



ARBITRATION AWARD

Panellist/s: Paul Kirstein
Case No.: PSHS414-10/11
Date of Award: 22-Mar-2011

In the ARBITRATION between:

In the matter between

DENOSA obo N SICWEBU

Applicant

and

**DEPARTMENT OF CORRECTIONAL SERVICES:
WESTERN CAPE**

Respondent

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1.

The matter was set down for arbitration on 16 March 2011 at the Regional Office of the respondent in Cape Town. The applicant was represented by J Behardien, an

official of DENOSA. The respondent was represented by S Mancotwya, an official in the employment of the respondent. The applicant submitted a bundle of documents marked bundle "A". The respondent submitted a bundle of documents marked bundle "B". The policies and procedures on incapacity leave has been marked bundle "C". The arbitration was mechanically recorded.

ISSUE IN DISPUTE

2.

The applicant referred an unfair labour practice dispute in terms of Section 186(2)(a) relating to benefits in that the respondent failed to approve temporary incapacity leave applied for by the applicant.

SUMMARY OF EVIDENCE

3.

The applicant testified and indicated that she was appointed at the respondent on 1 June 2008 in the capacity as a professional nurse. The applicant applied for temporary incapacity leave ("TIL") and referred to the reasons for the application for TIL. The applicant suffered from major depression disorder. The applicant based her illness on the unfair dismissal and an unlawful suspension following the unfair dismissal. The applicant applied for TIL on 6 May 2009. The applicant was booked off sick by a psychiatrist. The applicant returned to her employment on

15 February 2010. The applicant applied for short term TIL. Whilst the applicant was on sick leave the respondent made no contact with the applicant. The applicant was informed that the TIL has been declined. No reason was advanced by the respondent. The applicant received various letters claiming ultimately an amount of R48 000.00 back from the applicant. The respondent started to deduct money from the applicant's salary in November 2010. The applicant received a salary advice where it is indicated that the deduction from the applicant's salary was increased and that the applicant's remuneration for April would be minus R35.00. The applicant indicated that the deduction is done without her permission. According to the applicant no assistance was given to her during the period of illness. After the period of illness the respondent provided assistance by referring the applicant to practitioners. The applicant referred to the various legal representatives that she utilised in an attempt to protect her interests. The applicant indicated that the respondent failed to conduct an investigation within the stipulated thirty day period. The respondent further failed to obtain a second medical opinion. The applicant seeks approval of the TIL and that the money deducted from her remuneration be rectified.

4.

The first witness on behalf of the respondent was M Poswayo. Poswayo is employed as a HRM at Proactive Health Solution, a service provider to the respondent, advising the respondent on incapacity leave and related issues. The service provider makes a recommendation, *inter alia* with regard to the granting and or declining of TIL. Poswayo referred to the basis upon which such a recommendation is made. Various issues such as the following are taken into consideration:

- Type of application;
- Medical certificate;
- Period of TIL;
- Sick leave record.

In a short period TIL application there is no requirement to obtain a second medical opinion. A second medical opinion in a short term application does occur in rare instances. The respondent analysed the sick leave profile of the applicant and indicated that injudicious use of sick leave occurred. Poswayo indicated that the applicant exceeded the optimum leave for the specific illness. No hospitalisation

took place over the period of leave. Poswayo indicated that it is a requirement to comply with prescribed time frames. Poswayo referred to the psychiatrist treating the applicant and indicated that the psychiatrist is used regularly by other employees.

5.

The next witness on behalf of the respondent was IJ Shinga, a Health Manager in the employment of the respondent. Shinga indicated that the working conditions at the respondent is not similar to other workplaces due to the unnatural environment. Shinga indicated that intervention took place with the applicant to assist her with regard to working hours. The applicant reneged on an agreement and therefore disciplinary action was taken. During cross-examination the applicant denied that there was any intervention to assist her.

ANALYSIS

6.

The applicant referred an unfair labour practice dispute in terms of Section 186(1)(a) of the Labour Relations Act, Act 66 of 1995 ("LRA") relating to a benefit. It is common cause that the applicant applied for TIL for the following period:

- 1 June 2009 to 26 June 2009

- 24 July 2009 to 21 August 2009;

- 16 October 2009 to 13 November 2009.

The respondent approved TIL for the period 1 June 2009 to 26 June 2009. The other two applications for TIL were disapproved.

7.

Reference was made during the arbitration to Resolution 7 of 2000, a Collective Agreement regarding improvement in the conditions of service of public service employees for 2000/2001 financial year. Although provision is made for TIL in the mentioned Resolution no evidence has been placed on record at the arbitration that this specific Resolution is still applicable as it stated in paragraph 1.3 thereof that the Resolution is only applicable for the annual wage increase for public service employees for 2000/2001 financial year. The only relevant prescript regarding TIL placed on record at the arbitration is the policy and procedure on incapacity leave. In paragraph 7.1 and 7.2 the policy deals extensively with the requirements of TIL. The explanation that Poswayo gave regarding what should be considered in proving or disapproving an application for TIL is confirmed in the policy. The indication is that the HRM considered all relevant factor and accordingly made a

recommendation which was accepted by the relevant authority at the respondent. The indication is that there was substantial compliance with the policy. The only issue that may not have been complied with is the prescribed time period. The extent of the non-compliance cannot be determined because the applicant did not put on record at the arbitration when exactly the applications for TIL were submitted. The indication from the applicant that she could have arranged something else if she was aware that the TIL was not approved can be an indication that the applicant extended her sick leave on the basis that there was an expectation that the TIL will be approved. It is understandable that the respondent implements strict criteria and measures with regard to TIL. TIL is an additional benefit apart from other leave entitlements. The employee has no right to TIL which is dependent on the discretion of the respondent in terms of the relevant policy. An arbitrator should only interfere with the decision to grant or not to grant TIL if it has been shown that the decision was taken *mala fide*, malicious and/or acted with an ulterior motive. Although the applicant claims that her medical condition is based on occupational reasons it cannot be determined that the respondent declined the TIL because of such an allegation. The applicant is entitled to execute her rights in terms of relevant legislation on occupational diseases. The non-compliance of time period and/or procedural requirements does not make the applicant entitled to the TIL. It cannot be determined that the respondent acted *mala fide*, malicious and/or with an ulterior motive in declining the TIL. The

indication is that the HRM based the recommendation on the required criteria which includes the application of the applicant as well as additional information from her treating doctor. There is no requirement for a short term TIL application to refer a matter for a second opinion.

8.

A consequence of the declining of the TIL is that the applicant must pay back the remuneration that she received for the period of absence without leave. Since November 2010 the respondent deducted an amount from the applicant's salary. What is however of concern is that the respondent informed the applicant that she will receive no remuneration for April 2011. It was put on record at the arbitration that there is a specific policy regarding the deduction of money from an employee's salary. The respondent's representative correctly conceded that the indication from the respondent that the applicant will receive no remuneration for April 2011 is grossly unreasonable. The deductions from the applicant's salary should be done in accordance with the applicable policy and the minimum deduction should be effected from the applicant's monthly remuneration. The indication from the respondent that the applicant will not receive remuneration clearly upset the applicant. There is a responsibility on the respondent to assist the applicant. The respondent must allow the applicant to participate in an employment assistance programme ("EAP"). Although it cannot be found that the respondent committed

an unfair labour practice regarding the TIL an arbitrator is entitled to make any appropriate order. It will therefore be ordered that the respondent deduct the minimum amount from the applicant's remuneration on a monthly basis and that the employee participate in an EAP.

AWARD

1. The respondent did not commit an unfair labour practice regarding a benefit by disapproving the TIL applications of the applicant.
2. The respondent must deduct the minimum amount from the applicant's monthly remuneration in terms of the applicable policy. If there is no applicable policy the respondent should not deduct more than 25% of the applicant's net remuneration on a monthly basis. The respondent must subject the applicant with the applicant's consent to an EAP to assist the applicant with regard to health and financial matters.
3. No order as to costs.

SIGNED AT PRETORIA ON THIS THE 22ND DAY OF MARCH 2011



PH KIRSTEIN

ARBITRATOR