

AWARD

Panellist/s: Zolashe Lallie

Case No.: PSCB382-09/10

Date of Award: 5 October 2010

In the ARBITRATION between:

PSA obo CORNELIUS

(Union / Applicant)

And

THE DEPARTMENT OF EDUCATION – WESTERN CAPE

(Respondent)

Union/Applicant's representative: MR. G Theunissen

Union/Applicant's address: P.O. Box 1837

Cape Town

Telephone: 021 409 7360

Telefax: 021 409 7399

Respondent's representative: MS. Samson

Respondent's address: Private Bag X9114

Cape Town

Telephone: 021 467 2848

Telefax: 021 425 86112

DETAILS OF THE HEARING AND REPRESENTATION:

[1] This arbitration was held at the offices of the Department of Education of the Western Cape province in Cape Town on 15 September 2010. The Applicant Ms SF Cornelius (Cornelius) was represented by Mr G Theunissen (Theunissen), an official of the PSA (the union). The Respondent was represented by Ms Samson (Samson) one of its employees. The proceedings were digitally recorded.

BACKGROUND TO THE DISPUTE

[2] The Union referred a dispute to the PSCBC in terms of sections 24 of the Labour Relations Act 66 of 1995 (the LRA) pertaining to the interpretation and/or application of Resolution 7 of 2000 (the collective agreement). The dispute could not be resolved at the conciliation stage and the union requested that it be arbitrated. The PSCBC granted permission for the submission of this arbitration award outside the statutory 14 day period.

THE ISSUE TO BE DECIDED:

[3] I have to determine whether the Respondent acted in breach of Resolution 7 of 2000 by its refusal to grant the Applicant's application for Temporary Incapacity Leave (TIL) for the period 1 June 2006 to 1 December 2006 and 1 October 2007 to 31 March 2008.

SURVEY OF EVIDENCE AND ARGUMENT

[4] The Applicant works for the Respondent as a senior clerk. She is a secretary at the Kerria Primary School in Atlantis. Subsequent to being sexually abused by the principal of the school who has since been dismissed and a member of the school's governing body she was diagnosed as suffering from chronic post traumatic stress. She applied for TIL for the period 1 June 2006 to 1 December 2006 and 1 October 2007 to 31 March 2008. She received a letter dated 26 February 2009 from the Respondent refusing her TIL application.

[5] Theunissen argued that in refusing the Applicant's TIL application the Respondent breached clause 7.5.1(b) of the collective agreement in that it failed to inform her of the outcome of her TIL application within 30 days. He also argued that the Respondent further breached the collective agreement by not investigating properly the extent, degree and cause of the Applicant's incapacity. He stated that the Respondent exercised its discretion not to grant the Applicant's TIL unfairly.

[6] Samson called Mr Hickley (Hickley) who works in the Respondent's Human Resources office. He has been handling cases involving the Respondent's policy on the management of ill health leave and ill health retirement (PILIR) since October 2006. He explained that after receiving a TIL application they refer it to SOMA for assessment and recommendation. It was his evidence that TIL is not a right but it is granted at the discretion of the head of department.

[7] Hickley testified that the Applicant gave very little information regarding the kind of treatment she received, and who she visited during her period of absence. He added that the information was insufficient. He explained that the Respondent needed more information about the Applicant's hospitalization, the kind of treatment she received, the frequency of her visits to a psychologist or psychiatrist. He conceded that the Applicant was advised of the outcome of her TIL application on 26 February 2009. It was his further evidence that owing to the large number of TIL applications and insufficient manpower the Respondent outsourced assessment of TIL application, and that delays are caused in the process. He expressed the view that the Applicant's TIL application was treated fairly.

[8] Theunissen argued that the Applicant fulfilled her requirements in terms of the collective agreement in that she notified the Respondent of her absence and supplied the necessary medical evidence for both periods that form the basis of this dispute. He argued that the Respondent failed to inform the Applicant of the outcome of her TIL application within the 30 day period prescribed but took two years to reply to the application. He stated that it was the intention of the parties to the collective agreement to have TIL applications determined as expeditiously as possible. He asked me to find that the Respondent did not exercise its discretion fairly and order the approval of the Applicant's TIL application for the entire period in dispute.

[9] Samson argued that the Respondent considered the Applicant's TIL application fairly. It dismissed the principal who harassed the Applicant sexually and he is no longer at the Applicant's place of work. She further argued that SOMA considered all the information the Applicant submitted. It was her argument that the onus is on the Applicant to prove her incapacity for the period in dispute. She lastly argued that the Respondent acted fairly in determining the Applicant's case.

ANALYSIS OF EVIDENCE AND ARGUMENTS

[10] TIL is governed by clause 7.5.1 of the collective agreement which provides as follows:

“7.5.1 Temporary disability leave:

- a) An employee whose normal sick leave credits 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.”

[11] It is common cause that the Applicant complied with clause 7.5,1(a) of the collective agreement in that after her leave credits were exhausted she informed her supervisor that she was ill and submitted certificates from her medical practitioner. Evidence before me does not support a conclusion that the Respondent complied with clause 7.5.1(b) for the following reasons:

it forwarded the Applicant's medical reports to SOMA doctors for a recommendation. It used the recommendation to decide whether to grant the Applicant's TIL application. In the letter in which the Respondent declined the Applicant's TIL application it, amongst other reasons, informed the Applicant that the type of therapy she underwent while hospitalised was not divulged. It also referred to a contradiction in the Applicant's psychiatrist's report as to whether the Applicant's response to medication was satisfactory or not. The letter also refers to the absence of the details regarding the frequency, intensity, or contents of consultations with a psychologist the Applicant consulted with. The absence of information regarding other members of the multidisciplinary team being involved in the management of the Applicant is said to cast even further doubt as to the severity of the Applicant's condition.

[12] In his evidence Hickley stated that the Applicant provided insufficient information. Clause 7.5.1(b) places a duty on the Respondent to investigate the extent of inability to perform normal official duties, the degree of inability and the cause thereof. It is clear from the contents of the letter in which the employer declined the Applicant's TIL application that the Respondent was not satisfied that the Applicant suffered an inability to perform her duties. The Respondent however failed to investigate the degree and extent of the Applicant's inability. The letter is silent on the Applicant's sexual harassment. The most plausible inference that can be drawn from the silence is that the Respondent did not investigate the cause of the Applicant's inability to perform her official duties. While I acknowledge that TIL is not a right, the Respondent has a duty to exercise its discretion whether to grant it, fairly.

[13] It is common cause that the Respondent replied to the Applicant's TIL application on 26 February 2009. The explanation given by Hickley for the delay is that the Respondent is inundated with TIL applications and lacks the manpower to assist it comply with the 30 day period referred to in clause 7.5.1 (b). Clause 7.5.1 (b) is couched in peremptory language. The Respondent's extensive delay in responding to the Applicant's TIL application is therefore unacceptable.

[14] The above reasons show clearly that the Respondent failed to investigate the extent, degree and cause of the Applicant's inability to perform her official duties. The Respondent further failed to conduct such investigation with 30 working days of receiving the necessary documents. In the circumstances I find that the Respondent acted in breach of Resolution 7 of 2000. The period 1 June 2006 to 1 December 2006 and 1 October 2007 to 31 March 2008 is to be recorded as temporary incapacity leave.

AWARD:

- I. The Respondent acted in breach of Resolution 7 of 2000.
- II. The Respondent's decision refusing Shireen Cornelius temporary incapacity leave for the period 1 June 2006 to 1 December 2006 and 1 October 2007 to 31 March 2008 is hereby set aside.

Dated and signed in Port Elizabeth on this the 5th day of October 2010.

Z LALLIE

Panelist