



ARBITRATION WARD

Panelist: Khomotjo Daniel Matji _____
Case No.: PSCB 237-12/13
Date of Award: 7 April 2014 _____

In the ARBITRATION between:

PSA OBO TSAKANE JOHANNES MANGEZI

(Union / Applicant)

And

DEPARTMENT OF HEALTH - GAUTENG

(Respondent)

Union/Applicant's representative: Mrs. Louise Malan _____

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Respondent's representative: Mr. Teboho Machiche _____

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DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was heard at the HR boardroom of Steve Biko Academic Hospital in Pretoria on the 7th of November 2013, 2nd of February 2014, 2nd of April 2014 and was finalized on the 3rd of April 2014. The respondent, Department of Health - Gauteng, was represented by Mr. Teboho Machiche, whilst the applicant, Mr. Tsakane Johannes Mangezi, was represented by Mrs. Louise Malan.
- [2] Three (3) bundles of documents were entered into the arbitration marked as follows: Bundle A > Applicant's bundle of documents paginated from 1 to 77 and Bundles B and C > Respondent's bundles of documents paginated from 1 to 24 and 1 to 29 respectively.
- [3] I ensured that Mr. SJI Maluleke was present throughout the proceedings to clarify any issue unclear to the parties.
- [4] The proceedings were digitally recorded and evidence was heard viva – voce.

PRELIMINARY ISSUE

- [5] None

BACKGROUND TO THE DISPUTE

- [5] Mr. Mangezi is employed by the respondent as a financial clerk for the patients' accounts at Steve Biko Academic Hospital. He was absent from duty to ill – health for the period 13 September 2010 to 31 December 2010. He submitted medical certificates covering the period of his illness. The respondent granted him normal sick leave from 13 September 2010 to 27 September 2010 and the rest of the period from 28 September 2010 to 31 December 2010 was granted as unpaid leave.
- [6] PSA on the 23rd of October 2012 declared a dispute at the PSCBC on behalf of the applicant concerning the interpretation and application of Resolution 7 of 2000. The matter came before Panelist Thembekile Nobongo and she issued a certificate of outcome in confirmation that the parties were unable to resolve their differences during the conciliation phase. The matter was subsequently referred to arbitration

ISSUE TO BE DECIDED

- [7] The issue to be decided is whether the Respondent is in breach of clause 7.5 of PSCBC Resolution 7 of 2000 in its interpretation and application of the collective agreement when it failed or refused to consider the applicant's application for temporary disability leave and instead granted him leave without pay.

SURVEY OF EVIDENCE AND ARGUMENT

THE APPLICANT'S CASE

The applicant was the only witness called to testify for the employee party.

The witness, TSAKANE JOHANNES MANGEZI, in his sworn evidence testified that:-

- [8] The document in p58 of bundle A is a grievance that he has lodged with the respondent about the leave without pay deductions from his salary. He wrote a letter dated 24 February 2012 seeking clarity on the deductions. He had submitted an application for temporary incapacity leave on 9 December 2010 covering the period 13 September 2010 to 31 December 2010 but was informed by his supervisor that the form was not completed correctly.
- [9] The application for incapacity leave which he had submitted on 9 December 2010 is in p34 of bundle A. He was later informed that the form was lost. The document in p17A is a letter from Dr. Dankwa dated 2 December 2010 concerning the incapacity application form that the doctor was supposed to complete. The doctor explained in the letter that it would take him some time to fill the form and asked for an indulgence.
- [10] The doctor was requested to fill the form on 2 December 2010. The document in p11A is a medical certificate covering the period 13 September 2010 to 27 September 2010. He informed the employer of his illness before he submitted the medical certificate. He completed the application for leave on the 2nd of December 2010 which he signed and submitted to the employer.
- [11] The dates written on the leave form are not in his hand writing and were not written by him. The document in p13A is a medical certificate covering the period 4 October 2010 to 15 October 2010. The document in p14A is a medical certificate for the period 2 November 2010 to 30 November 2010. The

document in p15A is a certificate covering the period 5 October 2010 to 4 November 2010 while the document in p16A is a certificate covering the period 1 December 2010 to 31 December 2010.

- [12] He notified the doctor to send the letter in p17A for the attention of Charlotte. The document in p19 to 33 of bundle A is an application for temporary incapacity leave which he completed on 15 September 2011. According to his knowledge, the document in p48A was signed by the HOD. The employer would not have submitted his application for temporary incapacity leave to the Health Risk Manager if it was submitted outside the time limit.
- [13] The document in p60A is an extract of the Policy and Procedure on Incapacity Leave and Ill-health Retirement (PILIR). According to clause 7.1.7 thereof, if overcome by a sudden incapacity, the employee must personally notify the supervisor immediately. He had notified his supervisor about his illness and also sent a message through a lady working at the hospital.
- [14] Clause 7.1.8 of the policy provides that an employee must submit an application form for temporary incapacity leave personally within 5 working days after the first day of absence. When he became ill on 13 September 2010, he was not aware that his sick leave cycle credit was exhausted. The employer did not inform him that his days for sick leave were exhausted.
- [15] Clause 7.5.1 of PSCBC Resolution 7 of 2000 requires that the employer must within 30 working days investigate the extent of the inability to perform official duties, the degree of inability and the cause thereof. The employee is supposed to notify the supervisor and to submit medical certificates. There is no requirement stipulated that an employee must submit a medical certificate within a stipulated timeframe.
- [16] There is no timeframe indicated in the Resolution as to when the employer must be notified or for the submission of a medical certificate. The employer did not investigate as required in terms of clause 7.5.1 (b) of the Resolution after he had submitted the medical certificate. He was called by the Assistant director who said she would write him a letter but to date; he had not received the letter.
- [17] The employer signed the leave form in p12A on 3 December 2010. It came as a surprise to him when he realised that there were deductions made from his salary. A print-out of the leave without pay is in p56A. He has never received a letter from the supervisor dated 16 November 2010. He did not remember where he was on 19 November 2010 but he was not at work.

- [18] According to the document in p22B, the employer was in possession of all the sick notes that he had submitted. He was surprised because the HOD wrote in the document in p12A that no medical reports for the sick days were submitted. He was satisfied that the employer did not comply with Resolution 7 of 2000. The relief sought is reimbursement for the money that was deducted.
- [19] He said during cross-examination that he was sick during the period 13 September 2010 to 31 December 2010. He knew that if an employee is ill, the supervisor must be notified. He phoned Charlotte and notified her that he was sick. He submitted sick notes to the supervisor. He did not know that he did not have sick leave credit.
- [20] He said under cross-examination that he did not know the procedure if sick leave credit is exhausted. It was put to him that if he did not know, he would not have known how to access additional sick leave days with pay. He reiterated that he filled the application for temporary incapacity leave form in December 2010. The doctor completed the form but he was later told that the form was lost.
- [21] The document in p34A is the only document that he found in HR and the date on the document is 9 December 2010. He did not refuse to fill the long period leave form. The statement that there were no medical reports is not correct. He did not know if he had sick leave days when he completed the application form. It was put to him that incapacity leave must be applied for immediately an employee becomes aware that the sick leave days are exhausted.
- [22] He applied for incapacity leave before September 2011 but the form was lost. The document in p17A is a letter from the doctor explaining that he had pressure in completing the temporary incapacity application form as he was inundated with many such forms. He was asked to fax the letter to the supervisor. The doctor wrote the letter because after he gave the doctor the form to fill, the doctor said there would be a delay in the completion of the form.
- [23] He was called from work and told that there was an outstanding form which he must submit and he went to the doctor who then wrote the letter in p17A. It is true that he only enquired about the unpaid leave in August 2011.

THE RESPONDENT'S CASE

The respondent called only one witness who testified for the employer party under oath as follows:-

The witness, CHARLOTTE HACK, in her sworn evidence testified that:-

- [24] She commenced employment at the hospital in 1996. She applied for an advertised post and was appointed as a Chief Accounting Clerk in the billing section. The applicant is a billing clerk and works under her supervision. The document in p10A is a sick note but she could not remember if it was faxed or brought to her personally.
- [25] The applicant was absent from work for a long period due to ill health. She wrote a letter to him on 16 November 2010 and also phoned him to submit the leave and the temporary disability application form. She attached for the applicant's attention all the sick notes and the temporary disability application form to be completed by his doctor. The applicant was absent from duty from July 2010.
- [26] The document in p18 – 31 A is an application form for temporary incapacity leave. The document in p33 – 47A is also the document that she had attached to the letter she sent to the applicant. The comments on the leave form in p12A were written by the assistant director because the temporary incapacity leave form was not submitted. There are no timeframes stipulated for the submission of the temporary incapacity leave.
- [27] The applicant knew that he had to submit the temporary incapacity leave because he had done so in the past. The applicant submitted medical certificates to prove that he was ill. There were ten days left for his normal sick leave credit when she sent the applicant the letter. The letter is in bundle B p22. She received the signed letter back but did not receive the temporary incapacity leave form.
- [28] She only received the application for leave completed by the applicant on 2 December 2010. She did not implement the temporary disability policy because she did not receive the forms back from the applicant. The applicant was sick from 13 September 2010 to 31 December 2010. She did not at any stage receive the application form for temporary incapacity leave.
- [29] During the period of his absence, she phoned the applicant to submit the sick notes and application for leave. When she did not receive any response, she reported the matter to her supervisor. The applicant

had informed her of his illness. He had also submitted the relevant medical certificates. There is no time-frame stipulated for the submission of the form in the resolution.

[30] The employer did not investigate the extent of the applicant's disability because the applicant did not submit the form and thus there was no compliance. She did not see the letter from the doctor concerning the delay in the filling of the form. She gave the second application back to the applicant. She had a right to refuse the applicant's application because he did not follow the procedure. She had no powers but she decided to refuse the application.

[31] It is true that according to p48A, she had conditionally approved the application pending the outcome of the investigation. The document in p54 is proof that the application for temporary incapacity leave was submitted on 17 October 2011. She disapproved the applicant's application in December 2010. She had no proof that the applicant received the letter she sent to him on 19 November 2010.

[32] The temporary incapacity leave application form was for the period 13 September 2010 until 31 December 2010. The applicant refused to fill in the long leave application because he failed to return it promptly. She said under cross-examination that she did not inform the applicant how many sick leave days he had to his credit.

[33] She reiterated that employees must in terms of the policy submit the documents for temporary incapacity leave within 5 working days. She also confirmed that the temporary incapacity leave must be applied for at the beginning of the sick leave and not at the end.

ANALYSIS OF EVIDENCE AND ARGUMENT.

[34] A dispute over the interpretation of a collective agreement exists when the parties disagree over the meaning of a particular provision and a dispute over the application of collective agreement arises when the parties disagree over whether the agreement applies to a particular set of facts or circumstances. – **Grogan Workplace Law 8th Edition.**

[35] The dispute in this particular case is over the interpretation and application of PSCBC Resolution 7 of 2000 and in particular clause 7.5 thereof. The relevant provision of the Resolution provides as follows:-
"7.5 Disability management leave:

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

- [36] It is common cause that Mr. Mangezi was absent from work due to ill-health for the period 13 September 2010 to 31 December 2010. He had submitted medical certificates for the following periods: 13. 09.2010 to 23. 09. 2010; 27.09.2010 to 1.10.2010; 4.10.2010 to 15.10.2010; 5.10.2010 to 4.11.2010; 5.10.2010 to 4.11.2010; 2.11.2010 to 30.11.2010 and 1.12.2010 to 31.12.2010. (vide p10 to 16A).
- [37] All the sick notes were submitted to the supervisor. The supervisor wrote a letter dated 16 November 2010 to the applicant and advised him to complete the leave form and long period temporary disability leave form and to send it back to the hospital within **5 working days**. The letter was returned to the supervisor signed on the 19th November 2010 by Flora and not the applicant.
- [38] Mr. Mangezi denied in his evidence that he received the letter and went as far as to say that he saw the letter for the first time at arbitration. Mr. Machiche very convincingly refuted the applicant’s denial by arguing that how did the applicant get hold of the application form for temporary incapacity leave that he submitted to his practitioner if he had not received the letter?
- [39] I was satisfied that the applicant was not truthful when he denied that he received the letter because the leave form and the form for temporary incapacity leave were attached to the letter that Charlotte sent to

him on 19 November 2010. The applicant completed the leave form and submitted it to the supervisor on the 2nd of December 2010 but was unable to return the form that was to be completed by the doctor as it was not yet ready.

- [40] The doctor instead wrote a letter dated 2 December 2010 in which he pleaded for more time to complete the form as he was inundated with many such forms. The letter is in p17A but Charlotte denied that she received the letter. Be that as it may, Charlotte proceeded to process the applicant's leave form and the period 28 September 2010 to 31 December 2010 was granted as leave without pay. It was this deduction of leave without pay from the applicant's salary that gave rise to the dispute.
- [41] Charlotte testified that the applicant's sick leave was granted as without pay because he had exhausted his normal sick leave days in the cycle and had only 10 days to his credit. She testified further that she did not apply the disability policy because the applicant failed to submit the required documents within the stipulated time-frame of 5 working days. The applicant's contention is that there are no time frames stipulated in the Resolution and that the respondent was obliged to grant him temporary incapacity leave with pay as provided for in Resolution 7 of 2000.
- [42] Although Charlotte was adamant that the applicant failed to return the long leave disability application form hence the disability policy was not applied, she conceded that during December 2010, the applicant brought the form and she refused it as the leave had already been processed as leave without pay. This piece of evidence lent credence to the applicant's evidence that he submitted the form on the 9th December 2010 and was later told that it was lost.
- [43] This is not a scenario where an employee's application for temporary incapacity leave was refused by the Health Risk Manager and the employee challenges the fairness thereof. There is no evidence of the outcome of the applicant's application for temporary incapacity leave. This is a case where the employer did not apply the provisions of Resolution 7 of 2000 to grant the applicant additional sick leave with pay because the documents were not submitted or were submitted after the stipulated time-frame.
- [44] Charlotte was adamant that the applicant failed to submit the documents within the prescribed time frame and therefore was disqualified to be considered for temporary incapacity leave. The applicant's contention is that there are no time frames within which documents must be submitted and therefore the employer acted in breach of the Resolution when it failed to grant him temporary incapacity leave with pay. The applicant's contention is that had the respondent considered his application for temporary incapacity leave, he would have been granted additional sick leave with pay.

- [45] I am immensely grateful to the two representatives for the clarity they had displayed in their closing arguments, especially the relevant case law to which I was referred. I found in particular the case of **PSA & Another v Department of Land Affairs Others; D751/09 (LC)** very compelling and instructive. That case and the present case were all about the interpretation and application of Resolution 7 of 2000 although the facts differed in that in the PSA case, the application was processed but refused whereas in the present case, the employer did not apply the policy as it contended that the documents were submitted out of the prescribed time frame.
- [46] The learned Judge Cele in the PSA case stated the following: “The review application turns on whether the second respondent applied his mind appropriately in her interpretation of clause 7.5 of the resolution 7 of 2000. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those who are responsible for its production”
- [47] The learned judge stated further that:” In determining the apparent purpose to which clause 7.5 of the resolution it is directed and the material known to those who are responsible for its production, the second respondent could legitimately allow himself to be guided by relevant material outside the collective agreement without infringing the rules of interpretation.”
- [48] The applicant’s evidence hinged very strongly on the provisions of the Policy and Procedure on Incapacity Leave and Ill-health Retirement (PILIR). Although Charlotte did not expressly mention the policy by name, it was obvious that the 5 working days she so strongly relied upon as the time-frame within which the documents must be submitted, had its source from the PILIR. It appears to me that the interpretation of the resolution shall not be complete without reference to the PILIR. It will be a travesty of justice to attempt to interpret the resolution in *vacuo*.
- [49] Mr. Machiche argued very convincingly that the investigation to be carried out in terms of item 10 (1) of Schedule 8 of the Labour Relations Act would be meaningless and of no force and effect if the documents were to be submitted at any time even after the employee has healed. The purpose of the investigation is to determine the degree of the disability, the extent and the cause thereof. According to

Mr. Machiche, the condition must be certified by a doctor in advance as temporary disability and not ex post facto.

- [50] According to clause 7.1.8 of the Policy and Procedure on Incapacity Leave and Ill-health Retirement (PILIR) which was specifically enacted to give meaning and effect to PSCBC Resolution 7 of 2000, an employee must submit an application form for temporary incapacity leave personally or through a relative, fellow employee or friend within 5 working days after the first day of absence.
- [51] There is no doubt that the in 'advance" referred to in 7.5.1 (b) of Resolution 7 of 2000 has been clarified to mean 5 working days after the day of absence. While there is no doubt that Resolution 7 of 2000 creates a right for an employee to enjoy additional sick leave with pay after the normal sick leave days have been exhausted, there is also an obligation on an employee to ensure that there is due compliance on his part with the rules.
- [52] The applicant testified that he did not know that he had exhausted his normal sick leave days and that the employer has not informed him that his sick leave days were exhausted. Mr. Machiche sought to lead evidence on the applicant's pattern of sick leave and Mrs Malan objected to the evidence as irrelevant. However, with hindsight, the evidence was relevant to prove that the applicant could not reasonably have expected to have infinite sick leave days given his record of sick leave. It is clear that the applicant frequently took sick leave and he had an obligation to establish if he still had days to his credit. *Ignorantia iustus neminem excusat*.
- [53] The applicant cannot blame the employer for his lack of prudence and carelessness. The additional incapacity leave that Resolution 7 of 2000 makes provision of is granted entirely at the discretion of the employer. According to 7.1.9 of PILIR, if the employee fails to submit the application form within the stipulated period and even after an ultimatum, the sick leave period will be deemed to be leave without pay. Therefore clearly, the employer did not act arbitrarily but acted in accordance with a policy directive.
- [54] When the applicant failed to submit the application form within 5 days after the first day of absence, Charlotte wrote a letter to him and gave him an ultimatum of 5 working days instead of 2 days as provided in the policy. When the applicant failed to comply within the extended period granted, the employer was well within its right to deem the leave to be without pay.

[55] If my analysis is correct as I believe it to be, the only reasonable conclusion I could arrive at is that the employer is not in breach of clause 7.5 of Resolution 7 of 2000. It is true that the employer did not conduct an investigation within 30 days of receipt of the application but such would not have served any useful purpose as the application form was received in December when the sick leave was almost over.

AWARD

[56] The employer has not acted in breach of Resolution 7 of 2000.

[57] The case is accordingly dismissed.

[58] I make no order as to costs.

A handwritten signature in black ink, appearing to read 'K.D. Matji', written in a cursive style.

K.D. MATJI

PSCBC - PANELIST