



**IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL
HELD AT BLOEMFONTEIN**

CASE NO: PSCB 235-13/14

PSA obo M E MONAHENG

APPLICANT

and

NATIONAL PROSECUTING AUTHORITY

RESPONDENT

ARBITRATION AWARD

DATE OF ARBITRATION : 14 FEBRUARY 2014
DATE OF AWARD : 17 MARCH 2014
VENUE : PSA BLOEMFONTEIN
ARBITRATOR : CINDY DICKENS
ISSUE : INTERPRETATION AND APPLICATION
OF A COLLECTIVE AGREEMENT,
RESOLUTION 7 OF 2000

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The abovementioned Arbitration was held on the 14th of February 2014 at the Offices of PSA in Bloemfontein.

1.2 The Applicant, M E Monaheng, was represented by Mr. Greeff, an Official of PSA. The Respondent, National Prosecuting Authority, was represented by Mr. Mudau.

1.3 The parties requested to file Written Submissions as follows:

- Applicant before or on the 21st of February 2014
- Respondent before or on the 28th of February 2014
- Applicant before or on the 3rd of March 2014

2. ISSUE TO BE DECIDED

2.1 The issue which I was called upon to consider was the interpretation of Resolution 7 of 2000, relating to Temporary Incapacity Leave for the period from the 14th of November 2011 till the 20th of January 2012.

3. SURVEY OF EVIDENCE AND ARGUMENT:

3.1 SUBMISSIONS ON BEHALF OF THE APPLICANT:

3.1.1 I wish to state from the outset, that not all argument presented will be set out hereunder. Only a summary of the argument is contained herein.

3.1.2 **Mr. Greeff** argued that the dispute relates to the Interpretation and Application of Clause 7.5.1 (b) of Resolution 7 of 2000. He held that the Respondent failed to investigate and give feedback within 30 (THIRTY) days of the Applicant's Application for Temporary Incapacity Leave.

3.1.3 He held that the Applicant applied for Temporary Incapacity Leave on the 23rd of January 2012 for the period from the 17th of October 2011 to the 20th of January 2012. The Applicant was hospitalized during most of this period. The

Applicant was in constant communication with her Supervisor, Mr. Loots, during the leave period.

- 3.1.4 On the first day of her return to work, on the 23rd of January 2012, the Applicant completed the required application forms and submitted them to her Supervisor.
- 3.1.5 The Temporary Incapacity Leave was recommended by a registered medical practitioner. The Supervisor up till the Chief of Office approved the Application for Temporary Incapacity Leave. The Application was then submitted to SOMA. The Respondent did not at any stage, until the answer from SOMA, indicate to the Applicant that the leave will be disapproved. The Respondent only informed the Applicant in May 2012 that the leave for the 1 (ONE) period, from the 17th of October 2011 till the 11th of November 2011 was approved, and that the second period from the 14th of November 2011 till the 20th of January 2012 was disapproved.
- 3.1.6 He argued that it is strange that the same Application for the full period lead to the approval of one period and not the other.
- 3.1.7 He argued that the Applicant suffered from major depression and hypertension for the full period, yet only one portion of the sick leave was approved and the second period was disapproved.
- 3.1.8 Mr. Greeff argued that in terms of Clause 7.5.1 (b) the Respondent is required to investigate the extent and inability to perform normal duties, together with the degree of inability and the cause thereof. The Respondent failed to comply with this Clause and followed no process to determine this.
- 3.1.9 The Respondent blindly recommended the Temporary Incapacity Leave and submitted this to SOMA. Furthermore the Respondent failed to inform the Applicant within 30 (THIRTY) days of the disapproval of the leave in that they only informed her in May 2012 although she had applied for the leave on the 23rd of January 2012. The Respondent failed to comply with PSCBC Resolution 7 of 2000 and therefore forfeited the right to make the period in question leave without pay.

3.1.10 He argued that in various cases Commissioners ruled that the Respondents failed to comply with Clause 7.5.1 (b) of PSCBC Resolution 7 of 2000, and therefore forfeited the right to make the Temporary Incapacity Leave, leave without pay.

3.1.11 He argued that the Commissioner should rule that the PSA's interpretation of the Resolution is correct, and that the Temporary Incapacity Leave be awarded with full pay.

3.2 SUBMISSIONS ON BEHALF OF THE RESPONDENT:

3.2.1 I wish to state from the outset, that not all argument presented will be set out hereunder. Only a summary of the argument is contained herein.

3.2.2 **Mr. Foster** argued that the Applicant submitted an Application for Temporary Incapacity Leave on the 23rd of January 2012 after being off sick from the 17th of October 2011 to the 20th of January 2012, being a total of 63 (SIXTY THREE) working days. Clause 7.1.8 of the Policy and Procedure on Incapacity and Ill – Health Retirement, which deals specifically with incapacity, specifies that an employee must submit an application form for incapacity leave personally or through a relative, fellow employee or friend within 5 (FIVE) working days after the first day of absence. He argued that this indicates that the Applicant did not comply with the Policy, yet the Respondent continued to process her Application submitted more than 2½ (TWO AND A HALF) months late.

3.2.3 On the 17th of February 2012, the Respondent advised the Applicant that her Application for Temporary Incapacity Leave is acknowledged and conditionally approved subject to the outcome of an investigation into the nature and extent of the illness described in the Application. The Applicant was informed that depending on the outcome of the investigation by the Health Risk Manager, the Head of the Department may decide not to grant the Temporary Incapacity Leave and, if refused, the period conditionally granted as incapacity leave shall be cancelled and the period shall be covered by available annual leave or converted into unpaid leave depending on the availability of leave credits. This was done in compliance with

Resolution 7 of 2000, which provides that the Employer shall specify the level of approval in respect of application for disability leave.

- 3.2.4 He argued that it is not disputed that the Applicant became aware that the period from the 14th of November 2011 to the 20th of January 2012 has been disapproved in the first week of May 2012, but she was aware that the matter is being investigated and granted conditionally within 30 (THIRTY) working days. To ensure that the Respondent was fair at all material times, the Applicant was requested to submit additional evidence on several occasions if she wishes that the decision be reviewed but she failed to do so. Instead of lodging additional information she lodged a grievance requesting immediate approval for her Temporary Incapacity Leave from the 14th of November 2011 to the 20th of January 2012.
- 3.2.5 The Applicant sought that the Respondent forfeits the right to make the period in question leave without pay because the Respondent failed to investigate the matter within 30 (THIRTY) working days. He argued that it is of paramount importance that the time frames in question is not cast in stone and that Clause 7.5.1 (b) / (c) is silent on the question of whether the Employer is obliged to investigate the merits of the Application and inform the Employee of its decision within the required 30 (THIRTY) working days' time period.
- 3.2.6 He argued that these time limits should not necessarily mean that the Employer did not comply with the Resolution and the Applicant cannot claim that the Respondent waived his rights. The Applicant did not comply with the Policy since she made her Application after the prescribed 5 (FIVE) working days.
- 3.2.7 He argued that it should be borne in mind that the Respondent is utilizing the services of a third party, Health Risk Management, and that this factor causes inevitable delay.
- 3.2.8 He argued that the issue of time limits has nothing to do with compliance, but is a procedural issue which needs to be dealt with by another Council. He held that in the light of the above, suggesting that the Respondent waived its rights to implement leave without pay will be exceeding powers of the

Commissioner, because the dispute is about interpretation and application of a Collective Agreement. He argued that this relief should be claimed in a matter relating to an unfair labour practice and not under the current dispute.

- 3.2.9 The Respondent has requested the Applicant on various occasions to submit additional information in order to be re-assessed. The reason for requesting additional information is because the Respondent is of the opinion that the available medical information submitted is insufficient to justify an absence from work for a period exceeding the maximum recovery period as per the medical guidelines. Up to date the Respondent has not received any additional information from the Applicant which by implication means that she is not interested in the Respondent's proposal to further assist her.
- 3.2.10 He held that the Applicant raised an argument to say that she finds it strange that the same Application for the full period lead to the approval of one period and not the other. He argued that the reason for disapproval is not the delay by the Applicant, but rather insufficient information to justify absence for the period in question.
- 3.2.11 He argued that Clause 7.5.1 (c) of Resolution 7 of 2000 provides that the Employer shall specify the level of approval in respect of an application for disability leave, and that is what the Respondent did when approving the period from the 17th of October 2011 to the 11th of November 2011. There was insufficient information to justify an absence from the 14th of November 2011 to the 20th of January 2012 hence additional information was requested from the Applicant for review of the decision taken.
- 3.2.12 He argued that it will be of paramount importance for the Commissioner to consider other policies which deals with incapacity as a guideline. This will assist to determine the apparent purpose to which Clause 7.5 of the Resolution is directed and the material known to those who are responsible for its production, without infringing the rules of interpretation.
- 3.2.13 In closing, Mr. Foster argued that the Respondent did comply with Resolution 7 of 2000 and has not breached any Collective Agreement. He requested that the Application be dismissed and the Applicant be ordered to submit

additional information if she wants the period from the 14th of November 2011 to the 20th of January 2012 to be reviewed.

4. ANALYSIS OF EVIDENCE AND ARGUMENT

4.1 The issue in dispute is whether the Applicant is entitled to paid Temporary Incapacity Leave in terms of Resolution 7 of 2000 for the period from the 14th of November 2011 till the 20th of January 2012.

4.2 The dispute that has been referred relates to Clause 7.5.1 and for ease of reference I will quote the Section below:

“7.5.1 Temporary disability leave:

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 employee shall, during 30 working days, investigate the extent of the inability to perform normal 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.

(c) The employer shall specify the level of approval in respect of applications for disability leave.”

4.3 Schedule 8, Item 10 (1) reads as follows:

“Code of Good Practice: Dismissal

10. Incapacity: Ill Health or injury

(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employee should

investigate all the possible alternatives short of dismissal. Then alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability."

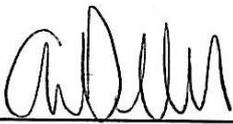
- 4.4 Having regard to Resolution 7 of 2000 and more specifically Clause 7.5.1, the Employer must, within 30 (THIRTY) working days investigate the extent of the Employee's inability to perform duties, the degree of inability and the cause thereof within the context of Schedule 8, Item 10 (1). A further requirement is that the Employer must consider the Application objectively and notify the Employee whether the Application is disapproved, partly approved or fully approved.
- 4.5 Affected employees normally rely on a strict application of the 30 (THIRTY) day period, arguing that if the employer fails to respond within the 30 (THIRTY) days, that the employee is entitled to paid Temporary Incapacity Leave benefits. This question is however more complex, as set out in *Jonker v Okhahlambah Municipality & Others (2005) 2BLLR 564 (LC)*.
- 4.6 I cannot align myself with the contention that the Employer abandons or waives its discretionary powers to disapprove the Application once the said 30 (THIRTY) days have expired. My reasoning therefore is the same as those set out in the Jonker judgement.
- 4.7 Regard must be had for the fact that the Respondent makes use of a third party, Health Risk Management (SOMA), to investigate all applications and make recommendations to the Employer. Taking this into consideration one can not expect that the time frames will be met, and if not, the Employer abandon his discretionary rights.
- 4.8 This does not mean that the Employer can disregard in totality the time frames. There is a duty upon them to follow up with SOMA as to attempt to comply with the time frames.

- 4.9 In this case at hand, it is common cause that the Applicant applied for Temporary Incapacity Leave on the 23rd of January 2012. The Applicant was booked off for hypertension and major depression. In a letter dated the 23rd of April 2012 the Applicant was advised that her Temporary Incapacity Leave for the period from the 17th of October 2011 till the 11th of November 2012 was approved. She was further informed that her Temporary Incapacity Leave for the period in question was disapproved. The Applicant was advised that if she is not satisfied with the outcome she can lodge a grievance. She was further advised that the period exceeds the maximum recovery period guideline. She was also advised that should additional medical information pertaining to this period be made available, the disapproval period could be reviewed.
- 4.10 It is common cause that the Applicant was advised on 3 (THREE) occasions that additional medical information is required to justify the length of the incapacity. No such information was furnished to the Respondent.
- 4.11 I am satisfied that a delay of 35 (THIRTY FIVE) working days is reasonable and can be justified by the fact that the Respondent make use of SOMA for their investigations.
- 4.12 Mention must be made of the fact that the Applicant failed to comply with the provisions of the Resolution in that she failed to submit her application for Temporary Incapacity Leave within 5 (FIVE) working days of becoming ill. It is common cause that she only submitted her Application on the 23rd of January 2012 after she returned to work. Notwithstanding the fact that her Application was more than 3 (THREE) months late, the Respondent proceeded to process her Application. The Applicant therefore does not have clean hands in this forum as she too failed to comply with the requisite time frames.
- 4.13 I find that the Respondent did interpret Resolution 7 of 2000 correctly. I further find that the Applicant failed to furnish the further medical information relating to her illness as was requested on 3 (THREE) occasions.

5. AWARD

- 5.1 The Respondent did interpret Resolution 7 of 2000 correctly.
- 5.2 The Applicant must provide the Respondent with additional medical information pertaining to the period from the 11th of November 2011 till the 20th of January 2012 within 30 (THIRTY) days of this Award.
- 5.3 Should the Applicant furnish such further medical information to the Respondent within the prescribed 30 (THIRTY) days, the Respondent is directed to reconsider the Temporary Incapacity Leave Application and to furnish the Applicant with the outcome within 30 (THIRTY) days of receipt of such additional information.
- 5.4 No order as to costs is made.

SIGNED AT BLOEMFONTEIN ON THIS 17th DAY OF MARCH 2014



C L DICKENS