ARBITRATION AWARD

Panellist/s: **Joseph Mphaphuli**
Case No.: **PSHS450-11/12**
Date of Award: **2-Dec-2012**

In the MATTER between:

Mr Pillay GA
(Union / Applicant)

and

Department of Health – Kwazulu Natal
(Respondent)

DETAILS OF HEARING AND REPRESENTATIONS

The hearing was conducted in terms of Section 191 of the Labour Relations Act 66/1995. The hearing took place at the Respondent's premises in Durban on 31 July, 01 August 2012 and 05 November 2012.

Mr Donachie an Attorney represented the Applicant. The Respondent was represented by Mr Luthuli also an Attorney.
The Parties agreed to file their closing arguments on 19 November 2012

The proceedings were digitally recorded.

ISSUE IN DISPUTE

Whether there was a dismissal or not ,if so, whether the dismissal was effected for a fair reason and in accordance with a fair procedure and the appropriate remedy, if any.

BACKGROUND INFORMATION

The Applicant served as an emergency care practitioner at a monthly rate of R 10 161.25. His last day at work was in 2009. He however received his last salary in July 2011. The Applicant alleged that the Respondent terminated his services, and unfairly so and wished to be reinstated in the position he occupied prior to the dismissal.

Both the substantive and procedural fairness of the alleged dismissal were contested.

It was common cause that termination of employment was informed by the provision of Section 17 of the Public Service Act /1994.

In dispute was whether the Applicant's absence was authorised or not and whether Section 17 of the Public Service Act 1994 were applicable or not.

SURVEY OF EVIDENCE AND ARGUMENT

The Applicant took oath and gave evidence. His job entailed driving to accident scenes and giving medical care on the scene of accident. He was employed in 1990.

He sustained an injury on duty on 10 August 2001. He suffered a neck and back injury. He was admitted in hospital for a total of ten days.

He returned to work three weeks after the accident. He remained at work for about a month and half. He was once again admitted in hospital in November 2001 and for about nine days.

He had submitted medical certificates for each incident of absence from work on his return to work

The Respondent proposed that he apply for medical boarding. He did not get to know the outcome of the application in 2004.

He continued to stay at home due to a reason related to capacity. The Respondent threatened to discontinue the payment of his salary in 2009.

The Respondent argued that the Applicant did not submit the required medical certificate and progress reports. Further investigation showed that his medical certificates and reports were up to date.

The Respondent accordingly continued to pay his salary. He was requested to work in the control room in July 2009. He only worked for two weeks .His health continued to fail him and the Respondent instructed him not to continue to present himself for duties.

To his amazement the Respondent handed him a document terminating his services dated 18 August 2011.

To the best of his knowledge he had at all times submitted proof of incapacity for the duration of his absence.

Mr D Gounden, acting supervisor at R.A Khan Hospital gave evidence. He previously supervised the Applicant. He had knowledge that the Applicant sustained an injury on duty in 2001.

An employee who fails to report for duty on account of illness or injury was obliged to submit proof of incapacity and to complete a leave application for approval by the responsible management.

A leave application which is not signed by the responsible representative of management suggests that the leave application was not approved, further that the absence would be unauthorised.

He did not believe that the Applicant was suitable for employment seeing that the Applicant was not fully recovered from his injury and further that the previous attempts by the Respondent to place the Applicant on light duty proved to be unsuccessful.

Mr Kunene, Labour Relations Officer in the service of the Respondent gave evidence. He served in the EMR component of the Department of Health. He was responsible for attending to employees' grievances, conducting disciplinary hearings, representing the employer in the bargaining chamber and chairing the institutional labour management forum.

He did not know the Applicant personally. The Applicant was stationed at the district and he was at head office.

He was familiar with the circumstances leading to the termination of the Applicant's services namely, unauthorised absence from duty for thirty consecutive days.

To the best of his knowledge no dismissal took place. As far as he was concerned the termination of the Applicant's services was by operation of law as contemplated by Section 17 of the Public Service Act of 1994.

The Respondent's contracted medical consultants advised that the Applicant's services be terminated as medical boarding was not recommended.

As far as he could recall the Applicant refused alternative work within the Respondent's establishment.

It was the Applicant's case that following the injuries the Applicant was no longer suited to carry out his normal duties. The alternative duties offered were for the Applicant to perform duties in the control room.

He found the Applicant to have been uncooperative.

He noted that the Applicant's leave application dated 16 August 2011 was not approved, meaning that the absence for the relevant period even if it was for illness was not approved.

Similarly the leave application dated 10 January 2011 was equally not approved.

A medical certificate or a progress medical report only serve as an attachment or a supporting document when applying for leave. These documents do not take the place for an approved leave application.

He had no knowledge of a final medical report submitted by the Applicant.

He found it strange that the Applicant was requesting to be reinstated when in fact he submitted that he was too sick to work.

He found that the medical certificates submitted by the Applicant were back dated and therefore invalid.

He was of the view that the Respondent was left with no option but to terminate the Applicant's services in view of the fact that the Applicant refused to do light duty.

It was also his comprehension that the termination of the Applicant's services was for a reason associated with the Applicant's failure to report for duty.

ANALYSIS OF EVIDENCE AND ARGUMENT

Termination of employment may be at the instance of any party to the employment relationship. Termination of employment at the instance of an employer is referred to as a dismissal in Labour Law. Where termination is at the instance of an employee, or by agreement between the parties there is no dismissal.

Termination of employment at the instance of an employee or by agreement or by operation of law may not form the subject of a labour dispute as contemplated by Section 191 of the Labour Relations Act, save in instances where there is a dispute about whether termination of employment was by agreement, operation of law or at the instance of an employee as in the case of resignation.

Termination of employment by operation of law may be at issue where a fixed term employment contract had run its course or where the provision of Section 17 of the Public Service Act, 1994 finds application.

In the instant case the Respondent's case was founded on the provisions of Section 17 which reads:

“an employee, other than a member of the services or an educator or a member of intelligence services, who absents himself or herself from his or her official duties without permission of his/ her head of department, office or institution for a period exceeding 1 calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect form the date immediately succeeding his or her last day of attendance at his or her place of duty”

It was as a consequence of the provision of the aforestated Section that the Respondent terminated the Applicant’s services in August 2011.

The notice of termination of employment addressed to the Applicant read;
“It has come to my attention that you have been absent from work for more than thirty days as from 11 August 2001 to date without a permission from your line manager. In the premises, you are advised that you are deemed to have been discharged from your employment in terms of Section 17 (5)(a)(i) of the Public Service Act with effect from 11 August 2001.

Your emoluments have been terminated and all remuneration paid to you during the period 11 August 2001 to date will be deducted from your pension once relevant process have been initiated”.

Undisputed evidence was that the Applicant continued to receive his monthly remuneration to the date of termination of employment. It was also undisputed that the Applicant had sustained an injury on duty during the year 2001.

If termination of the Applicant’s services was for a reason associated with unauthorised absence, the period referred to should be the period immediately preceding the 11 August 2011 . A ten year period is not what is contemplated by the Section relied upon by the Respondent.

To rely on the provision of Section 17 an employer must invoke the provision here of as soon as it is entitled to do so.

Absence without authorisation implies that an employee’s absence is for a reason not recognised by law, in the instant case, the Public Service Act.

The nature of employment relationship is such that it is a relationship of performance. Performance constitutes a material term of any employment relationship. In terms hereof an employee is only entitled to remuneration for services rendered save for instances where an employee’s absence is for a legally recognised cause.

Legally recognised cause refers to absence due to injury, illness, leave or other activity related to an employer's business such as training or agreed to in terms of a collective agreement, for example.

There is no obligation on the part of an employer to continue to pay an employee for services not rendered.

The question to be asked is what was the basis for the Respondent to continue to pay the Applicant for as long as the Applicant did not present himself for duties.

The answer can be found in the testimony of Mr Gounden. Mr Gounden confirmed that he had previously supervised the Applicant, that he had knowledge of the fact that the Applicant sustained an injury on duty and that the Applicant had not fully recovered.

In the second place Clause 19.1 of the Determination on Leave of Absence in the Public Service also sheds light.

In terms hereof an employee who as a result of his or her work, suffers an occupational injury….., shall be granted occupational and disease leave for the duration of the period they cannot work.

A combination of Mr Gounden's knowledge of the Applicant's injury as a management representative and the fact that the Respondent continued to remunerate the Applicant at his normal monthly rate, is testimony to the fact that the Respondent derived its authority to pay from the provision of Clause19.1 of the said Determination.

It was not disputed that the Applicant had continuously submitted evidence of his continued inability to perform duties.

In the light of the provision of Clause 19.1 of the Determination authorisation of leave of absence was not required.

The substratum of the Respondent's argument was that permission of absence was not granted in which event the Respondent acted within its right to invoke the provision of Section 17 of the Public Service Act, further that the illness did not result from the Applicant's occupation.

I find that there is a disjuncture between the Respondent Party's argument that the Applicant did not sustain a work related injury as its witness testified to the contrary. The Respondent's

argument was not supported by the Respondent's conduct in continuing to pay the Applicant for the duration of his absence.

Mr Gounden's testimony and the Respondent's conduct in continuing to pay the Applicant did not make sound logical sense of the Applicant Party's argument.

The Applicant Party's case was on the other hand well grounded and had both factual and legal basis. The illustration in the analysis herein above bears this fact.

It is on consideration of the factors herein above stated that I arrive at the conclusion that there existed a dismissal. The dismissal had no factual or legal basis.

AWARD

1. There was a dismissal and the dismissal was unfair.
2. I order that the Department of Health – Kwazulu Natal reinstate Mr Pillay GA on or before 07 January 2013. Reinstatement must be in the same or similar position but subject to terms and conditions not less favourable than was previously the case.
3. Reinstatement must be with arrear salaries calculated at R 10 161.25 x 15 (being the equivalent of the period for which the Applicant received no remuneration) = R 152 418.75.
4. Both reinstatement and arrear salary payment must be effected simultaneously on or before 07 January 2013.

Joseph Mphaphuli
Signed
PHSDSBC Panelist
27 November 2012