



## **ARBITRATION AWARD**

**CASE NO: PSCB365-09/10**  
**PANELIST: JOYCE TOHLANG**  
**DATE: 20 NOVEMBER 2010**

In the **ARBITRATION** between

**C TIMMERMAN**

**Applicant**

**AND**

**SOUTH AFRICAN POLICE SERVICES**

**Respondent**

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### **ARBITRATION AWARD**

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#### **1. DETAILS OF THE HEARING AND REPRESENTATION**

1.1 The matter was scheduled for arbitration. The applicant is represented by Mr. Gouws a practicing attorney. The respondent is represented by Colonel Janse van Rensburg.

1.2 The parties agreed that they would not lead viva voce evidence and that the matter would be decided on bundles of documents that were submitted including written heads that were to be submitted at a later stage. The written heads were submitted accordingly.

## **2. ISSUE TO BE DECIDED**

2.1 The dispute relates to the interpretation and application of Resolution 7 of 2000 as amended by Resolution 5 of 2001 read in conjunction with National Instruction 2 of 2004.

2.2 Whether the applicant is entitled ill health retirement benefits and sick leave with full salary for the duration of the period he cannot work if he suffers from an occupational disease.

2.3 Whether the respondent interpreted and applied the Collective Agreement correctly.

2.4 The applicant seeks the following relief:-

- Approval of ill health retirement
- Approval of temporary incapacity leave
- Reinstatement of salary with retrospective effect.

## **3. BACKGROUND TO ISSUE**

3.1 The applicant is employed by the respondent and from the documents it appears that the applicant was diagnosed as suffering from Post Traumatic Stress Disorder.

3.2 The applicant was booked off sick and has been absent from work. The applicant applied for temporary incapacity leave and ill health retirement. The application for ill health retirement was not granted.

3.3 The applicant referred a dispute of application and interpretation to the Council the dispute was conciliated and it remained unresolved at conciliation.

3.4 The applicant requested that the dispute be resolved through arbitration.

#### **4. SURVEY OF THE EVIDENCE**

4.1 As indicated above the parties submitted bundles of documents and written heads.

4.2 On behalf of the applicant it was submitted that the applicant has been ill since 19/09 2004 and he was diagnosed with Post Traumatic Stress Disorder and this illness was confirmed by the treating psychiatrist, the independent psychiatrist as well as the Health risk manager. He applied for temporary incapacity leave and ill health retirement. His application for incapacity leave for the period 13 December 2004 until 2009/07/29 was approved.

4.3 The application for ill health retirement was disapproved and the applicant was instructed to resume his duties.

4.4 The applicant's salary was suspended on the 30<sup>th</sup> September 2009 due to his absence from work after he had a relapse after he resumed duties on the 4<sup>th</sup> August 2009 and he was booked off sick again.

4.5 He lodged a grievance and the said grievance was not satisfactorily resolved.

4.6 The applicant dealt with his claim under the headings indicated herein below.

### **Stoppage of Salary**

4.7 Counsel for the applicant referred to Clause 7. 6 of Resolution 7 of 2000 which provides that:

(a) Employees who, as a result of their work, suffer occupational injuries or contracts occupational disease **shall** be granted occupational injury and disease leave for the duration of the period they cannot work.

4.8 Reference was also made to Paragraph 6 of the National Instruction and it provides as follows:

(a) An employee who sustains an occupational injury , or contracts an occupational disease , is entitled to occupational disease with full pay from the time he or she becomes unable to work –  
(i) Until he or she can resume their duties; or  
(ii) Until he or she is discharged from the Service after an inquiry as contemplated in Section 34 of the Act.

4.9 On behalf of the applicant it was submitted that he has been absent from work from 2004/09/19 due to the fact that he suffered from an occupational disease thus he is entitled to be paid until he resumed duties on the 4<sup>th</sup> August 2009.

4.10 It was submitted that the provisions of the National Instruction are peremptory and that the respondent does not have a discretion.

- 4.11 It was argued that once an employee is diagnosed with post traumatic stress disorder he is unable to work and would be entitled to sick leave with full pay until he or she is able to resume his duties.
- 4.12 It was further submitted that the applicant's sick leave was approved.
- 4.13 It was submitted that the Health Risk Manager recommended that the applicant be re evaluated and that the respondent subject him to a Psychological assessment and submit a psychological report. The respondent has not complied with the requirement.
- 4.14 It was submitted that despite the fact that the Health Risk manager could not comment on whether the applicant is fit to resume duties or not the respondent instructed him to resume duties.
- 4.15 It was submitted that the applicant is therefore entitled to sick leave with full pay from the 4<sup>th</sup> August 2009 until the respondent conducts a fitness board and terminated his services.
- 4.16 The second aspect related to-  
**Ill health retirement.**
- 4.17 The applicant referred to Clause 7.5.2 ( c ) which provides that if both the employer and the employee are convinced that the employee will never be able to perform any type of duties at his level/rank , the employee shall proceed with application for ill health benefits in terms of the pension laws.
- 4.18 It was submitted further that Clause 5 ( c ) of the National Instruction 2 /2004 stipulates that:

“ If the service is satisfied that an employee will never be able to perform official duties at his or her level , steps must be immediately taken to initiate the process of considering his or her medical retirement and the process must, if at all possible be finished within six months, a written report setting out the reasons for the delay must be submitted to the divisional commissioner Personnel Services....”

- 4.19 It was submitted that the applicant’s ill health was disapproved conditionally provided the respondent subject the applicant to a psychological evaluation and submit a report to HRM for re evaluation. Respondent failed to comply with that and instead instructed the applicant to resume his duties in a low stress environment.
- 4.20 Mr. Gouws submitted that the respondent did not comply with the provision of Item 10 and 11 of schedule 8 (Code of Good Practice)
- 4.21 It was submitted that the Collective Agreement stipulates that the employer and the employee must reach consensus regarding the fact that she cannot be able to work. It was submitted that the respondent did not act in good faith as it excluded the respondent from the process.
- 4.22 Further that Regulation 28(4) (c) of the South African Police Services Regulations provides that the employee and his medical practitioner may be present when the application for ill health retirement is considered.
- 4.23 On behalf of the respondent it was submitted that the Health Risk Manager is a medical assessor appointed to examine and make recommendations to the National Commissioner on all applications for incapacity leave, ill health retirement and injuries on duty employees. The

health risk manager is independent and falls under the auspices of Alexander Forbes.

- 4.24 In this case the health risk manager did not recommend that the employee be granted ill health retirement as it was of the opinion that the applicant would benefit from a more goal directed rehabilitation treatment approach focusing on vocational rehabilitation and return to work.
- 4.25 Based on this the respondent is of the view that the applicant is in a position to work in a lower stress environment.
- 4.26 It was further submitted that there is no provision in the Collective Agreement that bars the respondent from stopping the salary if the employee refuses to return to work.
- 4.27 It was submitted further that the applicant relied heavily on Resolution 7 of 2000 and National Instruction 2/2004. The respondent submitted that the whole process was completed when the applicant decided that he would not be returning to work and this led to the stoppage of his salary. Thus there is no obligation on the respondent to conduct an inquiry in terms of Section 34 of the Act.
- 4.28 It was further argued that the applicant relies on clause 7.5 (c) of Resolution 7 Of 2000, and that this would not be applicable as there is clearly no consensus between the parties.
- 4.29 On the submission by the applicant that regulation 28 (4) (c) it was submitted by the respondent that the provisions hereof are not peremptory. Thus the applicant does not have a right to be present in the sitting of the medical board. Accordingly the applicant is not entitled to any relief.

## 5. ANALYSIS OF THE EVIDENCE AND ARGUMENT

5.1 The issue that I have to determine in this case is whether the respondent failed to apply and interpret correctly the provisions of Resolution 7 of 2000 relating to incapacity leave and ill health retirement and whether the respondent had the right to stop the applicant's salary.

5.2 It is common cause that the applicant applied for ill health retirement and that this application was not approved.

5.3 The applicant in this matter appears to be relying on the provision of Clause 7.5.2 in support of his claim relating to his application for ill health retirement. He further relies on Clause 7.6 of the Resolution.

5.4 I will deal firstly with the issue of ill health retirement. In determining whether the respondent failed to apply the Resolution correctly it is important to consider the whole clause which provides that

Clause 7.5.2 (a) Employees whose degree of disability has been certified as permanent shall, with the approval of the employer, be granted a maximum of 30 working days paid sick leave, or such additional number of days required by the employer to finalize the process set out in (b) and (c) below

(b) The employer shall within the 30 working days, ascertain the feasibility of:-

- (i) Alternative employment or
- (ii) Adapting duties or work circumstances to accommodate the disability.

(c) If both the employer and the employee are convinced that the employee will never be able to perform any type of duties at her or his level or rank the employee shall proceed with the application for ill health benefits in terms of the pension laws of 1996.

Clause 4(5) of the National Instruction 2 /2004 provides that:

(a) An employee whose degree of incapacity has been certified as permanent, shall with the approval of the National Commissioner be granted paid permanent incapacity leave for up to 30 days or for such additional number of working days as may be required by the service to enable the service to determine the fitness of the employee for continued employment in the service.

(b) The service must within 30 working days from the commencement of the permanent incapacity leave, ascertain whether it would be feasible to retain the service of the employee by-

- placing the employee in the alternative post, or
- Adapting the duties or work circumstances of the employee to accommodate the incapacity of the employee.

(c) If the service is satisfied that the employee would never be able to perform official duties at his or her level or rank steps must be immediately taken to initiate the process of considering his or her medical retirement and the process must if possible be finalized within six months. If the process cannot be finalized within six months a written report, setting out the reasons for the delay must be submitted to the Divisional Commissioner Personnel Services.

5.5 I have perused the Report of Health Risk Manager and it appears that there is a dispute between the parties in terms of the interpretation of the findings and recommendations in the report . The applicant submitted that the respondent was supposed to have subjected the applicant for Psychological evaluation. In the report, page 34 of the Bundle, a question is posed as “Can the employee be currently alternatively placed .“ The response from HRM reads “The HRM request that the requested report from the attended Psychologist is submitted which will assist HRM to comment more exclusively on the comprehensiveness of treatment and response to treatment”. A further statement is made that “an updated report is received from Dr. Verster, no independent reports have been received for reassessment and the requested psychological report has not been received.” The Health Risk Manager also makes reference to the previous report where this was requested. I have also perused the previous report and on this report, Page 44 of the Bundle under recommendations it is stated “that it is recommended that Mr. Timmerman seek further optimal management of his condition with access to the following:

- More regular contact with his psychiatrist
- Psychological treatment at least weekly for 6 months for treatment to be considered therapeutic.”

5.6 I thus understand the statements to be requiring the applicant to furnish this report and not the other way round. On the report I could not find any statement to the effect that the respondent should subject the applicant to any psychological assessment.

5.7 The Health Risk Manager did not express the view that the applicant should be medically boarded because of the outstanding report which it appears has been outstanding since 2007 when the first report was made by HRM.

- 5.8 The respondent did not approve the application for ill health retirement and he was ordered to return back to work on the 4<sup>th</sup> August 2008. It appears that the applicant did resume his duties but only for a few days and booked off sick and as result his salary was stopped.
- 5.9 It is so that whilst the Collective Agreement creates and stipulates rights that the employee has, the National instruction gives meaning to the Resolution and as indicated Commissioner Tlhotlhalemaje in H Blom v SAPS (PSCBC 350-08/09), is meant to complement the Resolution to the extent that procedural or implementation tools are found wanting in the Resolution.
- 5.10 Clause 7.5.2 (c) provides that if both the employer and the employee are convinced that the employee will never be able to perform any type of duties at her or his level or rank the employee shall proceed with the application for ill health benefits in terms of the pension laws of 1996.
- 5.11 Such an agreement can only be reached if the employer has been afforded an opportunity to independently verify that the applicant indeed the employee would never be able to work. The employer in this instance utilizes the services of the Health Risk Manager in order to be able to make such an informed decision.
- 5.12 In this case the Health risk Manager did not make a recommendation due to outstanding reports. The Health Risk Manager although conceding that full functional recovery is not anticipated for the applicant could not however confirm medical boarding.

- 5.13 The respondent is of the view that the applicant could function in a low stress half a day position and thus the application was not approved. Thus there is no agreement between the parties.
- 5.14 I accordingly find that Clause 7.5.2 of the resolution envisages a situation where if an employee is found to have a permanent degree of disability the employer would investigate with the view of ascertaining the feasibility of alternative employment or adapting the duties. If this cannot be done due to the condition of the employee and medical assessment which is part of the investigation indicates that the situation cannot be dealt with in terms of sub clause (b), both parties would then be convinced and agree that the employee cannot function and the employee would then proceed to apply for ill health retirement. This is not the case in this instance as there is clearly a difference of opinion.
- 5.15 On behalf of the applicant it was submitted that the Resolution should be read with Items 10 and 11 of the Code of good Practice. It was submitted that the provisions of these items together with the provisions of Regulation 28 (4) (c) of SAPS Regulations confirms that consideration of ill health retirement is a mutual process. Thus the employee ought to have been included in this process.
- 5.16 Items 10 and 11 of the Code of Good practice should be read in context. Item 1 of the Code sets out the purpose of the Schedule. It provides as follows:
- “This Code of Good Practice deals with the key aspects of dismissal for reasons related to conduct and capacity...
- 5.17 Thus the Code is aimed at setting guidelines to be followed before an employee may be dismissed, bearing in mind that one of the underlying principles of social justice is job security. With this in mind it is important that

no employee should be dismissed without being afforded an opportunity to be heard.

5.18 In this case the context is different as it is the employee that wants his employment to be terminated so that he can access certain benefits and the employer on the other hand wants to comply with Item 11 which places a duty on the employer to accommodate the employee with the view of ensuring that the employee continues to work.

5.19 Regulation 28 (4) does not compel the employer to include the applicant in the process. It provides that the employee ***may*** be present. Thus it does not create an obligation on the part of the employer to include the applicant.

5.20 The second issue that the applicant sought to be decided was the issue of incapacity leave which the employer should grant the employee Mr. Gouws submitted that the employee is entitled to this kind of leave until the employer determines his fitness to continue working.

5.21 In this case the applicant has been off sick since 2004. He applied for temporary incapacity leave. It appears that his leave from that period to the 4<sup>th</sup> August 2009 when he was instructed to resume his duties was approved. It is not clear on the arguments if this period is covered.

5.22 If it is I am of the view that the applicant should be paid for this period as his leave is approved and therefore authorized.

5.23 The applicant submitted that he had a relapse and booked off sick. This is after his application for ill health retirement was disapproved and he had returned to work. On the applicants behalf it was submitted that he is entitled to be paid from 30<sup>th</sup> September 2009.

5.24 The fact that an employee has applied for leave does not necessarily mean that the employee is entitled to absent himself, the application must be approved for the employee to claim some entitlement.

5.25 In this case the applicant is on unauthorized leave and thus the employer does not have an obligation to pay him.

5.26 I accordingly find that on the evidence the employer applied the provisions of the resolution correctly.

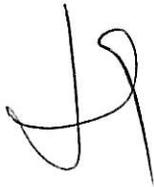
## **6.AWARD**

6.1 I find that the respondent did apply and interpret the provisions of the Resolution correctly.

6.2 The applicant's claim is dismissed.

6.3 No order as to costs

**Done and signed on this the 20 November 2010**

A handwritten signature in black ink, appearing to be 'JT' with a stylized flourish.

**JOYCE TOHLANG**

**ARBITRATOR**