



PUBLIC SERVICE CO-SIGNATING BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: Stephen Bhana
Case No.: PSCB626-09/10
Date of Award: 30 August 2010

In the ARBITRATION between:

WJC Vermeulen

(Union / Applicant)

and

Department of Correctional Services - National

(Respondent)

Union/Applicant's representative: Andre Geldenhuys _____

Respondent's representative: Annalize Malan _____

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

The arbitration was held on 26 July 2010 at Drakenstein Prison, Paarl. Mr. Andre Geldenhuys, an attorney from Faure & Faure Inc, represented the employee, WJC Vermeulen. Ms. Annalize Malan, the regional coordinator – legal services, 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 5 of 2001 (an amendment to 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 is a correctional officer at Drakenstein Prison. He suffers from and is treated for major depression. He had applied for temporary incapacity leave (TIL) for the period 21 February 2007 to 18 June 2007. The application was declined and the reasons therefore accepted. The application was resubmitted in June 2007.

The applicant averred the issue in dispute is the long delay between the application and the respondent's response and that this was unreasonable. The applicant requested repayment of a reasonable amount for the deductions made from his salary and that future deductions be seized, be ordered as a remedy.

The respondent submitted that the applicant was booked off sick from 18 December 2006 to 20 September 2007. His sick leave was exhausted in February 2007 and he had to apply for TIL. He submitted an application which was declined due to an invalid sick note. The application was resubmitted for the period of 21 February 2007 to 18 June 2007 (79 days). The HRM recommendation was to decline the application and the area commissioner accepted this recommendation. The respondent had attempted to get the applicant to return to work and integrate via the EAP but he refused. He only returned when unpaid leave was implemented.

The parties agreed on the period of illness, that the reasons for declining the application were acceptable and that the applicant was only notified of the respondent's decision on 8 October 2007. They further agreed that there was no need to present oral evidence, that they would rely on the voluminous bundles submitted and only argue the matter.

SUMMARY OF EVIDENCE AND ARGUMENT

The applicant referred to Clause 7.5.1 (a) and (b) that stipulate that the respondent had to investigate the applicant's disability within 30 days. The applicant pointed out that the implementation policy of respondent (PILIR) requires a two pronged assessment process and the timeframes stipulated must be strictly adhered to. The respondent was in breach of the resolution because it had exceeded the 30 day time limit.

The applicant confirmed that he was only advised of the outcome of his application on 8 October 2007 and that he had not been advised on the initial applications declining. The respondent had acknowledged in correspondence to the applicant that the HRM had not provided timeous feedback. The applicant proposed that deductions are allowed for 30 working days and that the remainder of the TIL period (49 days) be repaid to him.

The respondent submitted that the policy is clear and that TIL is not an unlimited right. The HRM's recommendation as received in September 2007 and the applicant informed of the respondent's decision on 8 October which was the earliest the respondent could get hold of him. Feedback on this date was given on the original and resubmitted applications. The respondent further submitted that its problem was that the HRM did not comply with the 30 day period and agreed that feedback to the applicant was thus not provided within the required 30 days.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

PSCBC Resolution 5 of 2001, 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. It is further common cause that there had been no final decision within 30 working days as per Clause 7.5.1 of the resolution.

The applicant had not contested the reasons for declining the applications but focused solely on the respondent's failure to abide by the 30 day period. The respondent acknowledged that feedback on both applications was only given on 8 October 2007, some almost 8 months after the first application and almost 4 months after the resubmitted application. Its reason for the delayed response is unacceptable. The respondent had contracted the HRM as a service provider and it was incumbent on it to impress on the HRM the requirements of the collective agreement and PILIR. The employee cannot be punished for the respondent's elected service provider's tardiness. The parties to the collective agreement had intended that such applications should be dealt with speedily and expeditiously, probably to spare an employee hardship and financial strain. PILIR is prescriptive on the timeframes and demands adherence thereto.

In light of the above, I find that the respondent had failed to apply the provisions of clause 7.5.1 in that it had not conducted an investigation timeously. I am however not convinced that the applicant's proposal is an appropriate remedy for this breach. In light of the fact that the respondent had a 30 day period during which to conclude its investigations, I deem it fair to order the respondent to grant the applicant the TIL for 30 of the 79 days applied for.

AWARD

The respondent is in breach of Resolution 5 of 2001 by not adhering to the stipulated time frames.

The respondent must grant the applicant TIL for 30 working days and repay the equivalent sum to the applicant within 30 days of the respondent receiving this award. The parties had not quantified any amounts owing to the applicant for this period and should they wish for a specific amount to be included in this award, they must submit accurate facts and figures and I will vary the award accordingly.

A handwritten signature in black ink, appearing to read "S Bhana". The signature is written in a cursive, flowing style.

Stephen Bhana

ARBITRATOR