



ARBITRATION AWARD

Commissioner: Stephen Bhana
Case No.: **PSCB193-09/10**
Date of Award: 22 March 2010

In the ARBITRATION between:

PSA obo GM October

(Union / Applicant)

and

Department of Community Safety - Western Cape

(Respondent)

Union/Applicant's representative: Aileen Mosaic _____

Respondent's representative: Chris Hickley _____

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. The arbitration was held on 2 March 2010 at the respondent's premises. Aileen Mosaic, a union official, represented the applicant, Geoffrey M. October. Chris Hickley, the deputy director for Labour Relations, represented the respondent and called two witnesses. Both

parties submitted documents for consideration. The proceedings were conducted in English and Afrikaans and recorded digitally. Final arguments were due on 9 March 2010.

THE ISSUE IN DISPUTE

2. Whether the respondent is in breach of Resolution 7 of 2000 i.e. the interpretation or application of a collective agreement as contained in Sections 24(2) and 24(5) of the LRA and more specifically had the respondent applied the provisions of clause 7.5.1 fairly in declining the Temporary Incapacity Leave (TIL) applications for the periods 13 February 2008 to 21 March 2008 as well as from 24 August 2008 to 26 September 2008.

THE BACKGROUND TO THE DISPUTE

3. The respondent employs the applicant as a senior provincial traffic inspector. The applicant commenced service with the respondent from 1 July 1987 and has been in the traffic department since 13 July 1996. The applicant had applied for the TIL as stipulated in paragraph 2 and it had been declined.
4. The union averred that the applicant's health problems stem from his obesity and he had not received any assistance from the respondent via its Employee Assistance Programme (EAP). He had applied for TIL within 5 days as required. His applications were declined in March 2009. The monetary value of his TIL applications is R23 028.00 and had not been deducted from his salary yet. The union further claimed that the respondent did not apply the resolution (7) fairly and wanted the TIL approved.
5. The respondent referred to the PILIR policy and stated that TIL is discretionary. The respondent was of the view that the applicant's malady is self inflicted. The respondent had accepted the recommendation of SOMA (the HRM – my note) in this instance although it had previously granted TIL to the applicant despite the SOMA recommendation to decline it. The respondent was further of the view that the applicant failed to effect a lifestyle change and therefore its decision was fair.

SUMMARY OF EVIDENCE AND ARGUMENT

6. Geoffrey October, the applicant, testified on his own behalf. He confirmed that he had applied for TIL and that it had been declined for the periods specified above. His normal sick leave had been exhausted. He suffers from gout, high blood pressure, diabetes mellitus and obesity. He had been hospitalised before March 2008 and used his normal sick leave to cover his hospitalization. He made application for TIL within 5 days of the onset of the periods applied for.

7. October stated that the respondent had not discussed his condition with him. The EAP officer had offered assistance and suggested that he attend a gym. She also mooted the possibility of assistance from the department. He did not go to the gym and the EAP officer set up a meeting with Mr. Curren, a deputy director to discuss assistance for October. Curren offered transport and authorised absence from work to attend the gym. It needs to be noted that October was stationed at the weighbridge at Somerset West whilst the gym is in the Cape Town CBD. October stated that he waited for this offer of assistance in writing.

8. Mrs. Leetz, the EAP officer, made an appointment for him at the gym but he could not attend because he was on crutches at the time. He was also waiting for written permission for the use of an official car and for absence from the workplace to attend the gym. His senior Mr. Phillips did not supply this permission. Phillips and Mr. Lackay visited him at home while he was on sick leave. Phillips informed him that transport would cost R2500.00 per month and each gym session would take three hours out of a working day. This was not affordable according to Phillips, who further suggested that October gets quote from a local gym and attend such a gym with his own transport. He obtained a quote from Virgin Active and gave it to Phillips. Virgin Active required that the contract be signed on their premises but Phillips did not arrange for someone to do this. Phillips did agree that the cost was less than the transport October would have received.

9. October stated that he went to a private gym near his house and exercised, took walks at the beach and followed an eating programme given by his doctor. He lost weight quickly at first but then stabilized at 138kg. He had never refused to attend the gym as suggested by the employer. He had informed Leetz about the non-assistance of the respondent. When he returned to work he was placed to do administrative duties for six months. After the six months Phillips requested a follow up medical report and October was moved back to law enforcement.

10. October stated that it took him 58 years to achieve this excess weight and it is not easy to lose weight. He is still following an eating programme but is not losing any significant weight. He did not attend the gym suggested by Leetz because he had no written permission for the transport and the absence from work. October referred to the additional report requested by Curren which describes the illnesses that he suffers from. He is currently awaiting confirmation from GEMS that it will pay for an operation to reduce his stomach size and thus his food intake. The total result of his illnesses is a decrease in mobility and an increase in gout attacks. It is difficult for him to walk and he drinks about 17 pills per day as medication.

11. October referred to the medical certificates and reports that confirmed he was incapacitated for the periods that relate to this dispute. He was never uncooperative and his lifestyle is not known to the employer. His application for early retirement with medical reports and motivation was declined. It was better for him to work in the administrative section as he could do a full day's work there.

12. During cross-examination October admitted that his illnesses and condition were not work related nor did they develop as a result of his working conditions. He believed that Phillips created an expectation of assistance. There is nothing wrong with his lifestyle. He agreed that his condition is a personal problem. He had no comment on the respondent's version that he had been assisted. October agreed that Leetz had tried to assist him and had visited him at the workplace as the EAP manager for the respondent.

13. October conceded that the head office makes the final decisions in all instances and added that his departmental directors and deputy directors make an impact on these decisions. He agreed that Virgin Active gyms open at 06h00 and close at 22h00. The key issue in respect of the Virgin Active gym was the signing of the contract and payment. He can't afford the payments. The problems that he faced in relation to the respondent's gym in Cape Town were transport and time off from work. He would have had a personal trainer at the Cape Town gym, but is still attending the neighbourhood gym.
14. October confirmed that Curren is the regional director and that he had promised transport. He could never get hold of Curren to follow up on this. He conceded that he had not found out where the Cape Town gym is and what the cost was. (Hickley indicated that it was about R40- R60/month). He could not recall what Leetz' reply was when he informed her of the obstacles he had faced in accessing the Cape Town gym. He did not follow up with Phillips on the Virgin Active gym because he felt that the respondent did not want to help him.
15. October confirmed that the respondent is his employer and that he was transferred to the administrative section after his medical reports were received. He further agreed that it was better for him to do administrative work. He decided to return to law enforcement as a result of the conditions he faced. He was of the view that the respondent did not do enough to assist him. October agreed that he completed the TIL applications but disagreed that he provided information on his lifestyle changes. SOMA made its own deductions and he conceded that they might be right that he could later perform his functions. He agreed that he can manage his illnesses.
16. In reply to my questions October stated that he started at the gym after Easter; approximately 3 weeks after he returned to law enforcement. He explained that his weight increased after he stopped playing sports and that he partied a lot.
17. Cynthia Leetz, the acting deputy director and the EAP manager, testified for the respondent. She stated that Phillips and Curren asked her to assist October with his

- weight and that she visited him at the weighbridge station on 1 and 3 June 2008. She confirmed his evidence about the gym and added that she did a follow up on 11 June 2008. The government gym in Cape Town costs R40.00 per month and her submissions on the gym participation was approved by the employer.
18. October missed his gym appointments in August 2008 and she was not aware that he had problems with his supervisors. She kept in telephonic contact with October and tried her best to assist him. She had also arranged psychological sessions for October with his agreement and he attended 5 sessions. She believed that October could have done more to help himself.
19. During cross-examination Leetz said that Curran was keen that October joined the gym. The psychologist visits were in November and December 2009. She had mooted the possibility of psychological counselling much earlier and did not know why October only agreed in late 2009 to this.
20. Both parties submitted final arguments in writing and I will refer to these where necessary in my analysis below.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

21. PSCBC Resolution 7 of 2000, par 7.5.1 reads as follows:
- i) *"a) An employee who 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:*
 - ii) *her or his supervisor is informed that the employee is ill, and*
 - iii) *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."

22. It is common cause that temporary incapacity leave is not a statutory entitlement but can be applied for in cases where an employee's normal sick leave had been exhausted. It is also not an unlimited amount of additional sick leave at the employee's disposal, but can be granted at the employer's discretion based on its investigations.
23. It is agreed between the parties that October had applied for TIL for two separate periods viz a viz 13 February 2008 to 21 March 2008 as well as from 24 August 2008 to 26 September 2008 and that these have been declined. The Resolution deals with additional sick leave on full pay for disability i.e. being unable to perform one's normal functions. When one examines this Resolution in the context of Schedule 8 of the LRA, to which the Resolution refers, it is clear that this was designed to assist employees with medium to long term disability which could be temporary or permanent. That is the main reason for an investigation i.e. to determine how long the employee would be incapacitated and how working conditions could be adapted to assist the employee. In assessing whether the respondent was in breach of the resolution, I am of the view that it is important to examine the cause that gave rise to the excessive sick periods.
24. It is clear that October's illnesses are directly related to his obesity and by his own admission this is not due to working conditions. He further admitted that his behaviour played a big part in becoming obese. It can thus be deduced that his incapacity was a consequence of his own voluntary actions. I am of the view that TIL had been created to assist employees whose medical conditions were either largely because of factors beyond their control or as a result of working conditions. I am not hereby saying that these are the only factors to consider whether TIL should be granted or not. It is however important to consider whether the employer should indulge an employee whose condition is directly attributable to his own behaviour.

25. It is clear that whilst there was no formal investigation as required by the resolution, the respondent had endeavoured to assist the applicant. It had acted on the SOMA recommendations and has shown that it had applied its mind to the problem of the applicant. It must also be noted that much of the evidence presented has no bearing on the first TIL application and the respondent's attempts to assist were prior to the second TIL application. Whilst one has sympathy for the applicant that cannot be a reason to interfere with the respondent's decision. I am satisfied that the respondent had exercised its discretion fairly in this matter and see no reason to interfere with its decision.
26. In passing it is probably prudent to mention that the parties still have options to consider in dealing with the applicant's condition. It appears that the applicant is now aware of the dynamics of the Cape Town gym and he can follow up on the matter of the Virgin Active one as well. The respondent can also consider whether it is feasible to transfer the applicant to a different environment like administration.

AWARD

27. The respondent is not in breach of Resolution 7 of 2000.
28. The application for relief is herewith dismissed.

Stephen Bhana
ARBITRATOR