



ARBITRATION AWARD

Case No: **PSHS1448-17/18**

Commissioner: **Anna Maria Fourie**

Date of award: **11 April 2019**

In the matter between:

PSA obo Nonceba Elizabeth Winkel

(Union/ Applicant)

and

Department of Health- Free State

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

[1] The Applicant referred a dispute of an alleged unfair labour practice to the Bargaining Council on 1 August 2018. The dispute was initially set down for arbitration at the Botshabelo District Hospital, Botshabelo on 24 August 2018 on which date I could only hear opening statements, as there was no interpreter available and the Applicant's mother tongue was Xhosa. The dispute was subsequently set down for arbitration on 9 January 2019 on which date unfortunately the Interpreter indicated on the notice of set down did not attend the proceedings. The arbitration was thus postponed for a second time after an extended attempt to resolve the dispute was not successful. The arbitration was set down for finalisation on 28 March 2019 on which date both parties were represented and the Interpreter was in attendance. The Applicant was present and was represented by Mr. Fandie of the Union. The

Respondent was represented by Mr. Litlhakanyane, an Employment Relations Officer of the Respondent.

- [2] The proceedings were conducted in English and Xhosa and the Interpreter was Mr. MP Mbohi. I took hand written notes and the proceedings were electronically recorded.

PRELIMINARY ISSUE RAISED

- [3] The Respondent's representative submitted that he was only instructed to apply for a postponement of the arbitration as he was not familiar with the details of the case. Ms. Makoa, who previously dealt with the matter on behalf of the Respondent was not available as she had to attend to another arbitration on the same date. He asked that, in the alternative, the matter should be dealt with on written heads of argument only.

- [4] The Applicant's representative submitted that he understood his opponent's predicament as the matter was previously handled by Ms. Makoa.

- [5] After considering the parties' submissions, as well as the fact that the arbitration was previously postponed several times, I was of the view that there was no compelling reason for me to grant the postponement. One of the objectives of the Labour Relations Act is the speedy resolution of labour disputes. The dispute before me was old and the Respondent had knowledge of the arbitration proceedings for at least a month. The fact that one representative is not available is no excuse. The Respondent has resources in that there are numerous Labour Relations Officers in its employ and there seems to be no reason why an alternative Labour Relations Officer could not be timeously instructed to prepare for and deal with the arbitration. I could not allow the parties to submit written heads of argument only, as at the first sitting of the arbitration the issues in dispute were narrowed and there were clearly several factual disputes that could only be determined by considering evidence. I did not allow the postponement and instructed the parties to present their respective cases as best as they could.

ISSUE TO BE DECIDED

[6] I am called upon to determine whether the Respondent's decision not to grant the Applicant temporary incapacity leave for several periods, constituted an unfair labour practice against her. The Applicant sought to be refunded in the amounts that were deducted from her salary as a result of the said refusal of temporary incapacity leave.

BACKGROUND

[7] The parties agreed that the facts were common cause and were as follows:

[7.1] The Applicant applied for temporary incapacity leave for the following periods:

- 15 to 19 April 2014
- 29 April 2014 to 2 May 2014
- 6 to 16 May 2014
- 20 June 2014 to 2 July 2014
- 4 to 22 July 2014
- 23 July 2014 to 4 August 2014
- 5 August 2014 to 2 September 2014.

[7.2] The Respondent requested the Applicant to provide further information (medical certificates) to substantiate her application.

[7.3] The Applicant submitted her application in December 2014.

[7.4] The Respondent responded to the application only in February 2015.

[8] The parties identified the following issues as being in dispute:

[8.1] Whether the Respondent complied with clause 7.5.1 (b) of Resolution 7 of 2000.

[8.2] The timing of the Respondent's request that the Applicant must provide further information.

[8.3] Whether a medical report as general motivation was submitted to the Respondent and whether it was done approximately a year later.

[8.4] Whether the Applicant in fact qualified for sick leave.

[8.5] Whether the Respondent complied with the thirty-day period provided for in clause 7.5.1(b) of the Resolution.

[9] The Applicant's representative confirmed on record that she was employed as an Assistant Nurse. The Applicant's sick leave had been exhausted when she was booked off by a medical practitioner, which had given rise to her application for temporary incapacity leave.

SURVEY OF EVIDENCE AND ARGUMENT

[10] The Applicant testified and submitted written arguments in support of her case. The Respondent called no witnesses, but submitted written arguments in support of their case. Written arguments were submitted on 4 April 2019.

EVIDENCE AND ARGUMENT FOR THE APPLICANT

Nonceba Elizabeth Winkel testified under oath as follows:

[11.1] She applied for temporary incapacity leave (TIL) by completion of the necessary form which was signed as witness by her Supervisor. She also annexed a medical certificate from a registered medical practitioner to her application. A portion of the application form also had to be completed by the medical practitioner, namely what illness she had as well as the extent of her illness. The medical practitioner also informed her what kind of work she could do due to her illness.

[11.2] During her period of absence, the Respondent never called her to suggest that they were of the view that there was a job that she could still do. The Respondent only took her to their own doctors at the Oranje Hospital and she was told that with her medication, she could continue working. However, she had already been on the treatment that the Respondent's doctors had suggested and her illness got worse. Her doctor had indicated on his report not only what her condition was, but also on what treatment she had been and he recommended that she was unfit to continue working.

[11.3] In her view, the Respondent did not treat her fairly by not granting her TIL. She did request her doctor to provide the information requested by the Respondent.

However, her doctor indicated that, although he was not unwilling to provide further information, he did not know what other information he could provide as he had written everything on the form. Her doctor had indicated that she had suffered from back- and leg pain, arthritis and kidney failure. She had to undergo an operation, but was not strong enough.

[11.4] The Respondent did not provide her with reasons for declining her TIL. For the hundred and ten days that her TIL had not been granted, the Respondent had deducted a total amount of R37 896.00 from her remuneration. There was also an amount of R17 000.00 deducted for a period of twenty-one days. She sought an order compelling the Respondent to reverse the deductions from her remuneration.

[11.5] She was the breadwinner of her family as her husband was deceased. She had been working for the Respondent since April 2007. At the time of the dispute, she earned R13 264.75 per month.

[12.1] Under cross-examination she reiterated that she submitted a doctor's letter (sick note) to the Respondent together with her sick leave form and TIL application form. After the said forms were submitted, the Respondent requested her to provide extended information and she asked the doctor to write a report about her. She gave the said report to the Respondent. Later she explained that her doctor would not give her such a report without being paid and as it would cost a lot of money which she could not raise, she left. She submitted that it was her responsibility to obtain the medical report.

[13.1] In closing, her representative referred to clause 7.5.1(b) of Resolution 7 of 2000, and quoted:

“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. Investigations shall be in accordance with item 10(1) of Schedule 8 in the LRA.”

[13.2] He argued that an employee was required to apply for TIL when a medical practitioner indicated that the employee was temporarily disabled to work and the

employee's sick leave was exhausted. In such cases, employees would have to inform the supervisor of the illness and a registered medical practitioner must certify in advance that the condition is a temporary disability. Should an application for TIL be granted, the employee would receive paid sick leave.

[13.3] He argued that in terms of item 10(1) of Schedule 8 to the Labour Relations Act, an employer had to investigate the extent of an employee's inability to do his or her normal duties. This was not done by the Respondent and therefore, the Respondent did not comply with clause 7.5.1(b) of Resolution 7 of 2000. He referred to a Labour Court decision in the matter of *Department of Defence v PSCBC and Others* handed down on 6 March 2018 JR158/17 Labour Court Johannesburg. He argued that the Respondent had no discretion regarding the initial TIL, but might have if an extension is applied for. He further argued that the Respondent could only approve or decline TIL on technical requirements and that once an employee had complied with the initial requirements, the employee was entitled to TIL.

ARGUMENT FOR THE RESPONDENT

[14.1] The Respondent called no witnesses and presented no documentary evidence during the arbitration. However, the Respondent did submit some documents with their written closing arguments. It should be noted that, although I had a look at the documents, they were not presented at the arbitration and thus the Applicant had no opportunity to comment on it.

[14.2] It was the Respondent's argument that the Applicant failed to submit the requested medical report as her medical doctor allegedly indicated that such a report was too expensive. The Respondent thus referred the Applicant for a second opinion. The second opinion was that if the Applicant continued with the treatment prescribed by her private doctor, she would be able to work and the TIL was declined.

[14.3] The Respondent wrote several letters to the Applicant to inform her that her failure to submit the required documentation would lead to a deduction from her

remuneration. It was the Applicant's responsibility to submit the relevant documentation in support of her application for TIL. The interpretation of Resolution 7 of 2000 did not form part of an unfair labour practice dispute.

[15] Documents submitted by the Respondent:

[15.1] Letter from the Respondent to the Applicant, dated 02/10/2017 relating to the Applicant's appeal against the outcome of her application for TIL for the period 15 to 19 April 2014.

[15.2] Letter from the Respondent to the Applicant, dated 04/02/2015 relating to the Applicant's application, dated 03/05/2014 for TIL for the period 29 April 2014 to 2 May 2014.

[15.3] Letter from the Respondent to the Applicant, dated 07/10/2014 relating to the Applicant's application for TIL for the period 4 to 22 July 2014.

[15.4] Letter from the Respondent to the Applicant, dated 07/10/2014 relating to the Applicants' application for TIL for the period 20 June 2014 to 2 July 2014.

[15.5] Letter from the Respondent to the Applicant, dated 09/12/2014 relating to the Applicant's application, dated 05/08/2014 for TIL for the period 5 August 2014 to 2 September 2014.

[15.6] Letter from the Respondent to the Applicant, dated 04/02/2015 relating to the Applicant's application dated 07/05/2014 for TIL for the period 6 to 16 May 2014.

[15.7] Letter from the Respondent to the Applicant, dated 30/10/2014 relating to the Applicant's application for TIL for the period 23 July 2014 to 4 August 2014.

ANALYSIS OF EVIDENCE AND ARGUMENT

[16.1] The Respondent disputed that an unfair labour practice was committed against the Applicant. The onus was thus on the Applicant to prove on a balance of probabilities that she had been subjected to an unfair labour practice.

[16.2] The Applicant testified, but presented no documentary evidence in support of her case. From the documentation submitted by the Respondent in closing, it appeared to be common cause that the Applicant indeed applied for TIL on several occasions. The Applicant's representative referred to clause 7.5.1 (b) of Resolution

7 of 2000 and argued that an employee was required to apply for TIL when a medical practitioner indicated that the employee was temporarily disabled to work and the employee's sick leave was exhausted. In such cases, employees would have to inform the supervisor of the illness and a registered medical practitioner must certify in advance that the condition is a temporary disability.

[16.3] It was not in dispute that the Resolution made provision for temporary incapacity leave where an employee's sick leave was exhausted. The important question is whether the Applicant could claim entitlement to the TIL in the circumstances. In order for me to determine whether the Applicant was entitled to TIL, I would need particulars of her application for TIL as well as the exact requirements for such an application. It was the Respondent's case that the Applicant did not meet all of the requirements in order to qualify for TIL, which meant that the Applicant had to show that she indeed complied with the requirements in question.

[16.4] Despite the presence of the interpreter as well as the fact that the Applicant was represented by a seasoned representative, the Applicant did not provide much detail in her testimony regarding what her private doctor would have indicated on her medical certificate as well as in the portion of the TIL application form he had to complete. In fact, she only provided particulars about what her doctor would have indicated to her after a consultation regarding her disability to work.

[16.5] The Applicant confirmed that the Respondent required her to provide further information on her condition. She explained that when she approached her doctor about it, her doctor had several excuses for not providing her with more information. She thus confirmed that the Respondent did in fact request further particulars from her and also that she did not provide such further particulars. Under cross-examination, she insisted that she in fact did provide such a further report when the Respondent requested her to do so. She then again changed her version in cross-examination and confirmed that she did not submit said report.

[16.6] The Applicant had difficulty to answer a question during her testimony in chief regarding whether or not she was provided with the reasons for the decline of her TIL. I found this to be impacting negatively on her credibility as a witness. She also contradicted herself in some aspects during her testimony in chief.

[17] I had to determine the following issues:

[17.1] Whether the Respondent complied with clause 7.5.1 (b) of Resolution 7 of 2000.

[17.2] The timing of the Respondent's request that the Applicant must provide further information.

[17.3] Whether a medical report as general motivation was submitted to the Respondent and whether it was done approximately a year later.

[17.4] Whether the Applicant in fact qualified for sick leave.

[17.5] Whether the Respondent complied with the thirty-day period provided for in clause 7.5.1(b) of the Resolution.

[18.1] The first and the last issue can be dealt with as one. Two components are in question, namely whether the Respondent did the required investigation as provided for in Schedule 8 and whether the Respondent complied with the thirty-day period.

[18.2] Clause 7.5.1 of Resolution 7 of 2000 provides as follows:

“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 employer shall, during 30 working days, investigate the extent of inability to perform normal 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.”

[18.3] Item 10(1) of Schedule 8 to the LRA, provides as follows:

“10. Incapacity: Ill health or injury

1. (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 employer should investigate all the possible alternatives short of dismissal. When 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.”*

[18.4] As I indicated before, the Applicant did not provide me with sufficient evidence to conclude that she indeed met the requirement of clause 7.5.1(a)(ii) of Resolution 7 of 2000. Turning to the question of whether the Respondent did the investigation as required in terms of item 10(1) of Schedule 8 to the LRA, the Applicant confirmed that the Respondent indeed asked her to provide further particulars and even referred her to Medical Practitioners in employ of the Respondent for a second opinion regarding her condition. I thus fail to understand how the Applicant can claim that the Respondent did not conduct an investigation into the extent of her condition.

- [19] It is debatable whether the Applicant could insist that the Respondent complied with the thirty-day period provided for in clause 7.5.1(b) of Resolution 7 of 2000 if the Applicant did not provide all the required particulars to substantiate her application for TIL. This also deals with the issue relating to the timing of the Respondent's request for further particulars.
- [20] As far as the question whether the Applicant provided a general medical report as motivation for her request for TIL to the Respondent is concerned, I have already indicated above, that the evidence before me was not sufficient to conclude on a balance of probabilities that any medical report was submitted to the Respondent in support of the Applicant's application for TIL. Furthermore, the internal and external contradictions in the Applicant's version made it impossible for me to determine what her version in this regard actually was.
- [21] Turning to the question whether the Applicant in fact qualified for TIL, I am not convinced that the Applicant presented sufficient evidence for me to conclude on a balance of probabilities that she in fact qualified for TIL. No medical certificates or even her application for TIL were submitted to substantiate her allegations in this regard.
- [22] In conclusion, I am not convinced that the Applicant discharged the onus to prove on a balance of probabilities that the Respondent had committed an unfair labour practice against her.

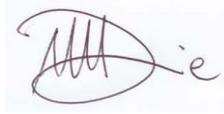
AWARD

[23] The Respondent, **Department of Health- Free State**, did not commit an unfair labour practice against the Applicant, **Nonceba Elizabeth Winkel**.

[24] The Applicant's claim is hereby dismissed and she is not entitled to any relief.

[25] I make no order as to costs.

Signature:

A handwritten signature in black ink, appearing to read 'AMF' followed by a large flourish and the letter 'e'.

Commissioner: Anna Maria Fourie