



# ARBITRATION AWARD

Panellist/s: U Bulbring  
Case No.: PSCB 406-09/10  
Date of Award: 19 May 2010

In the ARBITRATION between:

PSA obo Marilyn Langley

(Union / Applicant)

and

Western Cape Education Department

(Respondent)

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION

The hearing was held at the premises of the Western Cape Education Department ("the department") on 13 May 2010 under the auspices of the Public Service Co-ordinating Bargaining Council ("PSCBC"). The applicant, Marilyn Langley ("Langley") was represented by Gerry Theunissen ("Theunissen") from Public Servants Association ("the union"), while the department's Frederick Scholtz ("Scholtz"), assistant director; labour relations appeared for the department. The proceedings were recorded.

### ISSUE TO BE DECIDED

The dispute relates to the allocation and approval of temporary incapacity leave ("TIL"). Langley argues that she is entitled to TIL in terms of section 7.5 of PSCBC Resolution 7 of 2000 ("Res 7 of 2000") read together with the department's policy and procedure on temporary incapacity being a Determination on Leave of Absence in the Public Service (Issued by the Minister for Public Service and Administration) ("the DLA"). I must decide if Langley is entitled to such TIL and determine the appropriate award, if any.

## BACKGROUND TO THE MATTER

Langley commenced employment with the department July 1988. She works as a chief registry clerk in the Corporate Services Directorate: Metropole South District in Mitchells Plain.

Langley applied for TIL for the period 1 to 11 April 2008. It was declined. The union contends that the department has improperly exercised its discretion in relation to the refusal to grant TIL and seeks payment of TIL for the said period.

The department avers that its independent service provider, "SOMA" (essentially a group of doctors) dealt with the TIL application of Langley and determined that the medical evidence submitted by Langley was insufficient to substantiate the TIL application. It was further the department's view that Langley had not utilised her sick leave responsibly.

## SURVEY OF EVIDENCE AND ARGUMENT

### Evidence

Most of the evidence was common cause. The parties argued the matter and the department called Dumisani Daniso ("Daniso") as a witness. Daniso is deputy director: internal human capital administration. The following is a summary of the evidence and argument.

Theunissen set out that Langley became ill on 11 February 2008. She was hospitalised and diagnosed with major depression. It was due to domestic stress (an abusive marriage) coupled with stress at work (long working hours). Langley exhausted her sick leave for the January 2007 to December 2009 sick leave cycle in that she was ill from 11 February to 24 February 2008.

Langley was again off ill with depression from 1 to 11 April 2008. She returned to work on 14 April 2008. It is for this period that she applied for TIL. There was no other leave taken relating to this depressive episode. During January 2010 Langley was diagnosed with an irregular heart beat and was off for a period of time but this is unrelated to the request for TIL under discussion.

Langley submitted her application for TIL on her return to work on 14 April 2008. She attached a medical certificate from her psychiatrist, Dr Chris George. It confirms that Langley was unfit for work due to a major depressive disorder.

TIL was conditionally granted on 23 January 2009. On 4 September 2009 (17 months after the application was made) Langley was notified that her application for TIL was declined. Part of the letter notifying her reads:

- The supporting medical evidence lacked substantial information regarding your diagnosis, specific symptomatology and the severity thereof, treatment received during and following your absence, and/or the impact of your condition on your overall vocational ability. As such, your claim of significant occupational incapacity was not considered to have been substantiated. While we acknowledge that you have the right to confidentiality, and are not obliged to authorise the consulting medical attendant to provide any information of the medical certificate, nor to consent to disclose medical information/records, where this objective detailed information is not forthcoming, validation of temporary incapacity leave is unlikely as the department is simply not in a position to assess the validity or otherwise of an applicant's claim of occupational incapacity. In this context, (TIL) is an employee privilege, granted at the discretion of the Head of Department, and, unlike "Normal" sick leave is not a basic condition of employment. Furthermore, the onus of proof in respect of*

*the justification of (TIL) rests entirely with you, the employee, who is required to submit detailed objective medical evidence to prove your claim.*

- *Our analysis of your leave records created the impression that you have not utilised your sick leave responsibly and with circumspection...*

The letter further advises Langley that if she is not satisfied with the department's decision she may lodge a grievance in terms of the standard internal dispute resolution procedures. It adds by saying that the "official PILIR policy does not make provision for the appeal of any repudiation decision in respect of TIL, outside that of standard dispute resolution".

The letter concludes by advising Langley that future TIL applications "*will only be considered for validation should (she) submit detailed objective medical evidence in terms of the nature of the illness and the extent of the illness including whether specialist intervention was required and what it entailed, the treatment that was administered and whether any secondary complication arose*". Langley is finally advised that the failure to submit such information is likely to result in the declination of TIL.

On 9 September 2009 Dr George submitted further medical information (referring to the department's letter dated 4 September 2009) in support of her application for TIL. It reads:

*"(Langley) was first referred to me for psychiatric evaluation by her general practitioner on 11 February 2008 and she presented with symptoms of anxiety, tearfulness, insomnia and depression. There was previous history of psychiatric treatment in that about ten years ago she had been treated for depression.*

*The cause of (Langley's) emotional problems was directly related to domestic stressors and an abusive marriage. I diagnosed (Langley) as suffering from major depression, she was admitted to Lifeskills ward at Mitchells Plain Medical Centre on 11 February 2008 and was discharged on 24 February 2008. During her stay in hospital (Langley) participated in the occupational therapy rehabilitation program and she also had regular consultations with a clinical psychologist, Johan van der Westhuysen.*

*(Langley) was prescribed psychotropic medication as follows:*

*11 February 2008 Cipralext 10mg daily, Alzam 0.5mg bd, Zopimed 15mg nocte.*

*(Langley) was fully compliant with treatment and she responded positively to hospitalisation, pharmacotherapy and psychotherapy; she reported for duty on 14 April 2008.*

*I recommend that your department reconsider (Langley's) application for TIL and I have advised her to lodge a grievance in terms of the standard internal dispute resolution procedures".*

On 16 October 2009 Langley lodged a grievance. The grievance letter sets out that she took ill due to domestic stresses and an abusive marriage. Prior to taking ill she put in long hours at work without remuneration for overtime including working at night. She did not take time off. She was hospitalised for two weeks on 11 February 2008 and after she was discharged from hospital she was "in no state of mind to fulfil (her) duties as (she) was under pressure at home" Langley further stated in the grievance letter that many of her colleagues, including her supervisor can testify that she was in no state to be at work. She cooperated with her doctors as her "children were suffering as (she) is the sole breadwinner". Langley asked that the matter be reconsidered. She could not function in her role as chief registry clerk during that period. The grievance letter is signed by Langley's supervisor, W N Robertson, Deputy Director: EMDC Metropole South by recording at the end of the letter:

*"I concur with the content of this letter. I'm in full agreement of the explanation given by the employee, (Langley) and her sick leave was recommended by me".*

Daniso testified that once an employee has exhausted his/her 36 days sick leave for a cycle s/he may apply for TIL. An application is not an approval. The applications are outsourced by the WCED to SOMA. A panel of doctors makes the assessment as to whether an employee was "incapacitated" during that period. The employee must provide sufficient proof of the incapacity.

Here, SOMA determined that there was insufficient medical evidence for it to make a decision. The department accepted that and declined to grant TIL, said Daniso.

Regarding the 30 day time frame, Daniso testified that the department has struggled with a backlog of applications. It has embarked on a restructuring and reorganisation from 1 April 2009. During the period September to November 2009 the department sorted out the backlog.

As to why the department had not responded to the additional information supplied by Dr George and to the grievance, Daniso said that SOMA charges the department for each application; a re-application is treated as a new application. They are dealing with public funds and are audited. There is no duty on the department to resubmit information to SOMA. There is no duty on the department to allow Langley "a second application". There is also no duty on the department to reconsider additional medical evidence after it has declined to grant TIL in respect of a particular application. The additional information was received after the application was already declined.

Daniso agreed that the department has not dealt with Langley's grievance but said that it had accommodated Langley's right to dispute the department's decision by not deducting the money from her wages i.e the unpaid leave has yet to be implemented.

Daniso said that the period has not yet been allocated as unpaid leave; the department is awaiting the finalisation of the arbitration.

### The union's argument

The union argued that Langley met the requirements of 7(5) of res 7 of 2000 in that Langley was significantly ill at the time of her absence from work. The department did not adhere to the time frame of 30 days set by res 7 of 2000. The department improperly and unfairly applied its discretion, argued Theunissen. It is in breach.

The union argued that the department has not applied its mind to the "second application" submitted by Langley. This is the doctor's report. Theunissen argued that throughout the department, if an employee submits additional information it can be reconsidered.

It was also unfair that Langley did not receive a response to her grievance within 30 days as required by resolution 14 of 2002. The department failed to consider the recommendation of Langley's line manager. Langley is a loyal employee with a clean leave record.

The union asked that I make an award of compensation to Langley in terms of section 138 of the Labour Relations Act, 1995 ("the LRA"). Langley has been prejudiced because of the long awaited decision and the absence of finality. The department did not follow due process.

### The department's argument

The department's version is that it followed its normal procedure. Langley's application for TIL was submitted to SOMA for a recommendation. SOMA did not recommend TIL and the department implemented this recommendation. Langley was advised of this on 4 September 2009. She was then given five days to elect whether the leave was to be allocated as unpaid leave or taken as annual leave. The department then received Dr George's medical report and Langley's grievance was filed on 16 October 2009.

The department has not implemented the unpaid leave yet. It awaits the finalisation of this arbitration. The department agreed that it did not respond to Dr George's letter or the grievance.

The department set out that when applying for TIL Langley handed in her TIL form and the doctor's certificate from Dr George stating "major depressive disorder". No other information was given for the department to make a decision. It was only when the application was declined that additional information in support of the application was handed in. This information should have been submitted in the first place. The matter was fairly handled in the light of the information supplied by Langley in the first place.

The department commented that if Langley had a clean record as suggested by Theunissen she would not have to apply for TIL.

Scholtz agreed that the time frames were "a problem" for the department but added that the WCED is a big department.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

PSCBC Resolution 7 of 2000, par 7.5.1 reads as follows:

*"a) An employee who 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."*

The DLA document sets out at clause 15:

15.1. *"Incapacity leave is not an unlimited number of additional sick leave days at an employee's disposal. Incapacity leave is additional sick leave granted conditionally at the employer's discretion, read with the Policy and Procedure on Incapacity Leave for Ill-health Retirement determined by the Minister for Public Service and Administration in terms of .. the Public Service Act, 1994"*

15.3 sets out that for an employee's application for (TIL) to be considered,

*15.3.1. (the) employee must submit sufficient proof that s/he is too ill/injured to perform his/her work satisfactorily; and*

*15.3.2. application form must, regardless of period of absence, be accompanied by a medical certificate issued and signed by a medical practitioner that certifies his/her condition as temporary incapacity and if the employee has consented, the nature and extent of the illness/injury...*

*15.3.3 (the) employee is in accordance with item 10(1) of Schedule 8 to the Labour Relations Act, 1995, afforded the opportunity to submit together with his/her application form-*

*(a) any medical evidence related to the medical condition...".*

Section 15.8 requires the department to conditionally grant a maximum of 30 days TIL subject to the outcome of the investigation. The application is then to be sent to SOMA or the health risk manager.

The department's policy is that TIL is not an unlimited amount of additional sick leave days at an employee's disposal. It is additional sick leave granted conditionally at the employer's discretion.

The finding of SOMA was that the medical evidence lacked substantial information regarding the diagnosis and the severity thereof, treatment received and/or the impact of Langley's condition on her ability to work. I agree with the department that TIL is intended for applicants who have been incapacitated and are rendered unable to fulfill the requirements of their vocation and that the onus of proof is on the employee, here, there were several compelling mitigating factors that I believe the department failed to consider. I agree with the department that Langley did not have the right to a second bite at the cherry; contrary to what the union argued, there is no provision for a second application to be submitted. Yet, the duty to investigate the matter lies with the department employer, not with SOMA. SOMA simply makes a recommendation.

Langley had a clean work and sick record (from 1988, a period of almost 20 years) until she became ill with a major depressive disorder on 11 February 2008. This followed stress at home and at work (long hours of overtime for which she was not reimbursed; the department did not dispute this). There was no evidence that Langley was a "rogue" employee who had misused or not managed her sick leave in the past 20 years or at all. Langley was hospitalised for a period of two weeks and went onto psychotropic medication. It was hospitalization that used up her normal sick leave. Also, we are not dealing with a regular illness such as a broken leg or a heart transplant. In evaluating the medical evidence submitted, the condition here was not one that could simply be dismissed on the basis that the medical evidence was insufficient. The department must have known (I infer that the department knew) that Langley was hospitalized and that she was indeed significantly ill. Her supervisor confirmed this in a handwritten note.

Rather, what the department should have done was call for further evidence so that the facts could be properly established. The department must have known at the time of submitting the TIL application (with the one page medical certificate) that it would not be enough for SOMA to make an informed decision. When Langley did submit further information (in the way of a doctor's letter and a letter from herself supported by her supervisor) the department ignored it. They also completely ignored her grievance. As stated in another award in dealing with "mental illness", as opposed to other disabilities or defects, there is more scope for opinion and further evidence may have resulted in greater clarity. To simply dismiss the application on the basis that there was insufficient evidence does not meet the requirement that the department investigate the matter.

The TIL section is there for the benefit of both employers and the employees. I believe that the procedure adopted by the department prejudiced Langley. Whilst the employer has a discretion to grant TIL or not this must be exercised judiciously. To my mind, Langley's application has not been subject to fair consideration. The department, knowing Langley's condition, her clean sick record, her 20 years of service etc should have sought additional information (information that was known to it via the persal records and her supervisor) to make a fair decision. To blindly follow SOMA's recommendation is not exercising its discretion. It is incumbent on the employer to investigate applications for TIL.

The department also did not comply with the 30 day period. Although not under discussion here, the department is also in breach of the resolution requiring it to deal with Langley's grievance. This could well have been a matter that could have been resolved by the grievance procedure. The department had received additional information at that stage and was in a position to assess that Langley was ill during the leave period to the extent that she could not work. Whilst an applicant does not get a second bite at the cherry as stated there was nothing to prevent the department from considering the matter on its own.

Having considered the evidence and argument I find that the department is in breach of resolution 7 of 2000. The period 1 to 11 April 2008 is to be recorded as temporary incapacity leave. I decline to award compensation. The department did not make any deduction from Langley's remuneration electing to wait for the finalisation of the arbitration.

## **AWARD**

The department is in breach of PSCBC Resolution 7 of 2000.

The department's decision to refuse Langley's application for TIL for the period 1 to 11 April 2008 is hereby set aside.

The period 1 to 11 April 2008 is to be reflected as TIL on Langley's leave record.

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**Ursula Bulbring**