



Panellist/s: MR A S DORASAMY
Case No.: PSCB693-18/19
Date of Ruling/Award: 29 May 2019

In the ARBITRATION between:

In the ARBITRATION between:

PSA O B O TORRAO Y S

APPLICANT

and

Department of Home Affairs - GAUTENG

RESPONDENT

Applicant's representative:

Ms G SIMELANE

Respondent's representative:

Mr P MHLANGENI / J KYWE

DETAILS OF HEARING AND REPRESENTATION

Ms G Simelane of PSA represented the applicant and Mr J Kywe represented the respondent. The arbitration proceedings commenced at 10H00 on the 26 April 2019 at the DOL Boardroom in Braamfontein. The dispute concerns the alleged incorrect application of Resolution 7 of 2000 in respect of temporary incapacity leave.

BACKGROUND

1. The applicant contends that her application for temporary incapacity leave should be granted. After the matter could not be resolved the parties thereafter drafted a statement of case in respect of the issues in dispute. The submission dates were as follows:

APPLICANT'S FOUNDING SUBMISSION DUE 10:05:2019

RESPONDENT'S ANSWERING SUBMISSION DUE 17:05:2019

APPLICANT'S REPLYING SUBMISSION DUE 24:05:2019

THE AWARD WILL BE RENDERED THEREAFTER

SPECIAL NOTE:

The parties' submissions were taken into account in arriving at my decision.

ISSUE TO BE DECIDED

2. I am to decide whether the respondent failed to apply Resolution 7 of 2000 correctly in respect of the applicant's claim for temporary incapacity leave.

SUMMARY OF THE EVIDENCE

3. APPLICANT'S SUBMISSION

The matter was referred to the council as a dispute regarding Temporary Incapacity Leave - interpretation or application. (Resolution 7 of 2000)

Background regarding the matter:

The applicant had exhausted her normal sick leave and applied for 4 days Temporary Incapacity Leave for the period 9 July 2015 (Thursday) to 14 July 2015 (Tuesday). In August 2018, the employer informed the applicant that her application was declined, after they received the initial report from the Health Risk Manager in October 2016.

The applicant responded in writing, informing the employer that 6 days annual leave credits were available for the 2018 period, however arrangements were already in place for 4 days. She requested the employer to deduct 4 days annual leave from the 2019 annual leave credits. After her request, during the 2018 annual leave period, the applicant only utilized 2 days, thus allowing the employer to

recover the 4 days in the 2018/2019 annual leave period. In January 2019 the employer implemented leave without pay and deducted two times R924.60 in respect of LW Recovery.

Case Analysis

PSCBC resolution 7 of 2000 states that the respondent must provide the applicant with an outcome on her application within a period of 30 days. The resolution stipulate as follows:

“a) an employee whose normal sick leave credits in cycle have been exhausted and who, according to 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 employer is ill and*
- ii) A relevant registered medical practitioner has duly certified such a condition in advance as temporary disability excepted where conditions do not allow.*

“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.”

Firstly, the respondent failed to adhere to the stipulation of PSCBC Resolution 7 of 2000, the initial outcome was received in October 2016 but was never communicated to the applicant. The applicant only received an outcome report in August 2018 and replied to the respondent in writing.

Secondly, we implore to note that the Determination and Directives of leave of absence for in the Public Service states under clause 15 (**TEMPORARY INCAPACITY LEAVE**) 15.10. The Head of Department must within 30 working days after receipt of both the application form and medical certificate referred to in paragraph 15.3.2, approve or refuse the temporary incapacity leave granted conditionally. In making a decision, the Head of Department must apply his/her mind to the medical certificate (with or without describing the nature and extent of the illness or injury) contemplated in paragraph 15.3.2, medical information/records contemplated in paragraph 15.3.4 (if the employee consented to disclosure), the Health Risk Manager's advice, the information supplied by the employee in terms of paragraph 15.3.3 (if any) and all other relevant information available to the Head of Department and based thereon approve or refuse the temporary incapacity leave granted conditionally, on conditions that the Head of Department may determine, e.g. to return to work, etc.

PSA obo Le Roux, AJ – PSCB 144 11/12; PSA obo Armstrong and Strauss, PSCB 797 15/16.

“The 30-day period allows the respondent to conduct an investigation into the incapacity in terms of PSCBC Resolution 7 of 2000. The respondent failed to do so and now expected the applicant to accept unpaid sick leave for the period.”

Furthermore, in dealing with the implementation of Leave without pay or recovery of Temporary Incapacity Leave that was declined, the Determination and Directives of leave of absence in the Public Service states:

15.13. If the Head of Department-

15.13.1. approves the temporary incapacity leave granted conditionally, such leave must be converted into temporary incapacity leave; or

15.13.2. refuses the temporary incapacity leave granted conditionally, s/he must notify the employee in writing-

(a) of the refusal;

(b) of the reasons for the refusal;

(c) that s/he must notify the Head of Department in writing within 5 working days of the date of the notice to him/her, whether or not the period of conditional incapacity leave must be covered by annual leave (to the extent of the available annual leave credits) or unpaid leave and that, if s/he fails to notify the Head of Department of his/her choice, the period will be covered by unpaid leave; and

(d) the employee may, if he/she is not satisfied with the Head of Department's decision, lodge a grievance in terms of section 35 of the Public Service Act.

15.14. The Head of Department must cover the period of absence, referred to in paragraph 15.13.2 (c) in accordance with the employee's written notification or, if the employee fails to notify that the Head of Department in terms of that paragraph or the annual leave credits are insufficient, the relevant period of absence must be covered by unpaid leave.

Attached for your consideration please find the following:

- Applicant's salary advice
- Temporary Incapacity Application outcome 2018
- Written response by applicant

- HOD review outcome 2016
- Determination and directives of leave of absence in the Public Service

We humbly pray that the arbitrator rule as follows:

1. That the respondent failed to adhere to PSCBC resolution 7 of 2000.
2. That the respondent failed to adhere to the stipulated time frames.
3. That the respondent implement and apply the Determinations and Directives on leave of absence in the Public Service by recovering the declined days with annual leave
4. That the respondent reimburses the applicant the amounts deducted in respect of leave without pay.

5. **APPLICANT'S REPLY**

The matter was referred to the council as a dispute regarding Temporary Incapacity Leave - interpretation or application. (Resolution 7 of 2000)

Responding argument

This argument wants to affirm that the implementation of Leave without pay to recover the Temporary Incapacity Leave that was declined was not done correctly as per the Determination and Directives of leave of absence in the Public Service.

The respondent argues that it applied the resolution correctly however the outcome of the said application clearly indicated that the respondent communicated this 2 years later and this is a direct contravention of the Resolution, the PILLIR policy and the Determination and Directives of leave of absence of the public service.

The applicant requested in writing that the 4 days must be recovered from the next available leave cycle in January 2019, due to prior commitments for the 6 available days in December 2018. It must be noted that no written or verbal communication was received the respondent in this regard.

It must also be noted that the applicant only utilized 2 days in December 2018, however the respondent failed to adhere to its own policies, directives and prescripts but recovered the 4 days through unpaid leave even though 4 days leave credits were available. The respondent prejudiced the applicant in that they failed to recover the 4 days by utilizing available leave credits.

We implore you to note the following:

15.13. If the Head of Department-

15.13.1. approves the temporary incapacity leave granted conditionally, such leave must be converted into temporary incapacity leave; or

15.13.2. refuses the temporary incapacity leave granted conditionally, s/he must notify the employee in writing-

(a) of the refusal;

(b) of the reasons for the refusal;

(c) that s/he must notify the Head of Department in writing within 5 working days of the date of the notice to him/her, whether or not the period of conditional incapacity leave must be covered by annual leave (to the extent of the available annual leave credits) or unpaid leave and that, if s/he fails to notify the Head of Department of his/her choice, the period will be covered by unpaid leave; and

(d) the employee may, if he/she is not satisfied with the Head of Department's decision, lodge a grievance in terms of section 35 of the Public Service Act.

15.14. The Head of Department must cover the period of absence, referred to in paragraph 15.13.2 (c) in accordance with the employee's written notification or, if the employee fails to notify that the Head of Department in terms of that paragraph or the annual leave credits are insufficient, the relevant period of absence must be covered by unpaid leave.

Attached for your consideration please find the following:

- Persal Leave record for December 2018

We humbly pray that the arbitrator rule as follows:

6. That the respondent failed to adhere to PSCBC resolution 7 of 2000.
7. That the respondent failed to adhere to the stipulated time frames.
8. That the respondent implements and apply the Resolution and Determinations and Directives on leave of absence in the Public Service by recovering the declined days with annual leave
9. That the respondent reimburses the applicant the amounts deducted in respect of leave without pay.

6. RESPONDENT'S SUBMISSION

DETAILS OF THE HEARING AND REPRESENTATION

1. The arbitration commenced on 26 April 2019 at the Department of Labour: Gauteng at 77 De Korte Street, Braamfontein. Ms G.Simelane of the PSA represented the applicant and Mr. P Mhlangeni represented the respondent.

After discussing the matter the parties agreed and drafted a stated case with submission dates as follows:

-No oral evidence would be led.

-The applicant/employee will serve her Heads of Arguments in the Word Format the Commissioner and Respondent on or before 10/05/2019.

-The Respondent/Employer will serve its Answering Heads of Arguments in the Word Format on ---the Commissioner and Applicant on or before 17/05/2019.

-The Applicant/Employee will serve its Replying Heads of Arguments in the Word Format on the --- Commissioner and Respondent on or before 24/05/2019.

BACKGROUND

2. The applicant has exhausted her normal sick leave and applied for Temporary Incapacity Leave for the period 09/07/2015 (Thursday) to 14/07/2015 (Tuesday).The applicant completed the application form together with her supervisor on 15/07/2015. The Health Risk Manager declined the application for Temporary Incapacity Leave and the outcome was received by Human Resource Management at Head Office on 25/10/2016. The Provincial Human Resource Management issued an outcome letter of declined Temporary Incapacity Leave to the applicant on 13/08/2018, after receipt of the declined application from Head Office. The applicant responded in writing to the declined outcome letter and mentioned that she did not disputing the declination of her Temporary Incapacity Leave but questioned the period when she applied and the date of the initial outcome as well as the regret letter issued to her. She further stated that when she received the declination she was having six days annual leave left for that 2018/2019 leave cycle and no normal sick leave left. She proposed to the respondent She stated that she had already plans for the remaining six annual leave days and requested that the four days annual leave for the declined period be recovered from the new leave cycle that was about to have started in January 2019.

CASE ANALYSIS

3. The respondent issued an acknowledgment letter to the applicant that her application for Temporary Incapacity Leave for the period 9 July 2015 to 14 July 2015 (4 days) dated 03 September 2015 was received. Therein she was informed that in terms of the Determination of Leave of Absence in the Public Service her application was conditionally approved with full pay, subjected to the outcome of the

prescribed investigation and assessment by the Health Risk Manager. Also that the consequence of rejection was outlined to the applicant.

4. The Health Risk Manager issued a letter to the applicant with reasons for the declination with emphasis on the usage of sick leave without circumspection and also the lack of any indication of a definitive diagnosis or surgical procedure on the medical certificate. In the same letter it was also stated that the applicant have to elect whether the unapproved temporary incapacity leave period must be allocated as unpaid leave or taken as annual leave, should she have such leave. The applicant was also advised to lodge a grievance if not satisfied with the Department's decision.
5. The applicant lodged a grievance on the matter on 2018/09/17 wherein she proposed that the days of unapproved temporary incapacity leave be recovered from the annual leave days that was not yet allocated for 2019 leave cycle. The Provincial HR section verbally informed the applicant that her request supra would not be practical possible since the leave for 2019 was not yet allocated.
6. The applicant alleges that the respondent failed to adhere to PSCBC Resolution 7 of 2000. The applicant did not stipulate what clause or section of the said resolution was not adhered to by the respondent. This PSCBC Resolution in its entirety deals with improvement in the conditions of service of public servants and the applicant quoted only "a)" of the said resolution. The respondent assumes that the applicant rely on the 30 working day period for the respondent to investigate the extent of the inability of the applicant to perform her normal duties, the degree of inability and the cause thereof as stipulated in clause 7.5.1 (b) of resolution 7 of 2000.
7. All policies and guidelines on temporary incapacity leave warns applicants that temporary incapacity leave on only conditionally granted subject to the provision that where leave is not approved and the employee has exhausted all sick leave and annual leave, then the sick leave taken will be regarded as leave without pay. The policy clearly indicates that the employee assumes a risk that incapacity leave may not be granted, and if so, any leave taken will be regarded as either annual leave or unpaid leave.
8. At the time the rejection letter was serve on the applicant she was having six days annual leave to her disposal and the respondent indicated that it can be utilized to cover the period of absence without normal sick leave.
9. The applicant in writing indicated to the respondent that she wanted to utilize her remaining annual leave for something other than the period of absence due to her illness. She further requested that the days for her absence be recovered from a leave cycle that was not yet in place by then, and was advised that it would not materialized.
10. Clause 3.1 of the respondent's Policy and Procedure on Incapacity Leave and Ill –Health Retirement (PILIR) April 2009, provides that the leave dispensation as determined in the *Leave Determination*, read with the applicable collective agreements, provides for normal sick leave of 36 working days in a sick

leave cycle of 3 years, and if an employee exhausted his or her normal sick leave, the Employer, may at his/her discretion grant additional incapacity leave.

11. Clause 7.1.1 of PILIR provides that incapacity leave is not an unlimited amount of additional sick leave days but its incapacity leave granted conditionally at the Employer's discretion as provided for in the *Leave Determination* and *PILIR*.
12. Clause 7.2.2.2 of PILIR provides that a maximum of 29 consecutive working days be granted as temporary incapacity leave.
13. Clause 7.3.5.1(e) of PILIR provides that the employer must within 30 days after receipt of the application approve or refuse temporary incapacity leave conditionally on conditions that the employer may determine.
14. Clause 7.3.5.1(f) provides that if the Employer approves the temporary incapacity leave, such leave must be converted into temporary incapacity leave. This clause further states that if the temporary incapacity leave is refused, the employee be notified in writing of the refusal, of the reasons for the refusal, if not satisfied with the Employer's decision he/she may lodge a grievance and that he/she notify the employer in writing within 5 days of the date of notice to him/her whether or not the period of incapacity leave be covered by annual leave(to the extent of availability of such leave credits) or unpaid leave and if he/she fails to notify the Employer of his/her choice, the period be covered by unpaid leave.
15. Note 4 on the first page of the application form warn applicants that the application is subjected to an investigation in terms of the *Determination on Leave of Absence*, together with *PILIR*. It further states that incapacity leave will be granted conditionally and if decline it will be converted to either annual leave or unpaid leave.
16. The POPCRU and L E Mbongwa v The Department of Correctional Services and other delivered by Judge Whitcher ON 23 November 2016 has provided new direction in dealing with temporary incapacity leave. The following are recorded from the judgment:

[24] "I am aware of the judgment of my learned brother, Cele J in Public Service Association of South Africa and Another v PSCBC, Gouvea and Others in [2013] ZALCD 3 (at para 20), unreported in this he finds that where an application for temporary incapacity leave is declined outside the 30 day investigation period, any deduction from an employee's salary for the period (outside 30 day period) that he or she was awaiting a decision from the employer would offend the prohibition against retrospectivity. Cele, J states the consequence of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee. This has been takes to mean that employees cannot be subjected to leave without pay/monthly deduction for TIL/IHR is declined for a period they have been off work sick or stoppage of salary unless the application is declined within 30 days or unless they have been given a date to return to work and have failed to do so Bezuidenhout /Department of Health: Eastern Cape (2014) 23 PSCBS 4.2.2,

[25] The decision in Gouvea flowed from an analysis of clause 7.5.1 (b) of PSCBC Resolution 7 of 2000, which is identical in operation to clause 7.3.5 in PILIR, a ministerial determination, indeed amplifies the earlier Resolution 7 of 2000.

[26] In my view this interpretation of PILIR is not sustainable in light of the fact that an employee applying for incapacity leave has not been granted it yet. A late determination of an employee's application for additional leave, as lamentable as this is, and a subsequent instruction to pay back money to which the employee was not entitled to produce a decision that retrospectively deprives the employee of a right to the payment in question. An employee seeking additional sick leave in terms of PILIR has conditionally been paid a salary while their application for additional leave is considered. This consideration should be over within 30 days. However, if the period the employer takes to decide the application exceeds 30 days set out in PILIR, I do not see how the conditionality of payments to an employee, subject to a medical assessment, hardens into entitlement after the 30 day investigation period lapses. Nor in the light of clause 7.2.2.2, 7.3.3.2 and note 4 of PILIR, should a reasonable employee applying for additional leave assume that, should a medical assessment go against them, even if delayed, they are entitled to be paid for their absence from work. It seems to me that. If the underlying medical condition which prompted an employee to seek additional sick leave, is assessed not to have warranted such leave, this fact must determine what happens to any payments they received while applying and not the employer's delay in attending to the application".

17. The extract from the Whitcher judgment should take preference in relation to the Cele judgment and is applicable in *casu* to refute the allegations made by the applicant.
18. The non-recovery of the amount of money paid to the applicant will be in gross contradiction of the Public Finance Management Act and will constitute irregular and wasteful expenditure that will on its own have consequences to the respondent in terms of auditing.

For your perusal and consideration find the following:

- Application form: TIL Short Periods / Note 4
- Medical Certificate

Acknowledgment letter of application for temporary incapacity leave

- HOD Review and HRM outcome letter
- Grievance form/

Outcome of application dated 13/08/2018

- Response from applicant in terms of declined application
- PILIR Policy
- Determination on leave of absence in the Public Service
- Resolution 7 of 2000 clause 7.5.1 (a) and (b)

19. The respondent humbly pray that the Arbitrator rule as follows:

- (a) That the respondent correctly applied the provisions of Resolution 7 of 2000 in relation to the applicant's application for Temporary Incapacity Leave.
- (b) That the respondent adhered to the provisions of all applicable policies, directives and determinations that govern Temporary Incapacity Leave in the Public Service.
- (c) That no reimbursement be made for moneys deducted since it was for days of absence from work.
- (d) That the applicant is not entitled to any relief sought.

SURVEY OF EVIDENCE AND ARGUMENT

- 7. The applicant had applied for temporary incapacity leave for the period 9 July 2015 to 14 July 2015. The leave was disapproved and the respondent embarked on a process to recover the 4 days through unpaid leave even though 4 days leave credits were available. The respondent prejudiced the applicant in that they failed to recover the 4 days by utilizing available leave credits.
- 8. The respondent contends that it had correctly applied the Resolution and that the applicant's dispute be dismissed.
- 9. I have noted the case reference by the respondent and will deal with it in my analysis of the evidence and arguments below.

ANALYSIS OF EVIDENCE AND ARGUMENT

- 10. In order to remain within the scope of section 138 (1) of the Labour Relations Act the relevant provision of the applicable resolutions have been read with the applicable provisions relating to the terms and conditions of employment of employee by the employer. Further the previous and current decisions in respect of temporary incapacity leave have been taken into account in arriving at my decision. The whole question of temporary incapacity leave and the application thereof was determined by Judge Whitcher and delivered on the 23 November 2016. This judgment and its implications will be elaborated below after some pertinent judgments are explored.
- 11. In terms of decision in Public Servants Association O B O Liebenberg v Department of Defence and others (2013) 22LC 4.2.1 the issue of the jurisdiction of councils to arbitrate disputes referred under section 24 of the LRA has been settled. The Councils are now vested with the jurisdiction to determine the application of collective agreements.
- 12. In the present case there is no dispute that the leave was declined but the applicant contends that the employer ought not to have recovered the 4 days through unpaid leave but by debiting her leave credits at the time as she had sufficient credits to set off the days owed.
- 13. There is no argument from the employer to justify the manner it elected to recover the monies through unpaid leave having been advised by the applicant to debit her leave credits which were more than the

14. In order not to prolong the determination the following are recorded from the Constitutional Court judgment in *PSA O B O Olufunmilayitunu Ubogu v HOD Gauteng and Others* [2017] ZACC 45

Introduction

- [1] This case concerns the validity of a statutory provision that permits the state, as an employer, to recover monies wrongly paid to its employees directly from their salaries or wages in the absence of any due process or agreement between the parties.

It brings into sharp focus issues regarding self-help an aspect of the rule of law procedural fairness, and the common law principle of set-off.

[78] There can be no doubt that the recovery of monies overpaid by the state engages multi-faceted interests. Section 34 (1) of the BCEA may be a point of reference when the defect in the impugned legislation is remedied. This section prohibits an employer from making deductions from an employee's remuneration unless by agreement or unless the deduction is required or permitted in terms of a law or collective agreement or court order or arbitration award. It bears mentioning that section 34 (5) read with section 34 (1) of the BCEA does not authorize arbitrary deductions.....

It will be just and equitable to issue an order declaring section 38 (2)(b) (i) of the Act unconstitutional.

15. I have noted the above judgment by Judge Whitcher that is reportable and the judgment of Judge Lallie (not reportable) and prefer the Whitcher judgment over the Lallie judgment.
16. The above judgment clearly state that the employer cannot make a decision on recovery of monies due by an employee without an agreement.
17. At the time the applicant had sufficient leave credits to set off the 4 days and proposed a possible agreement. The proposal was reasonable and would have satisfied both parties. In not doing so and in the absence of an agreement the actions of the employer was unreasonable and unfair.
18. The applicant prayer that the respondent reimburses the applicant the amounts deducted in respect of leave without pay is also unreasonable given that she conceded that she owed to the employer for 4 days. A possible solution would be that if the applicant has sufficient leave credits then the employer may reimburse the monies deducted from the employee and debit her leave credits by 4 days. The refund and debiting of the applicant's leave due must be finalised by the 31 July 2019.
19. Therefore I determine and order that:
- 19.1. The respondent incorrectly applied the provisions of Resolution 7 of 2000 in relation to the applicant's application for Temporary Incapacity Leave;

19.2. As a result of the foregoing, if the applicant has sufficient leave credits then the employer must reimburse the monies deducted from the employee and debit her leave credits by 4 days. The refund and debiting of the applicant's leave due must be finalised by the 31 July 2019.

A handwritten signature in black ink, reading 'a S Dorasamy'. The signature is written in a cursive style with a large, looping 'D' at the end.

ANAND DORASAMY

PSCBC Panellist