



Commissioner: ANAND DORASAMY

Case No.: PSCB 203-09/10

Issued: 24 MAY 2010

In the ARBITRATION between:

F C NGCOBO

APPLICANT

and

SOUTH AFRICAN POLICE SERVICES (SAPS)

RESPONDENT

Applicant's representative

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DETAILS OF HEARING AND REPRESENTATION

1. This arbitration hearing took place on the 11 May 2010 at the Umlazi SAPS Boardroom, Umlazi. Mr S Mhlanga an attorney of Mhlanga Incorporated represented the applicant. Mr J van Rensburg of the SAPS Legal Services represented the respondent.

BACKGROUND TO THE DISPUTE

2. The applicant referred the matter to the Labour Court that directed that it must be ventilated at the Council. At this forum she is challenging the employer's interpretation and application of clause 7.5.2. (c) of Resolution 7 of 2000 which read as follows:

“ If both the employer and the employee are convinced that the employee will never be able to perform any type of duties at her or his level or rank, the employee shall proceed with application for ill health benefits in terms of the Pension Law of 1996.”

3. There has been an overlap of the proceedings at the Labour Court with these proceedings and I intend to deal only with the aspects pertinent at the Bargaining Council level.

SUMMARY OF THE EVIDENCE

APPLICANT'S OPENING STATEMENT

4. The applicant is seeking an order that overturns the decision taken by the medical board stating that the applicant should not be medically boarded alternatively stating that she can perform duties at a less stressful post.
5. The basis of the application is that the applicant has been identified by numerous medical practitioners and that she is unable to perform any further duties and therefore unfit to work. She has been tried on less stressful posts and failed to perform in that position.

6. It is the applicant's contention that had the employer correctly applied clause 7.5.2. (c) of Resolution 7 of 2000 she would have been boarded from 2002 when her application was made.
7. The applicant seeks an order that the decision taken on the 20 August 2004 was unfair and should be set aside and replaced by an appropriate order.

RESPONDENT'S OPENING STATEMENT

8. The respondent contends that the applicant is in a position to work.
9. The respondent prays that the decision of the Health Risk manager of 2007 not to medically board the applicant but to offer her duties at a lower stress environment be accepted and that clause 7.5.2. (c) was correctly interpreted by the employer.

ISSUE TO BE DECIDED

10. Whether the respondent had interpreted and applied sections 7.5.2 (c) of Resolution 7 of 2000 correctly and whether or not the applicant is entitled to ill health retirement benefits. Should my finding favour the applicant what relief may be appropriate in the circumstances.

SURVEY OF THE EVIDENCE

APPLICANT'S EVIDENCE

THEOPHILIUS LAZARUS

A synopsis of Professor Lazarus's evidence is as follows:-

11. He is a registered psychologist and has extensive experience locally, nationally and internationally. The applicant was referred to him by Dr Valjee in 2008 to conduct an assessment and he re-assessed her on the 6 May 2010 in his rooms.
12. In 2008 he concluded that the applicant's ability to return to work was very poor and that view was sustained in the second assessment.

13. His opinion is based on the traumatic incident that of the shooting that she witnessed at Umlazi Magistrate's Court where there was a direct threat on her life. She has chronic hypertension and his opinion is that even if the applicant is placed in a less stressful environment she would not be able to cope.

Under cross-examination he stated:

14. Psychologists differ and express their opinions based on their assessment of patients.

RESPONDENT'S EVIDENCE

15. The respondent elected not to call any witnesses.

CLOSING ARGUMENTS

SPECIAL NOTE:

16. The parties were requested to address me on their closing arguments and I directed the applicant's representative to the provisions of section 138 (2) of the Labour Relations Act wherein I required the parties to address me on their closing arguments and that there would not be an opportunity to reply to the respondent's closing arguments. Further he was advised that I would exercise my discretion to allow or expunge any submissions that was tendered on a without prejudice basis. The salient aspects of the parties closing arguments are recorded below.

There has been much overlapping of the application to the court and these proceedings and what is recorded below is pertinent to the dispute before that of the interpretation and application of clause 7.5.2. (c).

APPLICANT'S CLOSING ARGUMENTS

17. Judge Bhoola referred the matter to the Council indicating that the arbitrator interpret the resolution and the specific clauses and make a determination.

18. The evidence of Professor Lazarus is the only evidence tendered. His version is that the applicant cannot perform at a level or any other post.
19. Clause 7.5.2 (c) talks of both parties the employer and employee is convinced that the employee will never be able to perform any type of duties.
20. The employer ought to be convinced by the evidence before it.
21. It is common cause that the applicant was involved in an incident in 2000 at the Umlazi Court and after the incident she was diagnosed with post traumatic stress disorder (PTSD). She was moved to various positions where she performed badly.
22. After she applied for medical boarding she was assessed by various medical practitioners who recommended that she be boarded. She was not medically boarded.
23. Thereafter she was asked to return to work but she failed to report for duty and her salary was stopped. The employer's decision was challenged without the applicant obtaining any relief.
24. The discretion of the employer must be based on reasonable or valid reasons and the applicant submits that the employer did not base its discretion on valid reasons.
25. The applicant seeks an order directing that in terms of clause 7.5.2. (c) the applicant is unable to perform any duties at her level or rank and any decision contradicting that must be set aside.

RESPONDENT'S CLOSING ARGUMENTS

26. The whole issue is to decide whether the decision not to grant the applicant ill health retirement was fair and in line with Resolution 7 of 2000.
27. In terms of the resolution there must be consensus between the employer and employee that the latter will never be able to perform any duty. It is common

cause that the employer was not convinced that the employee will not be able to perform any duties.

28. Firstly the applicant must prove that there is an obligation on the employer to approve the application for ill health retirement. Secondly the employee needs to prove that there was a deviation in respect of clause 7.5.2. (c) in the decision not to approve the application because her case is based on this clause.
29. The employer is under no obligation in terms of the resolution to accept the recommendation of Thandile Health Risk Management in 2003. Both parties must be convinced. In 2003-4 and in 2007 the Health Risk Manager recommended that the applicant not be boarded but be put in a low stress environment.
30. There are numerous decisions that support the contention that where there is no consensus the application is dismissed.
31. There is no way that the employer acted unfairly in not approving the application for ill health retirement.
32. The respondent prays for the application to be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT

33. In order to remain within the scope of section 138 (1) of the Labour Relations Act the relevant provision of the applicable resolution has been read with the applicable documentary evidence.
34. In this matter the employee seeks a determination on whether the employer interpreted and applied the provisions of clause 7.5.2. (c) of resolution 7 of 2000 fairly alternatively correctly in declining her application for ill health retirement.
35. The employee was involved in a shooting incident at the Umlazi Court and thereafter was treated and assessed by various medical practitioners who expressed contradicting opinions about her ability to perform any work. Some

indicate that she should be medically boarded whilst others indicate that she should be allocated work that would be manageable.

36. The medical reports are submitted to a committee that makes recommendations to the Health Risk Manager who determines the matter. In other words he/she is the decision maker in the matter.
37. Clause 7.5.2 (c) reads as follows:

“If both the employer and the employee are convinced that the employee will never be able to perform any type of duties at her or his level or rank, the employee shall proceed with application for ill health benefits in terms of the Pension Law of 1996.”

In interpreting and applying the terms and conditions of the above-mentioned clause I have taken into account the rules applicable to the interpretation of statutes and have been guided by the grounding principles such as the ordinary, plain meaning of words should be used. I have taken note of resolution 7 of 2000 and the succeeding regulations and amendments in arriving at my decision. Further I have desisted from adopting a piecemeal approach but favoured a holistic or all embracing approach.

38. I do not intend to prolong what seem to be a simple matter and record that the fact that there is no meeting of minds in respect of clause 7.5.2. (c) renders the said clause inoperable. Clearly the employer is not on the same page as the employee. Therefore the decision of the employer must prevail. In any event the matter at hand is subject to the resolution shaped between the employer and employee. In terms of the employment relationship the employee commits itself to render service to the employer for which it is rewarded in the form of wages, leave, bonus etc. The relationship is further regulated by resolutions and in this case resolution 7 of 2000.
39. The decision to grant or refuse an application for ill health retirement vests on the Health Risk Manager. In this case the Health Risk Manager refused the

application and for all intents and purposes the matter rests there. The reasonableness or otherwise of the decision of the Health Risk Manager may be challenged in terms of the resolution. I may not even if I am wrong I am not prepared to pronounce on the decision of the Health Risk Manager as I believe that in doing so I would be acting unreasonably.

40. I record my appreciation to Professor Lazarus for the clarity that he, like other psychologists, express opinions that may contradict each other depending on various factors. Further I have noted that Dr Valjee referred the applicant to him for an assessment but that Dr Valjee was at all material times treating her and prescribed her medication.
41. As a consequence of the above I determine that the employer correctly interpreted and applied clause 7.5.2 (c) of resolution 7 of 2000.
42. In the normal course I would have made an order of costs in the light that costs should follow the result and as the respondent did not apply for costs I make no order as to costs.

AWARD

43. The respondent had interpreted and applied clause 7.5.2 (c) of resolutions 7 of 2000 correctly in declining the applicant's ill health retirement application.
44. The applicant is not entitled to ill health retirement.
45. The applicant's claim is dismissed.
46. There is no order as to costs.

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PSCBC Panellist: ANAND DORASAMY

24 MAY 2010