



ARBITRATION

AWARD

PUBLIC SECTOR CO-ORDINATING BARGAINING COUNCIL

Panelist: S H Christie _____

Case No.: PSCB 142 09-10 _____

Date of Award: 25 June 2010 _____

In the ARBITRATION between:

PSA obo S Visser

(Union / Applicant)

and

Department of Education

(Respondent)

Union/Applicant's representative: Mr G Theunissen _____

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Respondent's representative: Ms Abigail Samson Labour Relations Officer _____

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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. The hearing was held at the Overberg Primary School on 10 May 2010. The applicant was represented by Mr. Gerry Theunissen an official of the PSA and the Respondent by Mr Abigail Samson of the Western Cape Education Department.

ISSUE TO BE DECIDED

2. The issue in dispute relates to the Respondent's refusal to grant the Applicant paid Temporary Incapacity Leave (TIL) in terms of clause 7.5 of PSCBC Res 7 of 2000 for the period 13 November 2007 to 4 December 2007 and 14 January 2008 to 9 December 2008.

SURVEY OF EVIDENCE AND ARGUMENT

3. The applicant is a senior administrative clerk at grade 3. It was common cause that the Applicant had two back operations in July and August 2006. She has apparently never fully recovered and suffers recurring back problems. She also had a knee operation in June 2008.
4. Mr Williams Wilkinson of the WCED testified that he has been in its HR Department since 1987 and regularly deals with leave and the implementation of the Department's policy on the management of ill health leave and ill health retirement - PILIR. It is common cause that the Department has for several years referred all applications for TIL to the SOMA Initiative which makes an assessment of all applications. Once SOMA makes a recommendation to reject a claim management at WCED tends to follow that.
5. In 2006 the Applicant applied for TIL and it was granted for the period 2 August – 22 September; 5 October to 13 October and 23 October to 31 October and 1 November to 5 December. Effectively, save for 10 days from 13 to 23 October the Applicant had five months paid leave in terms of the TIL policy in 2006.
6. The Applicant was paid during the periods of her absence in 2008 and returned to work on 13 February 2009.

7. The applicant applied for TIL again on 17 March 2008. Neurosurgeon Dr Marius Small-Smith furnished a report in support of the application. For reasons that the Department has not explained he filled out the necessary application forms three times. On the last occasion on 4 May 2008 Dr Small-Smith wrote “dit is die 3^e en laaste keer dat ek dieselfde vorms met dieseslfde aanbevelings invul!!”
8. Throughout 2008 the Applicant sought feedback on her application for TIL. She received nothing.
9. On 4 February 2009 the Department declined the application for TIL for the short period of 13 November to 4 December 2007. In explanation the Department states that ‘while we acknowledge that you were booked off work on the basis of post-operative recovery, by an Orthopaedic Surgeon, we note that you underwent two back operations in July 2006 and August 2006, which is approximately 16 months prior to the current application. In our opinion, there is insufficient objective medical evidence to justify the specific period being applied for as incapacity leave. Furthermore, due to your sedentary type to work, we assume that you should have been able to continue fulfilling your occupational duties as an Administrative Clerk during the period under consideration despite having to walk with crutches.’
10. Also on 4 February 2009 the Department declined the application for the long period of TIL from 14 January to 9 December 2008. As with the short period the Department wrote, relying on the SOMA report that ‘there is insufficient objective medical evidence to convince us that you were functionally incapacitated ... there is no indication that you attended an intense back rehabilitation programme, was referred to respected health care professionals and/ or to a pain management clinic during your absence from work. Due to the dearth of objective information in our possession, we are unable to warrant the granting of incapacity leave.’ At no stage during 2008 was the Applicant advised to seek specialist treatment of the kind recommended by SOMA
11. The two SOMA reports recommending that the applications be declined were made on 23 December 2008.
12. After the TIL applications were declined the Respondent notified the Applicant that it would seek to recover the salary that had been paid to her throughout 2008 but it has not initiated this recovery, pending the outcome of this dispute. The Department has not advised the Applicant how much she owes the department although at the time of the hearing it was fifteen months after it had declined the TIL. Mr Theunissen put it to Mr Wilkinson that the Department had created a legitimate expectation that she would be entitled to the salary.
13. The Respondent claims that there was unavoidable delay in processing the applications for TIL because the Department cannot make decisions without the intervention of the Health

Risk Manager.¹ Wilkinson stated that the WCED is a large department, it was inundated with applications and this unfortunately led to delays. Wilkinson explained that SOMA declined the application partly because there was inadequate medical information. When an applicant makes an application for TIL the department simply acts as a messenger and forwards the application to SOMA.

14. The Applicant claims that there is no merit in the reasoning of the Health Risk Manager which is replicated in the Department's reasoning to her. She claims that far from having an absence of adequate medical information she indeed tendered reports x-rays, sonar tests and scans but that the HRM lost the documents. A report commissioned by the Department in October 2009 was also mislaid. The Department acknowledges this. "Alle moontlike pogings in aangewend om hierdie rekords op te spoor. Dr Fisher-Jeffes se spreekkamer sowel as die kantoor van die 'Health Risk Manager', SOMA, is genader om vas te stel of die rekords nie nog daar is nie. ... Daar more due ongelukkig aanvaar word dat die stukke verlore geraak het."² The Applicant's unchallenged version is that this medical information which remains her property cost in the region of R60 000. It is not clear whether the documents were lost in the Respondent's offices or in SOMA.
15. On 3 June 2009 after the TIL applications were declined two officials of the Department visited the school to investigate the work environment in the context of the Applicant's request for medical boarding. She had not been informed of their visit and the Department did not deny that no arrangement had been made in advance for these officials to consult with her so that by the time they arrived at the school she had already gone home for the day.
16. Mr Theunissen points to the fact that clause 7.5.b of the Resolution (read with Determination on Leave of Absence in the Public Service)³ provides that the employer shall process applications for TIL in 30 days. These provisions are peremptory; it was clear that the drafters of the policy wanted these applications dealt with expeditiously. Mr Wilkinson conceded that the tight time frames in the agreement were difficult for both employees and the employer to comply with.
17. On the merits of the matter the PSA contends that the SOMA statement that more medical information was required makes no sense. It had as much as was required and if had wanted more the Resolution provides that more can be called for. As it happened the employer's HRM did nothing until October 2008.
18. Mr Wilkinson stated that in TIL cases the Department accepted the SOMA recommendation but there have been cases of termination for ill-health when the Department has terminated

¹ Letter Wilkinson to the PSA 4 March 2010. para 2.1

² Ibid., para 2.3

³ July 2008.

although the SOMA had recommended declining. The PSA argued that the Department's failure to exercise its own independent discretion did not comply with the agreement.

ANALYSIS OF EVIDENCE AND ARGUMENT

19. The Employer did not comply with the TIL policy which requires consideration within 30 days. The only explanation why the Employer took about a year to respond to the requests for TIL is that it was inundated with applications.
20. The policy was intended to curb abuse of sick leave, inconsistent application of leave and having public officials on paid sick leave for lengthy periods. There was no abuse of sick leave. The record shows that in 2004 the Applicant took no sick leave and her illness started in 2005 when she took 10 days leave. Although the Applicant had two back operations in 2006 her condition worsened in 2008. It seems from the medical reports that she could not stand or sit for long periods and needed to lie down to relieve the pain. She had regular physiotherapy but her condition did not improve.
21. The record shows that SOMA considered the Applications for TIL at the same time as the Applicant's request for boarding. It is not clear why this was. The reasoning in SOMA's refusal to accede to the Applicant's request for medical boarding is much the same as its reasoning in the TIL application for the long period. There are different factors to consider when determining whether a person is permanently incapacitated from whether it would be fair to grant a person who is temporarily incapacitated paid leave.
22. I agree with Mr Theunissen that there was a very long delay in considering the applications and I am not persuaded that the fact that there were many applications justifies the delay. As Mrs Visser was at risk of having to pay back overpayment its imperative that these applications be considered expeditiously.
23. The policy is also clear that the Head of Department should investigate⁴ the possibility of adapting the work environment in order to make the employee more productive. The employer did not do this in 2008 during the relevant period because SOMA took so long.
24. The record suggests that the Department may have delayed in submitting the applications to SOMA but this is not clear. As the third application was signed in May 2008, I presume in the absence of any other explanation that SOMA received the applications not long after that. It is not clear why it took SOMA from May to October to request further information. It also seems that SOMA's request that the Applicant be examined by Dr Fisher-Jeffes in October was not relevant to the applications for TIL but was relevant to the Applicant's request for termination by reason of permanent incapacity. I say this because SOMA makes

⁴ Clause 15.12

no mention of Dr T Fisher-Jeffes' assessment in its response to the TIL applications although there is mention in the request for ill-health retirement.

25. It is not Mr Theunissen's contention that SOMA did not consider the applications properly or that it ignored relevant issues or concentrated on irrelevant matters. However, he did seem to suggest that because she had been granted TIL in 2006 she ought to be awarded it in 2008 because the underlying cause of her incapacity in 2008 was the same as had triggered the surgery in 2006.
26. The main focus of the PSA claim on behalf of Mrs Visser is that its delay in considering the applications gave the Applicant some expectation of success. Even though the Department may have been inundated with applications, each application should be considered on its own merit and in compliance with the strict time constraints imposed by the collective agreement.
27. The employer's obligations to comply with the agreement are not excused because SOMA was dilatory in considering these applications. SOMA was appointed by the Department, not by the Applicant. If the Department's preferred health risk expert failed to comply with the terms of the collective agreement, the loss occasioned by that delay should be borne by the Department and not by the Applicant. The Applicant had no power to accelerate the process. The record shows that during much of 2008 she requested feedback but got none.
28. The PSA argues that the delay coupled with the fact that the Applicant received TIL in 2006 warrants the Applicant being entitled to the TIL. I do not think so. It is not disputed that the Applicant was not well and that she was in considerable pain during much of the period under review. But the fact that she received paid TIL for many months in 2006 does not enhance her request for TIL eighteen months later.
29. The Applicant is entitled to some remedy where the Respondent has unduly delayed in considering an application. But it does not follow that the Applicant is entitled to the full outcome that she seeks.
30. It is trite that TIL is discretionary and if the employer exercises its discretion fairly it is not for an arbitrator to intervene. But fairness requires employers to act expeditiously. It is unfair for an employer to conditionally pay an employee for a whole year, then to decline the leave and call on the employee to pay back a year's pay, even if the reimbursement is in instalment. Fairness requires leave arrangements to be made – as far as possible – within a month. That is what is envisaged in the collective agreement and that is what a person in the position of Mrs Visser was entitled to. Even if the matter was complicated, the employer ought to have written to her and explained that there was some delay, to put her on notice that the application may well be refused and that she might consider taking something less than full pay while the application remained pending. None of this was done.

31. The applications ought to have been processed within a month and the delay in processing should be for the employer's account. I conclude that although the Employer may have been justified in refusing to grant the Applicant TIL for the relevant periods it is not entitled to recover salary for the period 13 November 2007 to 4 December 2007 and 4 January to 9 December 2008 but the Applicant is required to pay back two months remuneration in instalments over 4 months.

AWARD

- 1. The Applicant's absence from work during the periods claimed for in this dispute are to be treated as partially paid to the extent that Applicant is required to reimburse the employer two months remuneration at the same rate of pay she earned during the period 1 July 2008 to 31 December 2008.**
- 2. The amounts in paragraph 1 above may be paid in instalments over a period of four months.**
- 3. If there is a dispute about the calculation of the amount the applicant is required to pay to the Respondent I reserve the jurisdiction to determine such dispute on written representations by the parties.**

S H Christie

PSCBC Arbitrator