PSCBC
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

AWARD

Panellist/s: **Eddie Tlhotlhalemaje**

Case No.: **PSCB136-09/10**

Date of Award: **16 JULY 2010**

In the ARBITRATION between:

PSA OBO GERHARD STEYN
(Union/Employee)

And

THE SOUTH AFRICAN POLICE SERVICES
(Employer)

Employee's Representative:	MR. A SIGUDLA (PSA)
Union/Employee's address:	P. O BOX 11027
	HATFIELD
	0028
Telephone:	012 309 5017
Telefax:	086 610 9996

Employer's representative:	MR. J VAN RENSBURG (SNR SUPERINTENDENT)
Employer's address:	PRIVATE BAG X 94
	PRETORIA
	0001
Telephone:	012 393 7131
Telefax:	012 393 7159

DETAILS OF THE HEARING AND REPRESENTATION:

[1] These arbitration proceedings were scheduled to be held at the premises of the PSCBC in Centurion on 19 May 2010. As is typical of these matters and given the nature of the dispute referred and to be determined, the parties' representatives had agreed to rather have the matter decided on the basis of written heads of arguments.

BACKGROUND TO THE DISPUTE

[2] The PSA had referred this dispute on behalf of the Employee on 09 September 2009. A conciliation meeting held on 06 November 2009 failed to resolve the dispute. The Union/Employee had requested the dispute to be arbitrated on 02 December 2009, and it was accordingly set-down for a hearing as indicated above.

[3] The dispute was referred in terms of s24 (2) and s24 (5) of the LRA pertaining to the interpretation or application of the provisions of Resolution 7 of 2000. The Employee had applied for temporary incapacity leave for the periods 31/08/2005; 09/09/2005; 08/05/2006 to 19/05/2006; 31/05/2006 and 01/09/2006 to 15/09/2006. It needs to be pointed out at this stage that a similar referral was lodged by the Union/Employee in January 2009 in respect of the same issue however pertaining to 29 July 2005, 12 September 2005, and from 31 January 2006 until 10 February 2006. That Employee's claim was found to be unsuccessful in terms of an award issued under case number PSCB319/08/09 on 04 September 2009.

[4] In regard to this fresh dispute, it was common cause that the Employer had declined the application for Temporary Incapacity Leave due to the reasons ranging from the Employee being found to have demonstrated a poor sick leave profile after consideration of his previous and current leave cycle, or alternatively that the leave days applied for were adjacent to weekends or that the copies of the medical certificates he had submitted in support of the applications for leave, did not specify or define the condition or ailment he suffered from. However, his application for leave for the period 31/05/2006 to 31/08/2006 was successful. It was common cause that he had lodged an appeal to the National Commissioner or his delegate, which appeal was unsuccessful.

THE ISSUE TO BE DETERMINED:

[5] The issue to be determined is whether the Employee is entitled to temporary incapacity leave for the periods in question as contemplated in the provisions of Resolution 7 of 2000.

THE EMPLOYEE'S SUBMISSIONS AND ARGUMENTS:

[6] The following submissions and arguments were advanced on behalf of the Employee; that following his unsuccessful application for Temporary incapacity leave, he had lodged an appeal which was considered on 03 January 2006 by the National Commissioner or his delegate. The appeal was unsuccessful on the grounds that an analysis of the Employee's leave record indicated that he had included 12 sick leave periods adjacent to weekends. Additionally a total of 10 sick leave applications were not supported by medical certificates. The conclusions reached were that there was ineffective sick leave management. It was recommended that there should be a career discussion with the Employee.

[7] The Employee had made reference to Clause 4.4 (a) of the National Instruction 2 of 2004 which provides that if an employee has exhausted his or her sick leave entitlement for the leave cycle, and according to a medical practitioner the employee requires to be absent from work due to incapacity which is not permanent, the employee may at the discretion of the National Commissioner, be granted temporary incapacity leave with full pay for each period. It was argued that the National Instruction was meant to complement the Resolution in question to the extent that procedural or implementation tools are found wanting in the Resolution. Furthermore, it was contended that although the medical reports submitted on behalf of the Employee did not clearly indicate his condition, he was nevertheless certified unfit for work and was thus in terms of the provisions of the Resolution, entitled to full pay during his sick leave.

THE EMPLOYER'S SUBMISSIONS AND ARGUMENTS:

[8] The Employer's submissions and arguments were simply that the relief claimed was for the Employer to change the Employee's unpaid leave to temporary incapacity leave; that the Employer had a discretion to grant temporary incapacity leave; that the Health Risk manager had recommended that Temporary incapacity leave not be granted in respect of the days in question; that the Employee had misused his sick leave and that there was a severe ineffective management of his sick leave; and finally that the issues raised by the Employee in regard to his entitlement to leave were the same as those dealt with in a dispute previously referred.

ANALYSIS OF THE EVIDENCE AND ARGUMENTS:

[9] The Employee had relied on Clause 7.5.1 of Resolution 7 of 2000 which provides under *Temporary Disability Leave* that:-

(a) An Employee whose normal sick leave credit 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.

[10] Paragraph 4 (Temporary Incapacity leave) of the National Instruction 2 of 2004 which provides that:

("a) If an employee has exhausted his/her sick leave entitlement for the sick leave cycle and according to a medical practitioner, requires to be absent from work due to incapacity which is not permanent, may at the discretion of the National Commissioner, be granted temporary incapacity leave (sick leave) with full pay for each such period".

[11] The Employee's contention that the National Instruction complements the Resolution to the extent that the latter does not provide procedural or implementation tools has merit. It however needs to be borne in mind that a National Instruction is not a collective agreement for the purposes of a s24 (2) of the LRA dispute. It is only the Resolution that is the subject matter of interpretation and/or application.

[12] The Employee's application went through the normal processes envisaged in Clause 7.5.1, including being referred to the HRM. The application in respect of the ten days (2006/05/08 to 2006/05/19) according to the HRM report as contained on p10 of the common bundle was received on 17 March 2008. The Employee had, following his unsuccessful application, lodged an appeal which was also duly considered by the National Commissioner or his delegate and the decision to decline the application was upheld. This response was issued on 2009/04/07. It was common cause that prior to then, the Employee had taken prolonged sick leave days some of which were approved.

[13] It is now trite that where an employee alleges entitlement to a right arising from a collective agreement, the onus rests on that employee to show that the Employer flouted that right by not correctly interpreting nor applying the provisions of that agreement pertaining to the right in question. The Labour Appeal Court decision in **Minister of Safety and Security v SSSBC & others (PA2/09)** put to rest the issue as to whether some of

these disputes that are referred under s24 (2) of the LRA are disputes pertaining to the interpretation and/or application of collective agreements, or merely disputes that pertain to the questioning of the fairness or otherwise of a decision taken by an administrative authority or his/her delegate. For the sake of completeness, I will deal with the dispute as referred by the Employee insofar as he had contended that it relates to interpretation and/or application of Resolution 7 of 2000, and thereafter deal with the principles set of by the LAC in dealing with such matters.

[14] It was conceded on behalf of the Employee that although the medical certificate submitted by the Employee in support of his application was not detailed, the Employee was nevertheless entitled to temporary incapacity leave as he was certified as unfit to work. At the time, it was common cause that the Employee had exhausted his sick leave days. The medical certificate relied on was issued by a Dr. Prinsloo, a Psychiatrist on 05 May 2006, and had diagnosed the Employee as suffering from "Adjustment disorder with depression and anxiety". The Psychiatrist had then merely "granted" Temporary Incapacity Leave from 08 to 19 May 2006. It is not my intention to deal with the validity of this medical certificate. But *prima facie*, it falls short of the requirements and provisions of Clause (ii) of Resolution 7 of 2000 in that any person considering an application for temporary incapacity leave based on that certificate, would have difficulties in making an informed decision based on the contents of that certificate. Furthermore, it is uncommon for medical practitioners to "grant temporary incapacity leave". Medical practitioners can only declare a patient fit or unfit to resume duties, and not put a patient on "temporary incapacity leave"

[15] Based mainly on the Employee's supporting documents for temporary incapacity leave, and further taking into account the Employee's sick leave profile, it is hardly surprising that the HRM came to its conclusions. To the extent that the Employer had considered the Employee's application as envisaged in the provisions of the Resolution, and had done so having had due regard to the provisions of the National Instruction, I fail to understand how the Employee can be said to have discharged the onus of proving a right and entitlement to the relief he seeks.

[16] The Employee's appeal in respect of the disapproval of his application for temporary incapacity leave was considered by the National Commissioner or his delegate as per the provisions of the National Instruction 2 of 2004. In line with the LAC decision in the **Minister of Safety and Security (supra**), the issue in dispute in this matter in the light of the findings made above is no longer about the interpretation and/or application of a collective agreement. The issue in dispute, no matter how the Employee had phrased it in his referral, is about the f*airness* of the decision of the National Commissioner or his delegate to decline his application for Temporary Incapacity Leave. This decision one can safely say, was taken in accordance with the provisions of the National Instruction, and was thus discretionary. This is the main dispute or real dispute sought to be

resolved and does not as per the principles set out in the LAC decision cited above, relate to an application of a collective agreement. This is more particularly so in view of the fact that a National Instruction, or any decision that emanates from the implementation of that Instruction, cannot be viewed as interpretation and/or application of a collective agreement for the purposes of s24 (2) of the LRA. In these circumstances, the Council would lack jurisdiction to arbitrate such a dispute. Accordingly, the following award is made;

AWARD:

I. The Union/Employee's referral and claim does not pertain to a s24 (2) of the LRA dispute.
II. The Council lacks the requisite jurisdiction to deal with the dispute.
III. The application is accordingly dismissed.
IV. There is no order as to costs

Dated and signed at Johannesburg on this the 16th day of July 2010

E. Tlhotlhalemaje
Panellist: