



ARBITRATION AWARD

Panellist/s: Paul Kirstein
Case No.: PSHS456-10/11
Date of Award: 19-Apr-2011

In the ARBITRATION between:

**IN THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORIAL
BARGAINING COUNCIL (HELD AT CAPE TOWN)**

CASE NO: PSHS456-10/11

In the matter between

DENOSA obo LOGGENBERG, MG

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 13 April 2011 at the Regional Office of the respondent in Cape Town. The applicant was represented by J Bernadien, an official of DENOSA. The respondent was represented by S Mangotyoa, an official in the employment of the respondent. The parties submitted bundles of documents marked bundle "A", "B" and "B". The arbitration was mechanically recorded.

ISSUE IN DISPUTE

2.

The applicant referred an unfair labour practice dispute in terms of Section 186(2) of the Labour Relations Act, 66 of 1995 relating to benefits in that the respondent failed to approve temporary incapacity leave ("TIL") applied for by the applicant.

SUMMARY OF EVIDENCE

3.

The applicant testified and indicated that she applied for TIL during September 2006. The applicant was diagnosed by her psychiatrist with major depression and was booked off sick for an extended period. The medical condition was caused by occupational circumstances. During the period of absence the applicant was regularly visited by her superiors. The applicant returned to her employment in June 2007. The period of TIL which the applicant applied for extended from

September 2006 to June 2007. Upon the return of the applicant to her employment in June 2007 the applicant was placed in an alternative position. The psychiatrist was of the view that although she was fit to go back to work it was necessary for her to be placed in an environment different from the one that caused the illness. In a letter dated 18 February 2008 the applicant was informed that her TIL for the period 21 February 2007 to 31 May 2007 (67 days) has been disapproved by the Area Commissioner. The applicant lodged a grievance regarding the disapproval. In the grievance the applicant clearly states what her issues are with regard to the disapproval of the TIL. The issues relates to the following:

- The failure to give the applicant the opportunity to present her version;
- The relevant approving authority simply rubber stamped the HRM recommendation and did not apply his mind;
- The applicant could not attend an EAP simply because it was not provided for;
- The applicant was not informed of what the requirements were for application of TIL;
- The applicant was allowed off sick and was visited regularly by her superiors;

- The applicant was transferred on the basis that her illness was caused by her employment conditions;
- The period of TIL that was declined differs from the period which the applicant applied for;
- The applicant requested the TIL as was applied for be approved.

4.

The first witness on behalf of the respondent was AD Silva, employed at the relevant time as a leave clerk. Silva was not involved in the approval/non-approval of the TIL. Silva gave information to the Area Commissioner regarding the approval of deductions from the applicant's remuneration. The applicant was given the opportunity to make representations regarding the reimbursement that would be effected from her salary due to the disapproval of the TIL application.

5.

The next witness on behalf of the respondent was M Poswayo, employed as a HRM at Proactive Health Solution, a service provider to the respondent, advising the respondent on incapacity leave and related issues. The HRM makes a recommendation, *inter alia* with regard to the granting and/or declining of TIL. The onus is on the employee to submit the relevant information to show cause why the TIL should be approved. Poswayo referred to the difference between a medical

certificate and a medical report. Poswayo was not involved in the application for TIL by the applicant. Poswayo indicated that the timeframes prescribed in the policy should be adhered to. During cross-examination Poswayo indicated that it is not the HRM's duty to do a case study but the responsibility of management. The recommendation of the HRM is based on the application for TIL. During cross-examination it was put to Poswayo that only one application for TIL was submitted by the applicant. Poswayo indicated that there were two applications and that both applications were declined.

ANALYSIS

6.

The applicant referred an unfair labour dispute in terms of Section 186(a) of the LRA relating to a benefit. It is undisputed that the applicant applied for TIL for the period September 2006 until June 2007. It is in dispute whether there was one application or two applications by the applicant. The dispute is not material to determine this matter. The applicant contests the disapproval of the application for TIL for the period of 21 February 2007 to 31 May 2007.

7.

The HRM recommended to the respondent to decline the application for TIL because of the following reasons:

- There is insufficient medical information to justify such a long period of absence from work;
- The treatment modalities employed in managing the member's condition does not indicate the seriousness of her condition.

It was recommended that the applicant returns to her employment and seeks assistance from the EAP and her supervisor to resolve her work related problems. The recommendation of the HRM is based on the application submitted by the applicant. In the application form it is stated that it is an employee's responsibility to prove to the employer's satisfaction the illness to be absent from work. It is further stated that an employee is, in keeping with the principles of item 10 of schedule 8 of the LRA, afforded the opportunity to submit together with the application additional medical evidence relating to the medical condition of the employee and any additional motivation that it deems relevant supporting the application for TIL. In a declaration included in the form the applicant *inter alia* confirmed the following:

"I understand that the burden of proof of my illness/injury rests with me and that I am offered the opportunity to submit additional medical evidence and motivation to this application. I do understand that if I fail to do so that it would be of my own choice and that the commissions of such information may impact upon the decision regarding my application."

8.

It is undisputed that the illness of the applicant is occupational related and the applicant was specifically for that reason transferred after her return to her employment in June 2007. The applicant's evidence is also not in dispute that there was no EAP provided for during her illness. The applicant was however afforded the opportunity to present all information that she could in her application for TIL. The information did not convince the HRM that TIL should be approved and such a recommendation was made to the respondent. The recommendation of the HRM as a health expert and service provider to the respondent cannot be rejected on the evidence presented at the arbitration. It is not expected of the employer to extract information from an employee who applies for TIL to supply additional information until the employer is convinced that TIL must be granted. In the letter dated 18 February 2008 the respondent states that the TIL for the period 21 February 2007 to 31 May 2007 has been disapproved by the Area Commissioner. The Area Commissioner did not state what the reasons were for disapproving the TIL. In terms of the policy and procedure on TIL the employer must apply his mind to the following:

- Medical certificates;
- Medical information or records;
- Health risk manager advice;

- Additional information that has been supplied by the employee;
- All other information that is available to the employer.

It cannot be determined that the Area Commissioner did not take into account the information that was available. In the absence of evidence to show that the decision to disapprove was taken *mala fide*, malicious and/or taken with an ulterior motive there can be no interference with such a decision. There is a more onerous responsibility on the respondent if an illness is related to an occupational reason. The applicant was however entitled to execute her rights in terms of relevant legislation on occupational diseases. It is common cause that the respondent did not comply with time periods and/or procedural requirements in terms of the TIL policy. Even if the respondent and/or the HRM requested the applicant to provide additional information there is still no guarantee that the TIL would have been approved. The respondent failed to comply with the following procedural requirements in terms of the policy in that the respondent did not grant the applicant reasons for the decision taken and did not approve or disapprove the application within thirty days after receipt of the application. The procedural defects does not make the applicant entitled to TIL. In terms of Section 193(4) of the LRA an arbitration may determine an unfair labour practice dispute on terms that an arbitrator may deem reasonable and may include the ordering of compensation. Having considered the abovementioned issues it is determined that

a compensation amount equal to one month's net remuneration for the non-compliance of the procedural requirement be paid to the applicant. A consequence of declining the TIL is that the applicant must pay back the remuneration that she received for the period of absence. The respondent is entitled to deduct the overpayment of remuneration in terms of the applicable legislation.

AWARD

1. The applicant has shown on a balance of probabilities that the respondent committed an unfair labour practice in terms of Section 186 of the LRA with regard to benefits to the extent that the respondent did not comply with the procedural requirements of the policy relating to TIL. The respondent must compensate the applicant for the unfair labour practice committed in an amount equal to one month's net current remuneration. Payment of the compensation amount must be effected within thirty days after the date of this award.
2. No order as to costs.

SIGNED AT PRETORIA ON THIS THE 19TH DAY OF APRIL 2011



PH KIRSTEIN

