ARBITRATION AWARD

Panellist/s: Retief Olivier
Case No.: PSCBC103-23/24
Date of Outcome: 10 December 2023

In the matter between:

PSA obo D J Kotze

(Union / Applicant)

and

Dept. of Justice and Constitutional Development

(Respondent)

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. The arbitration hearing was held virtually on 16 August 2023, and continued on 29 November 2023. The matter was referred as an interpretation/application of Collective Agreement Resolution 7 of 2000, relating to an application for temporary incapacity leave (TIL). The applicant Mr Kotze was represented by Ms Revelin Mokwena from the PSA and the respondent by Mr Wandile Kumalo.

2. At the arbitration hearing held on 16 August 2023 certain issues were raised during opening statements regarding the decision of the employer not to grant the leave application for the full period from 31 October 2022 to 1 February 2023. The applicant submitted that the respondent did not comply with the said resolution, specifically clauses in relation to the timeframes within which the respondent should provide a response within 30 days.

3. The respondent submitted that the time frames in the Collective Agreement was not peremptory, and the employer was entitled to exercise their discretion whether to grant or not grant the temporary incapacity leave, and in this instance the leave was not granted on the basis that a specialist medical report was not submitted by the application. I made the parties aware of specific caselaw in reference to the peremptory nature of Collective Agreements and the employer said that they would be disputing this and that they would present caselaw confirming their point of view. it was agreed that parties would address this issue and submit written arguments.

4. In the event I only the received the respondent's submission as a result of an oversight, and I then directed that the matter be set down for continuance of the arbitration. At the arbitration hearing on the 29th of November 2023 the parties made oral submissions in respect of the issues in dispute and it was agreed that I would consider the submissions and evidence submitted in documentary form, together with the submissions that was made in writing from both the applicant and the respondent.

BACKGROUND TO THE DISPUTE

5. The Applicant is employed as a security official and applied for Temporary Incapacity Leave (TIL) in terms of the Policy and Procedure on Incapacity Leave for Ill-health Retirement for the Public Service Employees (PILIR) for the period 31 October 2022 to the 01 February 2023 (65 days). This application was submitted on the 01 November 2023, the response and the outcome of the temporary incapacity leave application was received on or about the 6 February 2023.

6. The Applicant submitted a grievance which was not resolved to his satisfaction, leading to the submission of an application on the interpretation and application of PSCBC Resolutions 15 of 2002, Resolution 5 of 2001 and Resolution 7 of 2000. The leave periods application applied for and was captured as leave by the employer for the period of 31/10/2022 to 1/02/2023 is as follows: 31 October 2022 – 25 January 2023 as annual leave; 26 January 2023 – 1 February 2023 as unpaid leave. Considering the issues raised regarding the nature of the dispute the applicant indicated it is their election that the dispute relates to the interpretation and application of a collective agreement and referred specifically to the timeframes in respect of Section 7.5.1 subsection c of PSCBC resolution 7 of 2000, which clearly prescribes that the employer must respond to the employee's application for temporary incapacity leave within 30 workings days of the application. It was submitted the applicant made the application within the 5-day time frame to submit such an application and the employer only responded and gave feedback on the 6th of February 2023, which was long past the 30-day period prescribed.

SUMMARY OF EVIDENCE AND ARGUMENT

7. The parties presented bundles of documents as evidence and the submitted opening statements, as well as written submissions.

Applicant's version:

8. The applicant representative stated that the applicant submitted a Temporary Incapacity Leave (TIL) application for the periods as noted. The TIL application was submitted on 1 November 2022, and outcome was only provided on 6 February 2023, some 76 days after the TIL application was submitted. It was submitted Section 7.5.1 subsection (c) of PSCBC resolution 7 of 2000 clearly prescribes that the employer must respond to the employee's application for temporary incapacity leave within 30 workings days of the application. The employer only responded on the 6th of February 2023, which is longer than the 30-day period prescribed. Section 7.5.1 (a)(ii) of PSCBC resolution 7 of 2000 prescribes further that the medical certificate must be from a relevant medical practitioner. Section 7.1 of resolution 15 of 2002 defines or amends the definition of a medical practitioner. Mr Kotze submitted medical certificates with his application for temporary incapacity leave.

10. The reason given by the employer for not approving the employee's incapacity leave as applied for was that "an appropriate specialist was not consulted over a prolonged period of absence from work, there was no escalation of care for over three months". This requirement by the employer is not in line with the resolution. The employer and Health Risk Manager (HRM) acknowledged that the employee's

application was supported by medical reports from a specialist Radiologist and a general practitioner. Furthermore, the HRM acknowledged that "Mr Kotze's conditions are chronic in nature and require ongoing monitoring and treatment." The HRM did not dispute that Mr Kotze was not fit for duty for the dates applied for, nor did he/she recommend that the employer adapt the employee's working conditions or seek an alternative placement. The applicant verified this information and also stated that the applicant had also submitted a grievance, that was unsuccessful, as noted in the applicants' bundle of evidence.

11. It was submitted that the resolution must be interpreted in a manner that makes sense in accordance with the meaning of the words that are used in the resolution. The employer had 30 working days to conduct an investigation in accordance with schedule 8 subsection 10 of the LRA and to give an outcome which they have failed to do. The employer's letter of outcome dated the 6th of February 2023 was in contravention of Resolution 7 of 2000. The 30 days prescribed in the resolution is binding and not open to interpretation. Furthermore, the employer's interpretation of medical practitioner is not in line with the meaning of the words in the resolution as explained in Resolution 15 of 2002.

12. The timeframes as set out in Resolution 7 of 2000 is peremptory and the employer failed to comply with the 30 working days prescribed by the resolution. The employer also failed to apply the resolution correctly and relied on a misinterpretation of the words "medical practitioner" to reach their decision to not approve the Temporary incapacity leave of Mr Kotze. A correct application and interpretation of the resolution would have resulted in the employer approving the employee's application as is. The applicant sought as relief that the employer converts the days in question to TIL with full pay and to restore the applicant's leave credits, coupled with a reversal of any leave without pay that may have been implemented.

Employers' version:

13. The employer submitted that the application for TIL for the period mentioned above was not recommended by the Health Risk Manager (HRM) because the applicant failed to consult a Medical Specialist as previously recommended to him. The delegated authority subsequently did not approve the period of absence and the conditionally granted incapacity leave was declared as leave-without-pay after his vacation leave was taken to cover some of the days of absence.

14. The applicant declared an interpretation and application dispute arguing that the employer failed to apply Res 7/2000 Clause 7.5.1(b) by failing to respond to him within 30 days from receipt of the application. It is common cause that in the present matter that the 30 working days" time frame was

never adhered to by the employer The employer submitted that PILIR is not additional leave but leave that is approved based on proven incapacity on medical grounds. The employee/applicant was requested to consult a Medical Specialist which he failed to do leading to the non-recommendation of his period of absence and the subsequent deduction of period from his vacation leave, and remaining days as leave without pay and he was informed accordingly. The first page to the application form contains warning notes to the applicant, cautioning the applicant that if the application is declined based on outcome of the investigation the TIL period shall be converted to either annual leave or unpaid leave.

15. The employer submitted that the case of ***POPCRU and L E E Mbongwa v DCS and Other delivered by Judge Whitcher on the 2 Nov. 2016*** has provided new direction in dealing with TIL. Here it was asked how the conditionality of payments to an employee subject to a medical assessment, hardens into an entitlement after 30-day investigation period lapses. Nor in light of clause 7.2.2, 7.3.3.2 and note 4 of PILIR, should a reasonable employee applying for additional leave assume that should the medical assessment go against them even if delayed, they entitled to be paid for absence from work. If an employee applied for an under lying medical condition and is assessed not to have such leave, this fact must determine what happens to any payments they received and not the delay by the employer in attending to the application. Sec 38(1) of Public Service Act, 1994 provides for the deduction of overpayments from salary. To allow the applicant to retain his salary would amount to irregular and wasteful expenditure in terms of the PFMA. In conclusion, it was submitted that the Commissioner is called upon to consider the reasons TIL was not granted to the applicant and not the period which was not adhered to in considering the application for TIL.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

16. The issue in dispute is thus whether the respondent is in breach of PSCBC Resolution 5 of 2001. PSCBC Resolution 5 of 2001, which as noted in par 7.5.1 reads as follows:

"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:

i) her or his supervisor is informed that the employee is ill, and

ii) 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."

17. This must also be read together with paragraph 7.2.9 of the Policy and Procedure on Incapacity Leave and Ill-Health Retirement (PILIR) which states "The Employer must within 30 days after receipt of both the application form and medical certificate referred to in paragraphs 7.1.4 and 7.1.5, approve or refuse temporary incapacity leave granted conditionally."

18. It is trite 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, as argued by the respondent is granted at the employer's discretion based on its medical investigation. It is however accepted as confirmed in the evidence submitted, and also confirmed by the employer as common cause that the applicant's TIL applications had not been dealt with in terms of the time frames in the Collective Agreement. The employer accepted the applications but had not complied with the time frames in respect of providing feedback. The 30 days to investigate and provide feedback starts when the applicant submits the application, and the supervisor receives the application. The dispute is not about the fairness of the process and decision of the health risk manager, and whether the employer had the administrative ability and resources to deal with the application, but whether the employer complied with the said resolution, and in this instance with the specific time frames.

19. In the case of ***SAMWU v City of Cape Town and Others (C 701/13) dated 26 May 2014***, Judge Steenkamp reiterated that adherence to Collective Agreements are peremptory. He noted that that concerns about time frames, in that particular instance about time frames in the disciplinary procedure, as agreed to in a Collective Agreement, because of its peremptory nature and its embodiment in contracts of employment, lead to non-compliance, and may in fact be defeating the purpose of the process. He noted however "But that is the deal that the parties brokered through collective bargaining. They may have to reconsider their deal. But that can only be done through a process of collective bargaining."

20. It is also necessary to note the determination in the matter of ***PSA obo H C Gouvea v PSCBC and others, LC Case no D751/09,*** dated 26 February 2013, where it was found:
"[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**." (my emphasis)

21. The respondent referred to the matter of ***POPCRU and L E E Mbongwa v DCS and Other delivered by Judge Whitcher on the 2 Nov. 2016*** stating it has provided new direction in dealing with TIL. Here it was asked how the conditionality of payments to an employee subject to a medical assessment, hardens into an entitlement after 30-day investigation period lapses. It is my opinion that in the first instance this case refers to whether it's fair to the decline leave based on a proper medical assessment and does not address the issue of whether collective agreements are peremptory, and therefore I am of the opinion that the issue in this instance regarding the peremptory the nature of collective agreements, is not properly addressed in the above matter.

21. Regarding the decision and finding in the matter of the above matter ***PSA obo H C Gouvea v PSCBC and others, LC Case no D751/09,*** the finding was confirmed in the matter of ***Dept. of Roads and Transport v J C Robertson & others, LC Case No PR 40/14,*** delivered on 15 February 2017. The Court found:

"[9] The arbitrator's interpretation of clause 7.5.1 of Resolution 7 of 2000 which is based on the decision in PSA HC Gouvea (supra) cannot be faulted. When exercising the discretion to grant or refuse TIL, the applicant was enjoined by Resolution 7/2000 to take into account provisions of item 10(1) of schedule 8 of the Labour Relations Act. The interpretation the arbitrator gave to clause 7.5.1 (c) is consistent with the letter and spirit of the LRA. His decision is not based only on giving a peremptory meaning to the word 'shall' in clause 7.5.1 (c) of resolution 7/2000. He therefore conducted the correct enquiry in the correct manner and reached a reasonable decision." It should also be noted that this is a later decision of the Labour Court than the matter of ***POPCRU and L E E Mbongwa v DCS and Other*** referred to by the respondent, thus not following the POPCRU ruling.

22. I therefore find that the Employer has not complied with the time fame in Sec 7.5.1. b) that 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.

23. In terms of the above rulings it would be fair to order the respondent to pay back any monies or salaries deducted from the applicant in respect of the TIL, if any monies had since been deducted as alleged by the applicant. It has however been noted that no monies have been deducted from the applicant in respect of the leave that was declined, and terms of the Labour Court rulings in ***PSA obo H C Gouvea v PSCBC and others*** and ***Dept. of Roads and Transport v J C Robertson & others,*** the employer would not be entitled to deduct any money for such leave not granted. Similarly in respect of the nature

of the dispute, I would not be entitled to order the employer to grant leave and to approve the TIL application.

AWARD

24. The respondent is in breach of Resolution 7 of 2000. The employer is not entitled to demand an overpayment of salary in respect of determining the leave as leave without pay. However, as no monies have been deducted from the applicant, there is no further order.

Arbitrator: Retief Olivier

Signature: 

Panelist: Retief Olivier