IN THE LABOUR COURT OF SOUTH AFRICA

Held at DURBAN

Case No: **D751/09**
Reportable

In the matter between:-

PUBLIC SERVICE ASSOCIATION OF SOUTH AFRICA	First Applicant
HC GOUVEA	Second Applicant
And	
PSCBC	First Respondent
COMMISSIONER R LYSTER	Second Respondent
THE DEPARTMENT OF LAND AFFAIRS (RURAL DEVELOPMENT AND LAND REFORM)	Third Respondent

Heard: 26 July 2012
Delivered: 26 February 2013.
Summary: Review of an arbitration award – interpretation of a collective agreement – principles of interpretation.

Judgment

Cele J

Introduction

[1] The arbitration award dated 3 July 2009 issued by the second respondent as an arbitrator of the first respondent in this matter is sought to be reviewed and set aside in terms of section 158(1) (g) of the Act[1]. The applicants simultaneously sought condonation for the late filing of the review application. At the hearing of the matter, applicants were granted condonation. The third respondent opposed this application in its capacity as the employer of the second applicant who is assisted by the first applicant as a registered trade union which she is a member of.

[1] The Labour Relations Act Number 66 of 1995.

Background facts

[2] The Second Applicant, Ms Gouvea is employed by the third respondent in the position of a Principle Data Capture at the Deeds Offices in Pietermaritzburg. She commenced her employment with the third respondent since June 1991.

[3] As from 7 November 2007 to February 2009 Ms Gouvea was continuously ill and she consulted a medical practitioner who booked her off-sick. The third respondent approved her sick leave for 7 November 2007 to 3 December 2007 with no hassle. Approval of the leave period of 4 December 2007 to 30 June 2008 was granted only after Ms Gouvea had successfully lodged a grievance. The third respondent declined to approve her leave of absence for the rest of the period from 1 July 2008 to February 2009, notwithstanding Ms Gouvea's application for incapacity. She then lodged a grievance.

[4] On 24 June 2008 Ms Gouvea received a letter from the third respondent instructing her to report for duty not later than 1 July 2008, failing which her absence from duty would be treated as leave without pay. She was also informed that her grievance would be referred to a state agency called Soma, invested with powers to make final recommendation on incapacity. A report was issued by the Health Risk Manager declining the application for long periodical temporary incapacity leave for 4 December 2007 to 30 June 2008. An unfair labour practice dispute arose between the parties which Ms Gouvea referred to conciliation and later to arbitration. The second respondent was appointed to arbitrate it. Parties agreed that the facts were essentially common cause between them and that the second respondent had to interpret the applicable collective agreement.

[5] The crisp issue before the second respondent was whether in terms of an existing collective agreement on this issue Ms Gouvea was entitle to the temporary incapacity leave (TIL) and further whether the third respondent could recover Ms Gouvea's salary for the period up to June 2008 and not to authorise payment for July 2008 to February 2009.

[6] It was the third respondent's contention at the arbitration that Ms Gouvea would not qualify on the recommendation of the Health Risk Managers appointed by the third respondent to investigate such application and accordingly all the consequences that followed thereafter were justified by their advice. It was Ms Gouvea's submission that she qualified in terms of the collective agreements as her condition was supported by medical advice.

[7] In terms of Resolution 7 of 2000 an employee has the right to apply for temporary incapacity leave in circumstances where the prescribed sick leave cycle has been exhausted. The pre-requisites to accessing the consideration of the temporary incapacity leave are:

1 the head of department must within 30 days of receiving the completed application either grant approval or refuse temporary incapacity leave.

2 Clause 7.5 of Resolution 7 of 2000 creates a right for employees whose normal sick leave credits in a cycle have been exhausted to be granted additional TIL on full pay provided that :

I. the employee informs the supervisor that he/she is ill;

II. a registered medical practitioner has duly certified the condition in advise;

III. the employer shall investigate the incapacity in terms of Schedule 8, clause 10(1) within 30 working days.

[8] The second respondent found that Ms Gouvea was not entitled to be granted temporary incapacity leave longer than 30 working days. The third respondent was found to be entitled to recover from her the salary paid to her for the period December 2007 to June 2008 and that she was not

entitled to further remuneration for the period July 2008 to February 2009. She then initiated the present review application.

Chief findings of the second respondent

[9] The second respondent said that:

"*In my view it is clear that both the Applicant and the Third Respondent have, with respect, misunderstood the concept of TIL and are continuing to consistently and incorrectly interpreting and applying the provisions of Resolution 7 of 2000*"

[10] He noted that clause 7.5.1(a) of Resolution 7 of 2000 made provision for a step by step scenario in which the following should apply:

a. An employee is ill and has exhausted all her nominal sick leave;

b. She applies for Temporary Incapacity Leave;

c. In order to do this, she reports to her supervisor, and secondly, she gets a letter from her doctor stating that she is temporarily disabled;

d. Her application is assessed by someone delegated by the Health Risk Manager, and if successful, she is then placed on Temporary Incapacity Leave for 29 days;

e. During a 30 days leave whilst she is on TIL, the employer must carry out the investigation referred to in Clause 10.1 of the Code i.e. must see if her workplace conditions can be changed or adapted etc.

f. Thereafter, the employer may, within its discretion, decide to extend TIL while efforts are being made to adapt or change the person's working conditions, or the employer may place

the person on vacation leave, or unpaid leave, or it may even terminate the employee's services as a result of incapacity (as per clause 10 and 11 of the Code of Good Practice);

g. If the disability continues, then the employer must take steps in terms of section 7.5.2 of the Resolution, to medically board the employee".

Grounds for review

[11] Ms Gouvea focused her review application on the fact that the second respondent was requested on the pre-arbitration minute to overturn the decision not to grant her temporary incapacity leave for the relevant period. The essence of the second respondent's finding was that on a correct legal interpretation of Clause 7 of Resolution 7 of 2000 there was no reason for Ms Gouvea to be granted temporary incapacity leave. The second respondent in making this decision has focused his attention on the application of Clause 17.7 of the third respondent's Human Resource Management Policy (which is not a collective agreement) and not on Resolution 7 of 2000. This is a fundamental error which renders the award reviewable.

[12] The second respondent was said to have inextricably interpreted to provide for a capping of temporary capacity leave of 30 days in circumstances where:

- there is nothing in Clause 7 to justify such a finding;
- this flies in the face of the evidence that the third respondent distinguishes between short incapacity leave (29 days or less) and long incapacity leave (more than 30 days) and that the leave for which Ms Gouvea had applied was long incapacity leave;
- accordingly, it renders the second respondent's finding unreasonable and illogical.

[13] Ms Gouvea said that the second respondent applied Clause 17.7 of the third respondent's Human Resource Management Policy as opposed to interpreting Resolution 7 of 2000 as required.

Grounds in opposition to the review application

[14] The third respondent submitted that it was clear that clauses 7.5.1 (a) and (b) ought to be read together, and a proper reading thereof did not give an employee the *right* to TIL. In the premises:

- The second respondent did not hand down an award in conflict with the behests of the Act;
- The award is not unreasonable;
- The second respondent has properly applied his mind and has not misconducted himself;
- The second respondent has not committed a gross irregularity and has not exceeded his powers by acting unreasonably or unjustifiably as alleged;
- The second respondent has given the wording of the agreement and in particular clause 7.5 its clear and unambiguous meaning in the award;

- The second respondent has correctly interpreted the Collective Agreement.

- The second respondent has not failed to make a rational connection between the material available before him and the conclusions that he reached. Based upon the facts he came to a finding that a reasonable decision maker could have.

- There exists no basis for the second respondent's award to be reviewed and set aside and substituted with an order granting Ms Gouvea TIL, alternatively that the second respondent exceeded his jurisdiction in dealing with the dispute.

- The medical evidence of Ms Gouvea alone was not the decisive factor in her application for TIL. That evidence was assessed and considered by the third respondent's Health Risk Managers and the application was declined for reasons set out in the SOMA report which form a part of the record.

- The third respondent has not acted outside of the ambit of the collective agreements, and the second respondent's finding is justified in terms thereof. On the foregoing basis the application must be dismissed with costs.

Analysis

[15] It remained common cause between the parties that the issue for the decision of the second respondent fell within the purview of section 186 (2) of the Act in that it revolved around an alleged unfair act which arose between the third respondent as the employer and the second applicant as the employee, involving an alleged unfair conduct by the third respondent relating to the provision of benefits to the second applicant.

[16] Clause 7.5 of the resolution 7 of 2000 to the extent relevant in these proceedings reads:

> "DISABILITY MANAGEMENT LEAVE
>
> 7.5.1 Temporary Incapacity Leave
>
> (a) An employee whose normal seek leave credits in a circle 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) his or her supervisor is informed that the employee is ill and
>
> (ii) a relevant registered medical practitioner has duly certified such a condition in advance as temporary disability.
>
> (b) The employer ***shall*** during 30 working days ***investigate the extent of the 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) ....."

[17] The review application turns on whether the second respondent applied his mind appropriately in her interpretation of clause 7.5 of the resolution 7 of 2000. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or

provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those who are responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context, it is to make a contract for the parties other than the one that they in fact made[2].

[18] The applicants accused the second respondent of making his decision by focusing his attention on the application of Clause 17.7 of the third respondent's Human Resource Management Policy and not on Resolution 7 of 2000. In determining the apparent purpose to which Clause 7.5 of the resolution it is directed and the material known to those who are responsible for its production, the second respondent could legitimately allow himself to be guided by relevant material outside of the collective agreement without infringing the rules of interpretation. Therefore the mere reference to clause 17.7 could not found a basis for review. His interpretation of the collective agreement, seen in its entirety, must be examined.

[19] The parties raised no factual issues on Ms Gouvea having complied with the factual requirements as are envisaged in clause 7.5.1. (a) (i) and (ii). It shall therefore be presumed, without decide that she met those requirements. The third respondent exercised discretion, as it was entitled, to grant her sick leave on full pay from 7 November 2007 to 3 December 2007. She applied for

[2] For this approach see Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13 (15 March 2012).

a further sick leave from 4 December 2007 to 30 June 2008, which leave was initially refused but upon her lodging a grievance, the third respondent exercised its discretion in favour of granting her that sick leave. From 7 November 2007 to 7 December 2007 the third respondent was within the 30 day investigative period as envisaged in clause 7.5.1 (b). The period 7 December 2007 to 30 June 2008 could justifiably be given to her as a further sick leave if the third respondent was acting within the clear terms of item 10 (1) of Schedule 8 of the Act. Once all investigations pertaining to the temporary disability leave are finalised and a decision is taken by the third respondent and communicated to Ms Gouvea, then and only is the moment reached when she could be called back to work, should the decision go against her.

[20] The limited facts of this matter suggest that on 24 June 2008 the third respondent had finalised all investigations and had made its decision which it communicated to Ms Gouvea by a letter it issued to her on that day. She had to report back at work on 1 July 2008. From the given facts, as I understand them, a report was issued by the Health Risk Manager declining the application for a periodical temporary incapacity leave for 4 December 2007 to 30 June 2008. This report sought to have a retrospective effect. The consequence of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of a discretion with unfair consequences to an employee. Nowhere in clause 7.5 of Resolution 7 of 2000, is there a suggestion that the employer may not grant further sick leave after the lapse a 30 day period. On the contrary, as investigations shall be in accordance with item 10 (1) of Schedule 8 of the Act, a further sick leave period may be granted to the employee.

[21] In my view, the second respondent accorded to clause 7.5 of Resolution 7 of 2000 a meaning that did not belong to it, when he provided for a capping of temporary capacity leave to 30 days. The result is that he reached a conclusion which a reasonable decision maker could not reach, for the temporary incapacity leave beyond 30 days that is 7 December 2007 to 30 June 2008.

[22] In the circumstances the following order shall be issued:

1. The arbitration award dated 3 July 2009 issued by the second respondent as an arbitrator of the first respondent in this matter is reviewed and corrected.
2. The second applicant is entitled to temporary incapacity leave for the period December 2007 to June 2008;
3. The second applicant is not entitled to temporary incapacity leave for the period 1 July 2008 to February 2009.
4. No costs order is made.

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Cele J.

Judge of the Labour Court.

APPEARANCES:

1. For the applicants: Mr B McGregor of MacGregor Erasmus Attorneys, Durban
2. For the third respondent: Adv S K Dayal instructed by the State Attorney, Durban