



ARBITRATION AWARD

CASE NO: PSCB 206-09/10
PANELIST: JOYCE TOHLANG
DATE: 11 NOVEMBER 2010

In the **ARBITRATION**
between

B THERON

Applicant

AND

SOUTH AFRICAN POLICE SERVICES

Respondent

ARBITRATION AWARD

1. DETAILS OF THE HEARING AND REPRESENTATION

1.1 The matter was scheduled for arbitration and the parties agreed that no viva voce evidence needs to be led in the matter as there is no factual dispute. The applicant is represented by Mr. Gouws, a practicing attorney. The respondent is represented by Senior Superintendent Janse Van Rensburg

1.2 The parties agreed to submit written heads of argument and these were duly filed with the Council.

2. ISSUE TO BE DECIDED

- 2.1 The dispute relates to the interpretation and application of Resolution 7 of 2000 as amended by Resolution 5 of 2001 read in conjunction with National Instruction 2 of 2004.
- 2.2 Whether the applicant is entitled to sick leave with full pay whilst suffering from an occupational disease

3. BACKGROUND TO ISSUE

- 3.1 The applicant is employed by the respondent and from the documents it appears that the applicant was diagnosed by Dr. Shevel as suffering from Post Traumatic Stress Disorder.
- 3.2 The applicant has been off sick and has been absent from work from since 15 May 2003. The applicant applied for temporary incapacity leave and ill health retirement. The application for temporary incapacity leave was not approved.
- 3.3 The applicant referred a dispute of application and interpretation to the Council the dispute was conciliated and it remained unresolved at conciliation.
- 3.4 The applicant requested that the dispute be resolved through arbitration.

4. SURVEY OF THE EVIDENCE

- 4.1 As indicated above the parties submitted bundles of documents and written heads.
- 4.2 On behalf of the applicant it was submitted that the applicant was diagnosed with Post Traumatic Stress Disorder. He applied for temporary incapacity leave and ill health retirement. The application was not approved.

4.3 The applicant lodged grievances and despite this his applications have not been approved however the respondent agreed to reconsider his application for ill health retirement.

4.4 It was submitted on behalf of the applicant that the clinical Psychologist Dr. van Bijon confirmed the diagnosis as PTSD and indicated that the applicant is functionally impaired which precludes him from working for the SAPS.

4.5 Further that a psychological report by Dr. Smit indicated that the applicant can be a danger to the public, his colleagues and that it is not safe for the applicant to return to work.

4.6 Despite this the applicant was instructed to resume his duties in a suitable low stress post on or before 2007/ 03/20

4.7 The applicant submitted a grievance regarding the fact that his incapacity leave and ill health retirement applications were not approved. Medical board agreed to subject him to re-evaluation medical examination and that process is still pending.

4.8 On behalf of the applicant it was submitted that Post Traumatic Stress Disorder is regarded as an occupational disease. Further that the collective agreement and the National Instruction stipulate that employees who contracts an occupational disease is entitled to occupational injury and diseases leave with full salary from the time he or she becomes unable to work

- (i) Until he or she can resume duties; or
- (ii) Until he or she is discharged from the service after an inquiry as contemplated in section 34 of the Police Act

4.9 It was submitted that the provisions of the section are compulsory and the respondent does not have discretion to grant or refuse incapacity leave if an employee suffer from an occupational disease.

- 4.10 It was submitted that the applicant is therefore entitled to sick leave from the 15th May 2003 until he can resume his duties or has been discharged in terms of Section 34 of the Act.
- 4.11 Applicant prays for an Award in terms of Section 138(9) (a) of the Labour Relations Act 66 of 1995.
- 4.12 On behalf of the respondent it was submitted that the health risk manager is a medical assessor appointed to examine and make recommendations to the National Commissioner on all applications for incapacity leave, ill health retirement and injuries on duty employees. The health risk manager is independent and falls under the auspices of Alexander Forbes.
- 4.13 In this case the respondent submitted that as it appears from the respondent's bundle that the health risk manager did not approve the application for temporary incapacity leave of the applicant.
- 4.14 It was submitted that the applicant has the onus to prove a prima facie right to the relief that he is seeking. The applicant has not proved the right and thus he is not entitled to any relief.

5. ANALYSIS OF THE EVIDENCE AND ARGUMENT

- 5.1 The issue that I have to determine in this case is whether the respondent failed to apply and interpret correctly the provisions of Resolution 7 of 2000 when it disapproved the applicant's application for temporary incapacity leave.
- 5.2 The applicant submitted that Paragraph 7.6 of Resolution 7 of 2000 provides that "employees who as a result of their work suffer occupational injuries or contracts occupational diseases shall be granted occupational injury and diseases leave for the duration of the period they cannot work.

5.3 National Instruction 2 of 2004 Clause 4(6)(a) provides that An employee who sustains an occupational injury , or who contracts an occupational disease , is entitled to occupational injury and disease leave with full pay , from the time that he or she becomes unable to work

- (i) Until he or she can resume his or her work or
- (ii) Until he or she is discharged from the service after an inquiry as contemplated in Section 34 of the Act.

5.4 According to the documents submitted in the common bundle of the parties the applicant has applied for incapacity leave and ill health retirement. The documents that are in the bundle cover the period up to 2006. It appears that in 2007 the applicant was ordered to return to work in a low stress environment.

5.5 It appears that the applicant has not returned to work.

5.6 On behalf of the applicant it was argued that the respondent does not have discretion to grant or refuse temporary incapacity leave. It is so that the provisions of Clause 7.6 of the Resolution are phrased in a peremptory language. This however does not deprive or preclude the employer from obtaining a second opinion if not satisfied with the opinion presented by the employee. Thus the existence of the Health Risk Manager.

5.7 In this case the applicant was referred to the Health risk manager and after considering the reports that were submitted the Health risk manager recommended that the period from 2004-02-23 to 2006-07-31 should not be approved. The reasons furnished for this decision was that the statement of the doctor was not complete. There is no information or evidence submitted before me with regard to whether the applicant did appeal or not, which option was made available to him subject to him furnishing a complete medical report by the doctor.

5.8 I accordingly find that whilst the provisions of Clause 7.6 are couched in a peremptory language, the rights and entitlements that arise from the agreement are not automatic. In order to prove such an entitlement the applicant must prove that he was unable to work. The mere application for leave does not create an entitlement to an employee to stay at home. Such application should be considered and a decision to approve the application should be made. In this case the application was presented to the Health Risk Manager and leave was not approved and in the opinion of the employer the applicant has failed to prove that he was unable to work.

5.9 I further find that a diagnosis of post traumatic stress does not give a right or an entitlement automatic to unlimited paid leave. I accordingly make the following award

6. AWARD

6.1 The respondent interpreted and applied the provision of Clause 7.6 correctly.

6.2 The applicant's claim is dismissed.

Done and signed on this the 11th November 2010

JOYCE TOHLANG

A handwritten signature in black ink, appearing to be 'JT' with a stylized flourish.

ARBITRATOR