

AWARD

Panellist/s: Zolashe Lallie
Case No.: PSCB524-09/10
Date of Award: 1 October 2010

In the ARBITRATION between:

PSA obo PHILANDER
(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. Stoffels
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 on 15 August 2010. The Applicant was represented by one of its officials, Mr Theunissen (Theunissen) and the Respondent by one of its employees Ms Stoffels (Stoffels).

ISSUE TO BE DECIDED

2. The issue to be decided is the interpretation and application of Resolution 7 of 2000 (" the collective agreement"). The basis of the Applicant's dispute is that the Respondent exercised its discretion in terms collective agreement unfairly. I have to decide whether to Respondent improperly investigated the extent of Ms Philander's (Philander) inability to perform her normal duties, the degree and cause of the inability in terms of clause 7.5.1(b) of the collective agreement. I am further required to determine whether the Respondent should have granted Philander's Temporary Incapacity Leave (TIL) for the period 20 July 2009 to 31 July 2009 and outstanding applications that have not been approved.

POINT IN LIMINE

3. At the commencement of the proceedings Stoffels raised a point in limine to the effect that the present proceedings are premature because in the grievance Philander referred to the Respondent regarding the Respondent's failure to approve her TIL she referred to the period 20 July 2009 to 31 July 2009. She referred to a letter dated 3 August 2010 in which the Respondent approved Phillander's TIL applications for the period 20 to 31 July 2009 and 3 August to 31 December 2009. She submitted that as no grievance was referred on behalf of Phillander regarding the non - approval of her 2010 TIL applications the arbitration of the refusal to approve her 2010 TIL applications was pre mature. For that reason she asked me to find that at this stage the PSCBC lacks the necessary authority to arbitrate this dispute.
4. Theunissen opposed the point in limine on the grounds that the request for arbitration covers the period specifically stated and all outstanding applications that have been declined. He submitted that the Applicant was under no obligation to lodge a grievance before referring a dispute to the PSCBC. He conceded that internal procedures must be exhausted by the Applicant and submitted that the Applicant did exhaust the said internal procedures.
5. The following is common cause:
Philander's TIL applications for 20 to 31 July 2009 and 3 August to 31 December 2009 were approved and she was told of the approval in a letter dated 3 August 2010.

Philander submitted leave for the following 3 periods: 23 February 2010 to 28 April 2010, 29 April 2010 to 30 June 2010 and 1 July 2010 to 31 December 2010. No grievance was lodged by or on behalf of Philander regarding the Respondent's refusal to grant her TIL application.

6. The parties in this dispute are signatories to the collective agreement which governs the handling of grievances in the civil service. It is in terms of that collective agreement that a grievance was lodged against the Respondent for its refusal to grant Philander's first TIL application. The intention of concluding a grievance procedure is to give parties to a dispute an opportunity to deal with its dispute before referring it to a third party.
7. The arbitration of the dispute regarding the Respondent's failure to grant Philander's TIL application which forms the basis of the dispute before me before a grievance about the same dispute has been lodged flies in the face of the collective agreement which governs the handling of grievances between the parties to the present dispute. In **Simela & Others v MEC for Education, Province of the Eastern Cape & Another** [2001] 9 BLLR 1085 (LC) the Court confirmed the rule requiring litigants' duty to exhaust domestic remedies before approaching the Courts. The Court further stated that this rule does not apply when the Respondent has undermined domestic remedies. The Applicant in the present case should have exhausted domestic remedies first before referring this dispute to the PSCBC. By not lodging a grievance regarding the TIL applications before me, the Applicant failed to exhaust domestic remedies. As the grievance was not lodged it cannot be said that the Respondent undermined the grievance procedure. In the circumstances this dispute is not ripe for arbitration.

RULING

1. This dispute is not ripe for arbitration, the PSCBC therefore lacks the necessary jurisdiction to arbitrate it.

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

Z LALLIE

Panelist