



PUBLIC SERVICE CO-SIGNATING BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: Stephen Bhana _____

Case No.: **PSCB507-08/09** _____

Date of Award: 27 July 2010 _____

In the ARBITRATION between:

PSA obo Suretta Vermeulen

(Union / Applicant)

and

Department of Justice and Constitutional Development

(Respondent)

Union/Applicant's representative: Gerry Theunissen _____

Respondent's representative: Colleen Bailey _____

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

The arbitration was held on 13 July 2010 at the Magistrate Court Mossel Bay. Mr. Gerry Theunissen, a PSA representative, represented the employee, Suretta Vermeulen. Ms. Colleen Bailey, a State Attorney, represented the respondent. Both parties submitted bundles of documents for consideration. The proceedings were recorded digitally and conducted in English.

THE ISSUE IN DISPUTE

Whether the respondent is in breach of Resolution 7 of 2000 i.e. the interpretation or application of a collective agreement as contained in Sections 24(2) and 24(5) of the LRA and more specifically had the respondent applied the provisions of clause 7.5.1 fairly in declining the Temporary Incapacity Leave (TIL) application.

THE BACKGROUND TO THE DISPUTE

The applicant, a senior clerk at the Mossel Bay Court, commenced employment with the respondent on 1 May 1986. She suffers from and is treated for ischemic heart disease, chronic obstructive pulmonary disease, diabetes mellitus, hypercholesterolemia, osteo arthritis in both knees and depression, the last one apparently as a result of work related stress. She had applied for temporary incapacity leave (TIL) for the periods 19 November 2007 to 11 July 2008, 14 July to 31 December 2008, 2 January 2009 to 31 May 2009, 1 June 2009 to 30 June 2009, 1 July 2009 to 31 July 2009 and 1 September 2009 to 30 September 2009. She was informed of the outcomes in September 2008, on 30 April 2009, 6 June 2009 and 2 February 2010 (for 1 June 2009 to 30 September) respectively. The parties initially debated which of these periods are in dispute but eventually agreed that all of them need to be dealt with in this award. The applicant retired as medically unfit on 30 June 2010.

The union averred that whilst the applicant complied with the requirements of applying for TIL, the respondent had not investigated her claims nor did it respond to the applications within the required timeframes. The union also averred that the respondent had exercised its discretion prematurely when it declined to consider some of the applications and had not supplied an outcome to the applicant's grievance. The union requested that all the periods of TIL applied for be granted.

The respondent declined to present an opening statement and elected to only present argument.

SUMMARY OF EVIDENCE AND ARGUMENT

Parties agreed that the documentary evidence and the facts in this were common cause and that there was no need for witnesses; instead parties would only present arguments. Parties agreed that the sums of R7 678.23 and R52 469.78 had been deducted from the employee's remuneration for unpaid leave.

The union argued that the employee had complied with Clause 7.5.1 (a) (i) and (ii) of the resolution. The respondent did not comply with Clause 7.5.1 (b) in that it had not investigated any of the applications within 30 days. This was contrary to the intention of the parties to the agreement that applications for TIL must be dealt with expeditiously. Theunissen pointed that the respondent refused to accept and or consider the employee's TIL applications for 1 June 2009 to 31 July 2009. The employee was forced to report for duty because the respondent had exercised its discretion prematurely.

Theunissen further argued that the respondent had a duty to investigate the applications and that by failing to do so, it was in breach of the directives of PILIR. He supported his argument with words from two panelists. The employee suffers from a serious heart condition and it was unfair of the employer to recover the monies as unpaid leave from her after such a long delay. The employee did not abuse the sick leave cycles and has long service with the respondent. He requested that all the TIL periods applied for be approved on full pay and that the applicant be reimbursed for monies deducted.

The respondent, in its reply, agreed that Clause 7.5.1 stipulates a 30 day period. Bailey explained how the respondent acquires the services of the HRM (SOMA in this case) and that the appointed service provider serves a cluster of state departments. The respondent refers applications for TIL to SOMA for assessment and recommendation. In January 2010 the respondent had received 47 applications for TIL in the Western Cape. She explained the background to PILIR and that each employee had 36 sick leave days in a 3 year cycle. The respondent has a discretion in respect of granting TIL. The respondent cannot investigate all cases within 30 days because of the backlog.

Bailey stated that the respondent had responded to the grievance lodged and wanted new evidence to forward to SOMA within 5 days, but the employee did not do anything. A detailed

report from SOMA for the period 1 January 2009 to 31 July 2009 was forwarded to the employee. The application was declined because of the lack of new evidence and injudicious use of sick leave. A detailed investigation had been done via SOMA and the respondent made a decision based on the SOMA report.

Bailey added that the delay was not intentional and that the service provider cannot handle the workload. She claimed that it was common cause that the employee has followed procedures but did not provide the additional evidence. Bailey also pointed that the employee was at work for August 2009 and had not applied for TIL for that month. The employee was at work for approximately 15 days in September 2009 but applied for TIL for the whole month, which was unreasonable. She agreed that the employee was only informed up to four months later of the outcome of her TIL applications.

Bailey referred to case law to illustrate that there is not much prejudice if the respondent does not respond within 30 days. The respondent's decisions were not excessively late with the exception of one decision. The employee had received a decision for every TIL application made. She agreed that the employee had an exemplary sick leave record prior to 2007 but added that her expectation to have TIL granted is not reasonable. All departments experience delays in their TIL applications and there is no proof of negligence or malice in this case. The respondent had exercised its discretion fairly. Bailey, in closing, argued that should TIL be granted in this award that September and August 2009 not be included.

Theunissen replied that it is a fact that some of the employee's TIL applications are still pending and this shows that the respondent generally does not comply with timeframes. The employee should not suffer because the respondent and its service provider do not comply with timeframes.

ANALYSIS OF THE 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."

It is common cause that temporary incapacity leave is not a statutory entitlement but can be applied for in cases where an employee's normal sick leave had been exhausted. It is also not an unlimited amount of additional sick leave at the employee's disposal, but can be granted at the employer's discretion based on its investigations.

In this case the applicant had been diagnosed with heart and pulmonary disease amongst other things. She has applied for TIL timeously and there is no argument or evidence that she had not complied with the rules and requirements in making these applications. She has received outcomes to her applications in most instances outside the 30 day period. The union's argument are premised on three grounds namely that the respondent had not complied with the timeframes stipulated, that it had not investigated the applications and that it had not exercised its discretion fairly.

The respondent had acknowledged that it did not adhere to the timeframes. In mitigation it submitted that its service provider (SOMA) was overloaded with applications. It argued that investigations were done via SOMA, who could not comply with the timeframes and applied its discretion based on SOMA's recommendations. The respondent acknowledged that it had declined to consider TIL applications and sick certificates for June and July 2009. This is in breach of Resolution 7 which requires that the respondent investigates ALL applications. PILIR also requires that the respondent investigates all TIL applications.

I am not persuaded by the argument that the service provider is overloaded. Employees have a right to expect that the employer will keep as closely to the timeframes as possible but delays of up to 4 months are unacceptable. It can create an expectation that the application could be approved. The risk of having those periods deducted makes it essential that applications be dealt with speedily. The respondent had not offered any reasons in arbitration why some of the TIL applications had not been considered.

I find that the respondent was in breach of clause 7.5.1 in that it had not conducted an investigation timeously or at all. The respondent can thus not be said to have exercised that discretion fairly. I am mindful that temporary incapacity leave is not an unlimited number of additional sick leave days available to an employee, but I am of the view that in this instance the applicant had been treated unfairly and is entitled to TIL. I have also taken cognizance that the applicant had not applied for TIL for August 2009 and had applied for TIL for the whole of September 2009 although she had attended work for these periods. I therefore deem it fair to order the respondent to approve the outstanding TIL for the applicant for the periods 19 November 2007 to 31 July 2009 and not to deduct the same from her leave, sick leave or salary. Any deductions effected for these periods must be repaid to the applicant within 30 days of the respondent receiving this award.

AWARD

The respondent is in breach of Resolution 7 of 2000.

The respondent is herewith ordered to approve TIL for Ms S. Vermeulen for the period 19 November 2007 to 31 July 2009 immediately.



Stephen Bhana
ARBITRATOR