



Case Number PSCB 416-09/10

In the matter between:

DENOSA obo Aveline Oliphant

Applicant

and

Department of Health (Western Cape)

Respondent

CONDONATION RULING

DETAILS OF HEARING AND REPRESENTATION

The above matter was set down for arbitration on 3 August 2010 under the auspices of the Public Service Co-ordinating Bargaining Council ("the PSCBC"). The DENOSA ("the union") on behalf of Aveline Oliphant ("Oliphant") was represented by one of the union's members, contracts manager, Danver Roman ("Roman"), while the Department of Health ("the department") was represented by deputy director: Labour Relations, Feizal Rodrigues ("Rodrigues"). The department advised me at the hearing that the issue of condonation had not yet been addressed. The union handed in its application for condonation. The parties agreed that the department would file its reply to the condonation application and the union would then file final replying papers. The final reply from the union was sent to me on 20 August 2010.

THE LAW IN RESPECT OF CONDONATION APPLICATIONS

The dispute is referred in terms of section 24 of the Labour Relations Act, 1995 ("the LRA"). It relates to the payment of temporary incapacity leave ("TIL") in terms of resolution 7 of 2000. Section 24 does not provide for a specific period in which disputes related thereto are to be declared. Yet, the period of delay must be reasonable in order to give meaningful effect to the purpose of the LRA, to resolve labour disputes expeditiously. "Reasonable" in the context of an interpretation / application disputes is 90 days, akin to the period for a referral of an unfair labour practice dispute. Section 191(1) of the LRA provides that "if there is a dispute about ... an unfair

labour practice, ... the employee alleging the unfair labour practice may refer the dispute in writing ... within 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence”.

Section 191(2) of the Act provides that “if the employee shows good cause at any time, the council ... may permit the employee to refer the dispute after the relevant time limit ... has expired”.

There are several criteria that must be dealt with in an application for condonation. These are the degree of lateness, the reasons for the lateness, the referring party's prospects of succeeding with the referral and obtaining the relief sought against the other party and the balance of convenience.

I turn now to deal with the above criteria.

BACKGROUND

Oliphant commenced employment with the department in March 1983. She is a senior staff nurse at Tygerberg Hospital ("the hospital") but is currently deployed as a full time shop steward at the union's head office in Bellville. Oliphant was granted TIL during the period 2003/2004. She again applied for TIL during 2006 for the period 23 January 2006 to 7 April 2006 (52 days). The TIL was not approved and she lodged a grievance on 7 November 2006. The department responded to the grievance on 11 October 2007 saying that the correct procedures had been followed in considering the TIL and the refusal was confirmed. During June/July 2008 Oliphant met up with Roman and expressed concerns about the matter. Roman asked Oliphant to send him the information. The union sent the department a letter on 3 November 2008 in respect of the matter asking that the application be reconsidered. It received a reply from the department on 12 January 2009 stating that it considered the matter as closed.

The union then referred an alleged unfair labour practice dispute to the Public Health and Social Development Sectoral Bargaining Council ("the PHSDSBC") on 22 January 2009. On 25 February 2009 the department raised the issue of condonation. An in limine hearing was held under the auspices of the PHSDSBC on 6 October 2009. Commissioner Arthi Sign ruled that the PHSDSBC did not have jurisdiction to hear the dispute and that the dispute ought to have been referred as a dispute in respect of the interpretation and application of a collective agreement. The dispute was then referred to the PSCBC on 23 November 2009. The conciliation was heard on 25 January 2010; the department was absent and a certificate issued. The union applied for arbitration on 1 February 2010.

EXTENT OF THE DELAY

TIL was declined in July 2006. The grievance was lodged on 7 November 2006 and the department replied to the grievance on 22 October 2007. To my mind, 22 October 2007 is the date of dispute. Some would argue that the dispute should have been referred when there was no reply to the grievance within a reasonable period. The department did not take this point though. That the union addressed a letter to the department on 3 November 2008 did not alter the date of dispute. The department replied to the letter on 12 January 2009 saying that it considered the matter closed. I do not agree with the union that the date of dispute is 12 January 2009 when the

department failed to rectify its error in not granting TIL. The letter to the department did not change the fact that the dispute had already arisen for the purposes of the LRA. 22 October 2007 is the date of dispute for the purposes of calculating the period of delay. The dispute was referred to the PSCBC on 23 November 2009. The referral is accordingly approximately 1 year and nine months late.

REASONS FOR THE DELAY

The union set out that the department had taken almost a year to reply to Oliphant's grievance. Oliphant had other personal problems (her husband had an extra marital affair and her child was sexually abused by her neighbour); her focus was not on the unfairness of the department. Oliphant met Roman "by accident" in August 2008 and discussed the matter with Roman. She believed that she had been unfairly treated. She was sad, depressed and tearful during the discussion. Oliphant asked Roman to attend to the matter. She posted the information to him in September 2008. At the time Roman was busy with his Masters and several other work and personal issues (soccer and church). He also took time to research the matter (to see where the dispute would be referred). Roman finalised the research in October 2008 and then addressed a letter to the department on 3 November 2008 asking it to reconsider the matter. The department replied on 12 January 2009 saying that its earlier decision was final. The union then lodged a dispute with the PHSDSBC on 22 January 2009. The time frames in respect of the progression of the matter are listed above. Following the jurisdictional ruling on 6 October 2009 the dispute was then referred to the PSCBC on 27 November 2009.

THE PROSPECTS OF SUCCESS

Regarding the merits, I do not intend to set out all the arguments. Briefly, the union set out that the department failed to apply the audi alteram partem rule. The department misinterpreted the intention of resolution 7 of 2000. The department is guilty of unfair labour practices in violation of the LRA.

THE DEPARTMENT'S ARGUMENTS

The department argued that Oliphant has little chance for success on the merits. The department applied its discretion fairly. The TIL application was first considered by the internal institutional committee. Following further interaction with Oliphant and after obtaining a second medical opinion the department again declined to grant the TIL. The department believes that Oliphant's treatment was not optimized during her period of illness and that Oliphant had used her sick leave excessively in the past. Save to set out the details the version of the department is that Oliphant used 309 days of sick leave and TIL in excess of her entitlement for the 1995 to 2006 period.

PREJUDICE TO THE PARTIES

The union argued that Oliphant has been prejudiced; she has lost capped leave, normal leave and had to forfeit unpaid leave. Monies were deducted from her salary and financially embarrassed her. Fair and just attention should be accorded to her case.

The department set out that the cost to the department amounts to a monetary value of 33 days capped leave, 6 days leave and 19 days unpaid leave. The department suffered affected service delivery during Oliphant's period of absence.

THE UNION'S REPLY

I do not intend to set out the full details of the reply other than to summarise what I believe is relevant. The union argued that the number of days as set out by the department are not in dispute. The department has the prerogative to decline the leave on justifiable grounds if the leave is more than the entitlement. Yet the department did not follow due process. Oliphant had justifiable reasons for applying for the leave. Oliphant was counselled for incapacity leave due to leave taken for orthopaedic reasons, not for depression. When Oliphant became depressed the department had an obligation to investigate whether *prima facie* the right to leave was justified. If justified then the leave should be granted. The doctor and psychologist supported this view. The psychiatrist also agreed although there was a different opinion on the treatment regime. Oliphant was in remission just before her husband's infidelity became known. The ongoing stress in relation to her daughter continued for some time.

The union argued that the department has a social responsibility to care for employees who have rendered good service over a long period or time who are suddenly immersed in situations beyond their control.

ANALYSIS

A late referral prejudices the other party. The rationale behind the time limits prescribed by the LRA is the quick resolution of disputes. Delays in referring disputes can result in expense and in uncertainty regarding outcomes. The reasons for a delay must be compelling reasons, circumstances out of the ordinary and unpredicted to justify non-compliance with the time limits.

For my purposes, hearing the matter at the council (the PSCBC) it is relevant that the matter has been at the PHSDSBC. The period of delay from end January 2009 (when the PHSDSBC was dealing with the matter) to when it was referred to the PSCBC is condoned.

Yet, the period of delay from 11 October 2007 to 12 January 2009 is substantial and requires compelling justification. The department assumed that the matter was finalised after 11 October 2007 when it heard nothing further. The union's version is that 10 months later, Oliphant met up with Roman by accident / by chance and expressed concerns about the matter. Roman then set about investigating the matter and a letter was sent the department on 3 November 2008. The department replied on 12 January 2009 and the dispute was then referred to the PHSDSBC. In consideration of the condonation application here I find that the reasons for the lateness are not out of the ordinary and unpredicted as required to justify condonation. Oliphant's meeting with Roman was by chance. Had she only met with Roman a year later, also by chance, would she then have delayed referring the matter by another year? Oliphant should have gone to the union to find out how to take her matter further when her grievance was declined. The fact that she did not do so and waited for her by chance meeting with Roman shows that she had little interest in pursuing the matter further after the grievance was declined. She had in effect abandoned her dispute until her chance meeting with Roman. The reasons for the lateness are accordingly not compelling. The

department was entitled to assume that the matter was closed. The union was not entitled to resurrect the dispute by sending the department a letter in November 2008; it was too late after the fact.

The merits are in dispute. Whilst Oliphant may well have been sick, I note that even in the case of genuine illness the department still has a discretion in respect of the awarding of TIL. TIL is not additional sick leave. To my mind the department would suffer more prejudice than Oliphant were the matter to be heard so late.

Condonation may be granted on the reasonableness of the explanation tendered; the referral is substantially late and in the circumstances, the reasons for the delay do not constitute "good cause".

ANY OTHER RELEVANT FACTORS / PUBLIC INTEREST / THE BALANCE OF CONVENIENCE

The LRA anticipates that disputes are heard shortly after the dispute arises. Given the reasons for the delay and other factors, I am satisfied that the balance of convenience favours the department and that there are no good reasons to grant condonation.

CONDONATION RULING

Condonation is refused.

Commissioner U Bulbring
30 August 2010