PSCBC

PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

IN THE PUBLIC SERVICE CO-ORDINATING 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

RULING ON VARIATION APPLICATION

BACKGROUND

I issued an award in the above matter, following the holding of an arbitration in January and April of 2010, in Empangeni. It is that award, which now forms the basis of this application for variation. I should mention that the application is styled in the form of an application for rescission. No grounds for rescission are put forward by the Applicants' representative, and it seems clear that the representative does not seek the award to be rescinded, but to be varied in terms of section 144 of the LRA.

On the other hand, if the Applicants' representative persists in his request that I should rescind the award, I decline to do so, on the basis that I have expressed views in my original award on various matters of law, and Applicants' remedy in circumstances where they believe that I have interpreted or applied the law incorrectly, is not to ask me to rescind my award, but to institute review proceedings in terms of section 145 of the LRA.

ISSUE

I do not intend to set out the terms of the Application for rescission made by the Applicants, and that application is incorporated by reference into this ruling. In short, the Applicants wish me to rescind (or vary) the award, to provide that:

a) The Respondent should be ordered to report the incident to the COID Commissioner;
b) Respondent be ordered to refund the monies deducted from Applicants' salaries in respect of unpaid leave;
c) Respondent should have been granted special leave in terms of Resolution 1 and Resolution 7.

ANALYSIS OF APPLICANTS' SUBMISSIONS

I have made it clear in my award that for the reasons set out in some detail, that I do not believe that I have the power to make the determination that Applicants seek of me. My understanding of the powers of a Commissioner when dealing with an interpretation or application of a collective agreement dispute is set out clearly in my award as follows;

> *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 PILILR. 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 third 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.

Accordingly, with regard to the 2nd issue, I am satisfied that I am not empowered to override the decision and authority of the health risk manager, and Applicants have, or at least had, a remedy at the time, viz: the lodging of a grievance.

With regard to the 3rd issue, i.e. ordering the payment of salary deducted, this is a matter which is beyond my powers as arbitrator to intervene into, and if the Applicants wish to take the matter further, they may apply for the award to be reviewed in terms of section 145 of the Act, or they may simply take the appropriate civil action against the Respondent, as I have alluded to above.

With regard to the first issue, i.e. the question of whether the Respondent should have reported the injury or accident to the Commissioner in terms of the COID Act, I stated clearly in my award that this it is the duty of the employer to report the accident/injury, whether or not the employer agrees with the employee's view that he or she has suffered an IOD. It seems to me that one can distinguish this from the 2nd and 3rd issues, set out above, where a relatively simple civil remedy is available to the Applicants.

Accordingly, and at the risk of appearing to act contradictorily, I vary the last page (page 15) of my award of 28 May 2010, to read:

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AWARD

a) *Respondent is ordered forthwith to report the injury/accident (i.e. the sexual harassment and harassment of the Applicants by Senior Manager D. Mohan, during and subsequent to September 2007) to the Commissioner for the Compensation of Occupational Injuries and Diseases.*

b) *The remaining aspects of Applicants' claim is dismissed.*

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R.M. L YSTER
COMMISSIONER
8 September 2010