



ARBITRATION AWARD

Panellist/s: U Bulbring
Case No.: PSCB 516-09/10
Date of Award: 31 July 2010

In the ARBITRATION between:

PSA obo Annette Jaffa

(Union / Applicant)

and

Department of Public Works

(Respondent)

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

The hearing was held at the premises of the Department of Public Works ("the department") on 15 July 2010 under the auspices of the Public Service Co-ordinating Bargaining Council ("PSCBC"). The applicant, Annette Jaffa ("Jaffa") was represented by Duncan Korabie, an attorney briefed by the Public Servants Association ("the union"), while the department's Vuyani Ngcuka ("Ngcuka"): 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"). Jaffa 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 incapacity leave and ill health retirement ("PILIR") and the Determination on Leave of Absence in the Public Service, a collective agreement in terms of s 24 of the Labour Relations Act, 1995 ("the LRA"). I must decide if Jaffa is entitled to such TIL and determine the appropriate award, if any.

BACKGROUND TO THE MATTER

Jaffa commenced employment with the department during November 1999. She works as a security officer (salary level 4) at the department's regional office in Customs House. She earns approximately R75000.00 per annum.

Jaffa underwent a hysterectomy operation during November 2008. She went off sick on 6 November 2008. She used up her then remaining sick and annual leave for the period 6 to 17 November 2008. She returned to work on 21 December 2008 and claimed TIL for the period 18 November to 19 December 2008 (23 days).

TIL was declined by the department for all of the above period but has not yet been deducted. The union seeks an order that the period 18 November to 19 December 2008 be reflected on Jaffa's leave record as TIL.

The department contends that it has complied with clause 7(5) of the resolution. It is an employee's duty to manage her leave responsibly. She has not done so.

SURVEY OF EVIDENCE AND ARGUMENT

Several of the facts and circumstances were common cause and these were set out by the parties. Jaffa testified for herself, while the department's senior personnel practitioner, Nomathemba Gusha ("Gusha"), senior labour relations practitioner, Nokuzola Apleni ("Apleni") and assistant director: leave and records management, Elizabeth Mathebula ("EM") testified for the department.

Jaffa testified that during the period 2007/2008 she experienced pain and excessive bleeding in her uterus and at times could not come to work. Her obstetrician and gynaecologist, Dr Louis T van der Poel ("vd Poel") recommenced a hysterectomy. She underwent the operation on 6 November 2008 and there was a six week sick leave requirement. The doctor's certificate for the period reads:

"This is to certify that the above patient was admitted for a total abdominal hysterectomy on 6/11/08 for persistent heavy bleeds caused by uterus fibroids. She was off work for the statutory six weeks. She was fit for work 17/12/2008".

Jaffa said that during her sickness she contacted her supervisor, Henry Albertyn ("Albertyn") (Chief Security Officer) to advise him of her illness. It was on her return to work that Albertyn told her that she had insufficient leave for the period of her illness. She was advised to apply for TIL. She applied for TIL on the same day, 21 December 2008.

Approximately eight months later, on 7 July 2009 Jaffa received correspondence from human resources management ("HRM") advising her that her application for TIL had been declined. Part of the letter reads:

"In assessing this application, SOMA noted that your previous sick usage does not allow SOMA to recommend your (TIL) to be approved".

Jaffa was advised that if she was not satisfied she could lodge a grievance; the PILIR policy does not make provision for an appeal.

Jaffa said that the department did not require her to go for any medical examination. Gusha suggested that she get additional information from her doctor. That is when she obtained the medical "report" cited above. She gave it to Gusha. Gusha told her that the sick note that she had attached to the TIL application initially had been insufficient. She followed up with Apleni who said she should wait for a reply.

Jaffa said that she could not have waited for the end of the 2007 to 2009 sick leave cycle before undergoing the operation. She had paid and struggled to come to work. She was suffering. Her doctor proposed the date of the operation and she went along with the doctor's recommendation. She did not know how long she would be off for. She did not know the severity of the operation until afterwards.

Jaffa is not happy with the way in which the application was dealt with. The administrators (who regularly deal with TIL applications) should have asked her to furnish additional information from the outset.

The original TIL application has gone missing as has the original sick certificate.

Jaffa referred to her 2007 to 2009 sick leave cycle. She took 5 days sick leave in 2007. During 2008 she took eight days for a small knee operation (she injured her knee at work) and 12 days for minor illnesses such as flu, gastro etc. There are 11 other sick days recorded for gynaecological reasons (three of these were before the operation). During the 2004 to 2006 sick leave cycle Jaffa took six days during 2004, 10 during 2005 and eight during 2006, all for different illnesses. The department put it to Jaffa that her record shows a "Friday-Monday syndrome". Jaffa did not disagree.

Jaffa testified that she often gets bronchitis when she gets flu. Jaffa agreed that at times she did not go to the doctor but went to the chemist instead. Jaffa said that she could not agree that she misused her sick leave. She took it seriously and did not use up all the days in the 2004 to 2006 cycle. Jaffa said that she did not know when she applied for TIL that her previous sick leave usage would be taken into account. She filled in the TIL application on her own. She was not advised to fill in the form with her doctor.

Jaffa said that after her operation her doctor advised her to stay in bed; she was told not to work. She could not sweep or exert herself for six weeks. Jaffa repeated that when her application was declined she was told by Gusha to get another doctor's report.

Gusha testified that her job is to deal with leave including TIL. Employees are required to manage their leave habits. If sick leave is exhausted the employees can apply for TIL with a sick note, leave form and a medical report. Gusha said that a sick certificate and a full medical report are essential with a TIL application. Otherwise an employee is disadvantaged.

Gusha could not remember Jaffa's application but said that there must have been a medical report of sorts because head office requires one. A sick note alone is not enough. TIL is generally granted conditionally. IT then goes to SOMA via head office. SOMA declined it. Gusha informed Jaffa who asked why it was declined. She said that all she could think of was the insufficient medical information. Gusha may have told her to get a full medical report and that she could refer a grievance. Jaffa brought her another medical report (the one referred to above).

Gusha said that Jaffa's application for TIL was sent to head office on 2 April 2009. She does not know why it took from 21 December 2008 to 2 April 2009 for it to be sent to head office. Gusha does not know who Jaffa gave her application to on 21 December 2008. If her leave form went to her supervisor it would then go to HR. Gusha would then do the capturing. PERSAL (the leave system) would then advise that there were insufficient leave credits. Gusha would then advise the supervisors that a TIL application was necessary. Gusha disputes that Jaffa handed the TIL application in on 21 December 2008 but said that the original application had been lost.

Gusha said that sometimes there is a delay with capturing the volume of leave applications. This is especially in the cleaning and horticulture departments. Gusha said that generally she would not send a TIL application to head office without a medical report. They would send it back; it requires medical reasoning.

During cross-examination Gusha said that at the time of Jaffa's TIL application copies of applications were not being made locally. Now copies are made before being sent to head office.

Gusha cannot remember when Jaffa handed in the TIL application but said it was only after she applied for leave with her sick note. She was then told she had insufficient credits and told to apply for TIL. Gusha said it must have been the case that Jaffa's supervisor gave her a leave form to fill in and that it was Gusha who then gave her the TIL form.

Gusha said that although she does not know where the original TIL form is she was satisfied with it before sending it to head office.

As to why the TIL application was not dealt with within the required time limits, Gusha said that SOMA deals with 100s of applications. Three months is reasonable given the number of applications SOMA is dealing with. Gusha said that she did not tell Jaffa about the time delays; she never asked.

Apleni testified that she has been a senior labour relations practitioner for two years. TIL applications go via the department's regional manager, Frederick Johnson ("Johnson"). Once an application is declined and a grievance lodged, Apleni checks the pattern of sick leave and the sick leave record and advises Johnson on a grievance. Apleni said that she sent a memorandum to Johnson advising him of the status of Jaffa's application. (It notes that TIL was declined because of the insufficiency of medical information which is not correct). Apleni recommends in the memorandum that the department review SOMA's recommendation. Apleni said that this was standard policy following a grievance; she is still awaiting an outcome.

EM testified that she manages leave in head office and PILIR throughout the department. She sees to it that employees manage their leave. TIL is not a right it is a privilege. It is leave the department can grant after the 36 days have been used up. It is not additional sick leave. The department has a discretion. All medical information is required to apply for TIL.

Head office has a data base where it records the receipt of all TIL applications. Jaffa's application was received on 14 April 2009 and sent to SOMA on 20 April 2009. SOMA sent the department its recommendation on 30 June 2009. It then went to the head of

department for approval / disapproval. If the HOD does not agree with SOMA it is then referred to the EAP (employee assistance program) to obtain further information and a report. It is then returned to the HOD for a decision. The "HOD" in this matter was acting chief director; HRA, S Zaba.

EM said that in this matter Jaffa misused her sick leave. She took several "long weekends". Head office did not receive a second application. EM did not know that Jaffa lodged a grievance. EM did see or receive Apleni's report.

As to the delay EM set out that at the time SOMA was dealing with all the department's applications. There are other delays along the way. The time taken here is reasonable given the workload.

EM said that SOMA's view here was that Jaffa misused her sick leave. The report from SOMA notes "Jaffa's general sick leave usage is not suggestive of a judicious and careful approach to sick leave". EM agreed that Jaffa did not use up all of her sick leave in 2004, 2005 or 2006 but said that there were two long weekends in 2004, six long weekends in 2005 and three long weekends in 2006; the long weekends being the times when Jaffa was sick on a Monday or Friday. There are 15 days sick leave during that period for which there are no sick certificates.

EM said that on considering the 2004 to 2006 cycle it is possible that had there not been the "Monday-Friday" pattern and the absence of sick certificates the possibility existed that the TIL would have been granted. EM said that the department's employees are also subject to the eight week rule contained Basic Conditions of Employment Act, 75 of 1997 which says that an employer is not obliged to pay an employee for sick leave if there is no doctor's certificate when an employee is sick for two consecutive days or within an eight week period.

EM noted a letter from Jaffa's direct supervisor, Albertyn written after Jaffa's return to work following her sick leave. It reads:

"With reference to Ms Jaffa, it should be noted that her attendance prior to the extended sick leave period that was required for post-operation recuperation was normal. There was no pattern of absence nor abuse of sick leave. Feel free to contact me should you require any further information".

Argument

The argument will be addressed below, if relevant.

ANALYSIS OF EVIDENCE AND ARGUMENT

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

"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.”

The applicant bears the onus of showing that the respondent did not apply the policy fairly. An arbitrator considering a challenge must defer to the department's discretion if it is properly exercised. This means that if the department did indeed take into account all the factors and struck a reasonable balance between them the decision must stand.¹

But the department's discretionary decision cannot stand if

- (a) it was not consistent with applicable rules or regulations;
- (b) it was based on an error of law;
- (c) it was based on irrelevant considerations;
- (d) it was biased or improperly motivated; or
- (e) it disregarded facts that should have been considered.

As set out by Christie in PSA obo du Plessis v Department of Correctional Services (PSCB 201-07/08), the PILIR is an elaborate policy and is clearly designed to meet two goals (a) to assist public sector workers who are suffering from serious ill-health and (b) to guard against frivolous or fraudulent claims. Each case must be decided on its own merits.

One of the issues raised by Jaffa is that the unfairness lies in the fact that it took too long to inform Jaffa the TIL was disapproved. According to the prescripts TIL should be administered within 30 days. This is in terms of the resolution under discussion as well as the determination and PILIR (Paragraph 7.2.9 sets out that the “employer must within 30 working days after the receipt of both the application form and medical certificate approve or refuse temporary incapacity leave.”) According to the PILIR, the employer must approve or refuse TIL within 30 working days. Here, the department disapproved TIL more than six months after the application (on Jaffa's version) and after three months (on the department's version). The department attributed the non compliance to SOMA and its backlog. It only received the application in April 2009.

Senior managers are accountable and are required to ensure that the time frames set for the employer in the above-mentioned policies are adhered to. If time periods are not going to be adhered to employees should be notified. That said, no money has been deducted. Jaffa knew that her leave was exhausted and that she ran the risk of the TIL not being approved. That the department did not investigate the matter within the 30 working day period is in breach of the collective agreement but Jaffa did not suffer any prejudice simply because of the time delay. I do not know why there was a delay from December 2008 to April 2009. Jaffa herself seemed somewhat uncertain about whether she gave Albertyn a leave form or a TIL application in December 2008.

¹ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC), per Justice O'Regan, para 50.

Here, Jaffa's TIL was declined on the basis of her previous sick leave usage. It was noted in the SOMA report that Jaffa has not exercised a "judicious and careful approach to sick leave". I do not entirely agree. The note from Albertyn, her direct supervisor says that there has not been a pattern of absence or abuse of sick leave. When considering her record I note the following: she took six days sick leave in 2006; she took 10 days sick leave in 2007; she took 8 days sick leave in 2007. Sixteen days sick leave over three years is not excessive even if there are several days where no medical certificates are provided (and that several are taken on "Monday-Friday"). There is no department rule requiring a sick certificate for absence of one day. There are a host of reasons why employees do not always manage to go to a doctor and obtain a certificate. Sixteen days in a three year cycle is a plausible number of days for any employee.

In the current sick leave cycle Jaffa took five days sick leave in 2007. During 2008 she took eight days for a small knee operation (she injured her knee at work) and 12 days for minor illnesses such as flu, gastro etc. There are 11 other sick days recorded for gynaecological reasons (three of these were before the operation). I also do not believe that the aforesaid amounts to an abuse or mismanagement of sick leave. Her supervisor certainly didn't think of it as such and if the department held a different view it could have managed it through incapacity hearings etc.

I note that it is within the department's prerogative to allocate TIL as contained in the resolution. Yet this prerogative must be applied fairly. A hysterectomy is a traumatic medical procedure that is in no way elective. It is significant surgery that requires medical leave of six weeks taken under the guidance of a medical physician. Jaffa could not defer the surgery to suit her sick leave requirements.

The refusal to grant Jaffa TIL is not justifiable. I find that the department adopted an inappropriately constrained approach in its assessment. The discretion was not exercised fairly.

AWARD

1. The department is in breach of resolution 7 of 2000.
2. The department's decision to refuse Jaffa's application for TIL for the period 18 November to 19 December 2008 is hereby set aside.
3. The period is to be reflected as TIL on Jaffa's leave records.

Ursula Bulbring