



ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy
Case No.: PSHS507-11/12
Date of Award: 22-Mar-2012

In the ARBITRATION between:

PSA O B O SOOKAY R

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative

: MR M DINGANA

Union/Applicant's address

: P.O.BOX 2056

PIETERMARITZBURG

3200

Telephone : 033 392 7600

Telefax : 033 392 7615

Respondent's representative

: MR M KHUMALO

Respondent's address

: PRIVATE BAG X 9001

PIETERMARITZBURG

3200

Telephone : 033 395 3142

Telefax : 033 395 3220

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration hearing took place on the 27 February 2012 at the Natalia Building, Labour Relations Boardroom, 7th Floor, North Tower, Pietermaritzburg. Mr V Haripersad of PSA appearing on behalf of

Mr M Dingana represented the applicant/employee and Mr M Khumalo represented the respondent /employer.

2. The parties agreed that no oral evidence will be tendered and that the matter be determined on their Heads of Arguments as follows:
 - 2.1 The respondent/ employer will serve its Heads of Arguments on the Points In Limine on the commissioner and applicant on or before 9 March 2012
 - 2.2 The Employee/ applicant will serve its Heads of Arguments on the Points In Limine on the commissioner and applicant on or before 16 March 2012.
 - 2.3 The Employee/applicant will serve its Heads of Arguments on the Merits on the commissioner and respondent on or before 9 March 2012
 - 2.4 The respondent will serve its Heads of Arguments on the Merits on the commissioner and applicant on or before 16 March 2012.

3 BACKGROUND TO THE MATTER

- 3.1. The applicant applied for temporary incapacity leave for 247 days. The respondent/employer declined the application and embarked on a process to recover monies paid to the applicant for the period in question.
- 3.2. The applicant prays for an order to declare the conduct of the employer to be unfair and that the employer grant the applicant's application for Temporary Incapacity Leave (TIL) and re-pay all monetary deductions that were made against the applicant's salary that amounts to R32890.23 over reasonable period of 12 months.
- 3.3. The respondent contends that the Council lacks requisite jurisdiction to arbitrate the matter alternatively the matter falls outside the scope of unfair labour practice as this clearly is a salary dispute. This is about the deduction of salary and therefore it is a salary dispute.

4. ISSUE TO BE DECIDED

- 4.1. Whether the Council has the requisite jurisdiction to hear the matter.
- 4.2. Whether the respondent had interpreted and applied the collective agreement in terms of resolutions Resolution 7 of 2000 as amended by Resolution 5 of 2001 correctly in declining his temporary incapacity leave for 247 days. Further and should my finding favour the applicant what relief may be appropriate in the circumstances.

5. SUMMARY OF THE EVIDENCE

APPLICANT'S (EMPLOYERS) SUBMISSION

1.

This is an application to have the applicant's application dismissed; the reasons for this application are going to be set out hereunder.

2.

It is submitted that the dispute lodged by the applicant on behalf of its member is purported to be a dispute about the interpretation and application of a collective agreement Resolution 7 of 2000.

3.

For the dispute of this nature to be determined it is important to first take into account the following factors: What is the real dispute and what are other issues which need to be decided in order to resolve the real dispute.

It is submitted that the dispute as lodged by the applicant is to all to intents and purposes a dispute about the fairness or otherwise of the decision of the employer when the employer decided to deduct leave without pay from the applicant's salary after the latter's application for temporary incapacity/disability leave was declined at the advice of the Health Risk Manager.

4.

In the latest decision of the Labour Appeal Court of South Africa, in *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Two Others*, the court took the above approach. The court held that interpretation and application of collective agreement disputes are not necessarily about the application or interpretation but they are disputes about the fairness or lack of it/ or otherwise of the decision of the employer. The Honourable Court came to a conclusion that therefore the Bargaining Council and the second respondent, the Commissioner had no jurisdiction to arbitrate the matter. The germane issues even in this matter are just the same as the issues which had to be decided in the aforementioned judgment.

5.

In the circumstances it is submitted that in light of the foresaid judgment, this Council does not have requisite jurisdiction to arbitrate this matter, as this is not necessarily a dispute about the application or interpretation of the collective agreement but the applicant is challenging the decision of the employer to deduct leave without pay from her salary.

6.

In the alternative once again the Council lacks requisite jurisdiction to arbitrate matters which are outside the scope of unfair labour practice as this clearly is a salary dispute. This is about the deduction of salary and therefore it is a salary dispute.

Wherefore it is respondent's prayer that the applicant's case be dismissed.

6. RESPONDENT'S (EMPLOYEES) SUBMISSION

The employer has transgressed the collective agreement in respect of Resolution 7 of 2000 as amended Resolution 5 of 2001. The following will highlight the claim for the applicant:

Applicant, Mrs R. Sookay is employed by KZN Department of Health in the capacity of Pharmacy Assistance. On the 02 July 2008, she made her first application for Temporary Incapacity Leave for the period of 02-05 July 2008 which equal two days.

The total days in question are 247 days which were unfairly declined by the employer without subjecting the applicant to any second opinion. Applicant onwards has submitted the referral (Applications) related to the process or procedure determined in the said collective agreement which had not been followed by the employer, resulting in serve prejudice to the applicant. And not to the manner in which the respondent had exercised his discretion to grant or refuse the applicant paid TIL.

Resolution 7 of 2000, clauses 7.5.1 (b) it states that the employer shall , during 30 working days investigate the extent of inability to perform normal official duties, the degree of inability and the cause thereof. Investigation shall be in accordance with item 10 (1) of schedule 8 in the Labour Relations Act 66 of 1995.

Item 10 (1) of schedule 8 in the labour Relations Act states, incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporary 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 they should investigate all the possible alternatives

The employer failed to do any of the above, and thus has failed to adhere to the time period of 30 working days.

Clauses 7.2.1 states the employer must immediately on receipt of the employee's application in the designated office register the date of receipt on the application from and a central register/ database;

7.2.2 states that the employer must within 5 working days from receipt of the employees application for temporary incapacity leave verify the documents correctness

Given effect to the time periods determined in the said policies, the employer had no discretion to deviate from the policy and to ignore the policy time lines and prejudice applicant. Thandile Health Risk Manager is equally obliged to comply with the rules of Resolution 7 of 2000 and / or the any ancillary policies.

Clauses 7.2.3 states the Health Risk Manager must acknowledge receipt of the above-mentioned reports/ application within 2 working days and confirm in writing that the Employer shall receive feedback on the application within 12 working days.

Neither Resolution 7 of 2000 nor any of the policies make any provision for the employer or (Health Risk Manager) to deviate from the time lines and therefore commissioner the conduct of the employer amount to unfair conduct and extreme prejudice to the applicant.

RELIEF

The above establishes a reasonable apprehension of unfair conduct of the employer and we pray to the Public Health Social Development Bargaining Council (PHSDBC) to declare the conduct of the employer to be procedurally and substantively unfair and that the employer must grant the applicants application for Temporary Incapacity Leave (TIL) for the above-mentioned period. Re-imbursed all monetary deductions that were made against her salary that amounts to R32890.23 over reasonable period of 12 months.

7. ANALYSIS OF EVIDENCE AND ARGUMENT

7.1. In this matter the applicant referred the dispute as one in terms of the interpretation an application of a collective agreement namely in terms of Resolution 7 of 2000 as amended by Resolution 5 of 2001 dealing with temporary incapacity leave. The applicant submitted her application for leave and thereafter she was advised that her application was declined and that all monies paid for the period in respect of the application was to be recovered in installments. Clearly this matter relates to salary and as such it is trite that the Council does not have the requisite jurisdiction to hear the matter as it is a matter of mutual interest.

The following is recorded for completeness.

7.2. In order to remain within the scope of section 138 (1) of the Labour Relations Act the relevant provisions of the applicable resolutions have been read and taken into account in arriving at my decision. Further I have taken note of the recent decision of Minister of Safety & security v SSSBC & Others (2010) BLLR 705 (LAC). The following are recorded verbatim from the practice notes for completeness:

- 7.3. In this matter the LAC dealt with the issue of whether bargaining councils have jurisdiction to arbitrate a dispute referred as an “interpretation” or “application” dispute when in fact the interpretation/application is not the real issue before it but that the real issue is disguised as the interpretation/ application of a collective agreement. In this case Ms Badenhorst applied for a transfer from Zwelitsha Safety and Security Provincial office to Port Elizabeth. Resolution 5 of 1999 regulates transfers. Ms Badenhorst’s application was refused and she then referred a dispute concerning the interpretation or application of collective agreement to the SSSBC. Part of her main argument related to questioning the fairness/ appropriateness of the decision not to approve her application and consequently that the decision maker did not apply his mind.
- The arbitrator found in Ms Badenhorst’s favour. The matter was then reviewed and the Labour Court dismissed the application for review and the SAPS took the matter on appeal.
- 7.4. The SAPS grounds for appeal were that the SSSBC lacked jurisdiction to arbitrate the dispute because it was not an interpretation or application dispute.
- The true dispute was about the fairness of the SAPS decision to refuse the transfer. In its judgement the Court dealt with the distinction between *a dispute* and *an issue in dispute*. The Court uses an example of a person who has been dismissed for operation reasons, and the person challenges the dismissal on the basis that the employer failed to follow a procedure that is in a collective agreement in terminating the employee’s services for operational reasons.
- 7.5. In this case the Court says the real issue is about the fairness of the dismissal and the issue in dispute is the interpretation/ application of the collective agreement that provides for the process of the termination. Simplified, the issue in dispute needs to be decided in order for the real issue to be resolved.
- 7.6. This issue is important because it deals with jurisdiction. In the operational dismissal dispute the Labour Court will have jurisdiction and in the interpretation / application disputes the matter would have to be arbitrated.
- 7.7. The Court concluded that the dispute before the SSSBC arbitrator was about the fairness of SAPS refusal of Ms Badenhorst’s transfer. The application of the provisions of the collective agreement was, according to the Court, an issue in dispute and not the main/real dispute.
- 7.8. The Labour Appeal Court overturned the decision of the Labour Court, set the arbitration award aside and held that the SSSBC had no jurisdiction to arbitrate this matter.
- 7.9. In the present case the applicant’s main dispute is about the employer’s decision to decline the application for temporary incapacity leave and the resultant recovery of monies paid to the employee while she was on leave. The application of the provisions of the collective agreement is issues in dispute and not the main/real dispute.

In reality the applicant is unhappy with the employer's decision to decline her application for temporary incapacity leave and the recovery of monies paid to her.

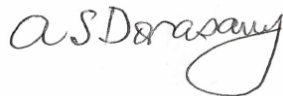
7.10. In line with the above reasoning and taking note of the decision of the LAC I determine that the Council does not have jurisdiction to arbitrate this matter.

AWARD

8. The Council does not have jurisdiction to arbitrate this matter.

9. There is no order as to costs.

THIS DONE AT DURBAN ON THIS 22 DAY OF MARCH 2012.

A handwritten signature in cursive script, appearing to read 'aSDorasamy'.

Commissioner: : ANAND DORASAMY
(AWARD SOOKAY)