained an occupational injury or contracted an occupational disease, must be granted occupational and disease leave for the duration of the period they cannot work in terms of the provisions contained in the directive on leave of absence in the public service read with the applicable collective agreements.

1.2 The employer is obliged to manage and control the leave so granted by means of requesting regular monthly progress reports of the occupational injury/disease sustained or contracted. These reports must be submitted to the Compensation Commissioner to evaluate and consider payment of medical expenses and also to determine permanent liability if any.

1.3 It is important that departments manage these sickness absences to prevent abuse. However should departments require any assistant/advice in this regard the Offices of the Compensation Commissioner should be approached for assistance.

She also made reference to the relevant or applicable Collective Agreement of the Public Service Co-ordinating Bargaining Council in Resolution 7 of 2000 and to Clause 7.6 thereof which reads as follows:

"7.6

(a) Employees who as a result of their work suffer occupational injuries or contract occupational diseases shall be granted occupational injury and disease leave for the duration of the period they cannot work.

(b) If an employee suffers a work related injury as a result of an accident involving a third party the employer may grant him or her occupational injury and disease leave provided that the employee:

(i) Brings a claim for compensation against the third party and undertakes to use compensation in terms of the COID Act to recompense as far as possible for the costs arising from the incident.

(ii) The employer shall be obliged to take reasonable steps to assist employees to claim compensation according to (b) above.

The witness said that she had sought a protection order against Director Mohan and brought a High Court interdict to prevent him from continuing to harass her and her husband.

The witness was then cross examined by Mr Ndlovu. She repeated that she had reported the incidents and events involving Director Mohan and herself and her husband with the staff officer Mrs Ngingana and had requested the G11 form to enable her to apply for injury on duty. Mr Ndlvou then asked who this person was i.e. Mrs Ngingana and requested the witness to spell her name. After the witness had done so, Mr Ndlovu retorted by saying that he had met and consulted with Mrs Ngingana the day prior to the hearing i.e. 24 hours before and said that she would deny that she had ever been asked to make the form available.

In response to his question the witness said she had applied for temporary incapacity leave at the request and suggestion of the Respondent and had picked up the forms to fill them in during December 2007 and January 2008. She confirmed that the temporary incapacity leave was declined by the Health Risk Manager. She made reference to the report of the Health Risk Manager in accordance with the temporary incapacity leave policy which states that a detailed medical report from a psychiatrist and psychologist be submitted with all incapacity leave applications but this had not been forthcoming and that therefore there was sufficient medical information to motivate for the period of absence. The application for temporary incapacity leave was therefore declined.

She also made reference to the abovementioned DPSA manual which confirms that post-traumatic stress disorder is a mental disorder which is included in the definition of an occupational injury in terms of the COID Act.

The matter was then adjourned for 15 April 2010. On that day, the Respondent's representative, Mr. Ndlovu, did not arrive. After waiting half an hour, a member of the staff of the prison advised me that Mr. Ndlovu had telephoned him and had advised him that he had problems with his motor vehicle, which had broken down on the way to Empangeni. I telephoned the office of Mr. Ndlovu in Pietermaritzburg, and was advised by the receptionist that Mr. Ndlovu was on the premises, but not in his office at the time. Naidu, the Applicants' representative then requested whether he could testify concerning the absence of Mr. Ndlovu. He testified stating that he had been present at an arbitration with Mr. Ndlovu, some two weeks before 15 April, and Mr. Ndlovu had asked him if he would agree to an adjournment of this matter on 15 April. Because of the prior attitude of Mr. Ndlovu i.e. arriving unprepared for the arbitration on two occasions, Mr. Naidu refused to agree to the adjournment. He then testified that Mr. Ndlovu had told him that he did not intend to be present at the arbitration on the 15th April, and that if the arbitrator went ahead and heard the matter in his absence, he would merely apply for a rescission of the award and if that was refused, he would apply for a review of the award.

Having heard that evidence, I then determined that Mr. Ndlovu had deliberately absented himself from the arbitration proceedings, and that I was empowered to proceed in his absence.

After Mr. Naidu had testified, the second Applicant, who is the husband of the first Applicant, confirmed that insofar as her evidence related to him, that it was true and correct.

Mr. Naidu then made a closing statement.

ANALYSIS OF EVIDENCE

As per the pre-arb agreement, the issues that I am called upon to decide are;

1. Respondent ought to have reported the matter to the COID Commissioner when Applicant made such request.
2. Respondent should be ordered to refund the monies deducted from both Applicants salaries in respect of unpaid leave pending a decision of the COID Commissioner.
3. Respondent should have granted special leave in terms of Resolution 1 and Resolution 7.

With regard to the first issue, it is abundantly obvious that the Respondent should have reported the injury or accident to the Commissioner in terms of the COID Act. It is very clear that this is the duty of the employer, whether or not the employer agrees with the employee's view that he or she has suffered an IOD. This is a matter for the Compensation commissioner to decide, not the employer. Accordingly the Respondent ought to have reported the injury/accident.

I shall deal with the second issue after I have dealt with the third issue.

With regard to the third issue, the application for temporary incapacity leave was made, and it was forwarded to the health risk manager, and a decision was made by the health risk manager that the applicants were not entitled to TIL, for reasons provided, relating to the failure of the Applicants to provide certain necessary medical reports and documents.

The granting of TIL is discretionary at the instance of the employer, such discretion to be exercised fairly and not arbitrarily or capriciously. The Resolution does not go into any detail as to how the discretion is to be exercised. Accordingly, the Minister has issued a determination as to how the discretion is to be exercised. This is the prerogative of the Minister i.e. the state as the employer is given the discretion, and it is the state's money that is being paid out to employees who qualify for the extra leave payout, and

accordingly the state, via the Minister is entitled to issue a determination as to the process to be followed for payment or Temporary and Permanent Disability Leave.

The Minister has issued a determination on Leave of Absence in the Public Service (July 2008) as well as a determination (April 2009), in the form of the so called **PILIR** (Policy and Procedure on Incapacity Leave and Ill Health Retirement), determined ITO section 3(2) of the Public Service Act of 1994. These documents lay down very clear guidelines as to when and how an employee in the public service will qualify for disability, or incapacity leave, as it is referred to in PILIR. It also spells out clearly that if the applicant for TIL is not satisfied with the outcome of the application process, he or she is entitled to lodge a grievance in terms of section 35 of the Public Service Act.

My authority as an arbitrator does not extend to overriding the decision of the health risk manager, and I cannot therefore make an order as to whether the Applicants are or are not entitled to temporary incapacity leave.

With regard to the second issue, i.e. as to whether the money deducted ought to be paid back, this involves a consideration of that portion of the Collective Agreement (Resolution 7), dealing with the chapter dealing with Leave for Occupational Injuries and Diseases, and specifically Clause 7.6 There are two parts to this Clause;

7(6)(a) Employees who suffer occupational injuries or diseases as a result of their work, **shall be granted** ….. leave for the duration of the period that they cannot work.

The use of the word “shall” means that it is mandatory for the employer to pay the disability leave (provided of course that the employee can prove that he has been injured or made sick as a result of his work).

7(6)(b) (NB this only covers injuries arising from accidents with third parties). If an employee suffers from a work related injury as a result of an accident involving a third party, the employer MAY grant him/her …. leave, provided that the employee brings a claim for compensation against that third party, and claims compensation in terms of the Compensation for Occupational Injuries and Diseases Act (i.e. formerly known as the Workmens’ Compensation Act). In this matter, the person who caused the occupational

injury or illness, was the Applicants' superior, and cannot in my view be held to be a third party.

It seems clear that no discretion is given to the employer by Clause 7(6)(a). Accordingly, if the employee succeeds in establishing that his injury or illness has arisen out of or as a result of his work, then the employer must pay the employee for the duration that he is away from work.

This is in accordance with **National Instruction 2 of 2004**, which provides that an employee who sustains an occupational injury is entitled to leave with full pay from the time that he/she becomes unable to work, until he or she can resume work or is discharged from the service.

So, while the employer is obliged to pay employees while they are on leave as a result of occupational injuries or diseases, the employer still has the right to lay down the ground rules as to **how** the employee should prove that he/she is suffering from an occupational injury or disease, and **what degree** of proof is required. In this regard, the employer has the right to require an employee who is making a claim for such leave, to attend to a doctor or specialist of the employer's choice. If the employee refuses to attend such doctor or specialist, the employer may withhold the employee's disability leave.

I am not aware of any determination by the Minister (similar to PILIR), which lays down the procedure to be followed in making claims for occupational disability leave. PILIR does not cover this area

The question arises as to whether Post Traumatic Stress Disorder (PTSD) falls with the definition of an occupational accident or illness. The Minister of Labour has made very clear rules pertaining to this particular illness, details of which are summarized below.

Circular Instruction 172

DEPARTMENT OF LABOUR

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT NO. 130 OF 1993) AS AMENDED

The following circular instruction is issued to clarify the position in regard to compensation of claims for *Post Traumatic Stress Disorder* (PTSD). This circular instruction comes into effect on 01 April 2003 and supersedes all previous circular instructions in respect of *Post Traumatic Stress Disorder*. *Post Traumatic Stress Disorder* is regarded as an occupational injury in terms of the Compensation for Occupational Injuries and Diseases Act, *No. 130 of 1993*, as amended (COIDA); therefore, an extreme *traumatic* event or stressor must be an accident as defined in *section 1* of the Compensation for Occupational Injuries and Diseases Act, *No. 130 of 1993*, as amended (COIDA). An occupational injury is an injury caused by an accident arising out of and in the course of an employee's employment and resulting in a personal injury requiring medical aid or resulting in disability or death and does not include an occupational disease in any form except if that occupational disease results from an occupational injury.

In this matter, the Respondent, in contravention of its obligations, unilaterally refused to process the Applicants' request that the matter be referred to the COID Commissioner, and advised them that their application for the matter to be treated as one of IOD had been refused. Monies that had been paid to the Applicants were then deducted.

There is some dispute as to whether an arbitrator who is called upon to interpret and apply a collective agreement, has the power to make a declaratory order or an order sounding in money or some form of compensation. The review in **S A Police Service v Public Service Co-ordinating Bargaining Council & others (2008) 29 ILJ 1989 (LC)** came about after a PSCBC arbitrator found that the SAPS had failed to comply with collective agreements dealing with the procedures to be followed in dealing with applications for incapacity leave in that there was an inordinate delay in dealing with the application and ordered the SAPS to pay compensation to the employee party. Regarding the powers of an arbitrator to grant relief in such circumstances Nieuwoudt AJ made the following findings on review:

Neither party referred me to any authority dealing with the relief that

> *may be awarded by an arbitrator in a dispute regarding the interpretation or application of a collective agreement. Section 24 of the Labour Relations Act is also silent on this issue. Section 193 of the Labour Relations Act expressly deals with competent relief in cases of unfair dismissal disputes or unfair labour practice disputes. Mr Grobler, who appeared for the third respondent, submitted that the relief that ought to be given in a dispute pertaining to the interpretation or application of a collective agreement ought to be the same as the relief granted in unfair dismissal or unfair labour practice disputes. I do not concur. It seems to me that the Act would have provided for this if that was the intention. Furthermore, the fact that part B of Chapter 3 of the Act (dealing with collective agreements) does not expressly provide for relief in disputes about the interpretation and application of collective agreements, is not a casus omission. The normal contractual remedies are available to the parties and there is no reason why these remedies would not adequately protect their rights.*

Having made the findings referred to in the preceding paragraph Nieuwoudt AJ set aside the award on the basis that the arbitrator did not have the powers to award compensation.

This finding is in keeping with the comments made by the learned author Professor John Grogan (Grogan *Workplace Law* (8th Edition) at page 375 where the meaning of "*interpretation or application"* was considered:

> *"A dispute over the interpretation of a collective agreement exists when the parties disagrees over the meaning of a particular provision; a dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to a particular set of facts or circumstances".*

The Applicants have, in the words of the judge in the SAPS/PSCBC matter above, the normal contractual remedies i.e. to take civil action against the Respondent for the return of the monies deducted from their salaries.

Having said this, I have great sympathy for the Applicants, who have been very shabbily treated by the Respondent. I also wish to draw to the attention of the Respondent, the

highly unprofessional conduct of the Respondent's representative, Mr. Ndlovu. His actions were deliberate and willful and bordered on contempt of the arbitrator and this Council. I leave it to the relevant authorities to take the necessary and appropriate action against him.

AWARD

Applicants' claim is dismissed.

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R.M. L YSTER
COMMISSIONER
28 MAY 2010