



ARBITRATION AWARD

Panellist/s: Karen Kleinot _____
Case No.: PSCBC132-21/22 _____
Date of Award: 8 November 2021 _____

In the ARBITRATION between:

PSA obo Mr. R Loykisoona

(Union / Applicant)

And

Department of Health - KZN

(Respondent)

Union/Applicant's representative:

Ms. G Hassan _____

Union/Applicant's address:

Telephone:

Telefax/email:

Respondent's representative:

Mr. Z Nyakazi _____

Respondent's address:

Telephone:

DETAILS OF THE ARBITRATION

- 1 The matter was set down for arbitration on 27 October 2021. The applicant was represented by Ms. Hassan from the PSA. The Dept of Health was represented by Mr. Nyakazi. The parties agreed that the facts were common cause and the matter could be dealt with on heads of argument. Parties were directed to supply heads of argument on 3 November 2021. An extension was granted to Ms Hassan to submit these on 8 November 2021 which was done. The proceedings were recorded.

ISSUE TO BE DECIDED

- 2 The issue to be decided is the interpretation and application of resolution 7 of 2000, relating to Temporary Incapacity Leave (TIL).

SURVEY OF THE EVIDENCE AND ARGUMENT

Applicant's submissions

3. The applicant is seeking approval of the following periods for the payment of TIL;
 - 28/09/2020 to 2/10/2020 (4) days,
 - 07/12/20 to 11/12/2020 (5) days
- 4 The respondent partially approved both applications as follows: the 28-30 September 2020 was approved as TIL, but the period 1-2 October 2020 was not. For the second period the 7-8 December 2020 was approved as TIL but the 9-10 was not approved. The 11 December 2020 was determined quarantine as the applicant went for a COVID test and the special leave considerations applied in terms COVID.
- 5 The applicant seeks payment of the above days. The TIL application for 28 September to 2 October 2020 is dated 12 October 2020. The response from the department is dated 13 January 2021. The applicant lodged a formal grievance on 15 January 2020 and further representations were made to the employer requiring a re-assessment. On 26 January 2021, the respondent advised that the period in question was declined. A partial approval was granted and the respondent informed the applicant on 29 January 2021. For the December 2020 period the respondent notified the applicant it was partially approved on 3 March 2021. The applicant was notified on 18 March 2021 that the respondent would recover the overpayment of R1 056, 00 in six monthly installments.

6. For the second period 7 December 2020 to 11 December 2020 a further TIL application was lodged on 24 March 2021. The dates 7-8 December 2020 were approved and the dates 9-10 December were declined as there was no new medical evidence. It was noted that the employee should have used COVID leave and not TIL leave while awaiting COVID test results. A further medical motivation should also be attached to the application for this period if he was ill. The reason for declining the two days was that there was insufficient medical information about his treatment and prognosis. Mr. Loykisoonaal reapplied this too was declined as there was no new information forthcoming. A formal grievance was launched with a motivation on 24 March 2021.
- 7 The applicant wrote a letter explaining his comorbidities and his working environment which is in a hospital and he is thus exposed to nurses, doctors and patients, meaning that it is a high-risk environment where he is exposed to airborne virus particles.
- 8 Despite the applicant's submissions the department deducted a total of R2 112, 60 without the applicant's consent.
- 9 It was submitted that the department has not exercised its discretion properly in that it failed to conduct an investigation as per clause 7.5.1 (b) of Resolution 7/2000. The respondent failed to take into account that there is a pandemic and the applicant suffers various comorbidities. Based on these his medical practitioner deemed it necessary to book him off for an extended period to recuperate.
- 10 Clause 7.5.1 of Resolution 7/2000 provides for guideline and the process to be considered and applied by the respondent when determining an application for TIL. This provision is applicable to those employees who have exhausted sick leave but a medical practitioner requires them to be absent due to disability which is not permanent. Such an employee may be granted sick leave on full pay notwithstanding the exhaustion of his/ her sick leave credits provided that ; his superior is informed of the employee's illness and the relevant medical practitioner has certified such condition in advance as temporary disability except where conditions do not allow.
- 11 The employer is obliged to conduct an investigation to determine the extent and nature of the employee's ability to resume normal duties, in accordance Schedule 8 with item 10 of the Code of Good Practice in the Labour Relations Act.

- 12 The Determination on the Leave of Absence in the Public Service (the Determination) gives effect to clause 7 of the resolution under the heading Temporary Incapacity Leave (TIL) which states that incapacity leave is additional leave granted conditionally at the employer's discretion, read with Procedure on Incapacity Leave for Ill health Retirement (PILLIR). This sets out time frames within which the application for TIL is made by the applicant, within five days of absence. The period within which the respondent must reply within five days of receipt of the application. The respondent verifies that it is complete and signed correctly and if there are any defects to notify the employee and allow a resubmission. The employer is also obliged to inform the employee of the consequences of not making an application. The respondent is obliged to approve and or refuse the application within thirty days of receipt of the complete application. Only health practitioners registered with the HPCSA certificates are acceptable for an application for TIL.
- 13 The respondent failed to adhere to the time frames to respond to the TIL and this resulted in severe prejudice to the applicant. The respondent failed to investigate the application within 30 days and failed to give effect to the Determination and PILLIR policy. It is submitted that the respondent does not have the discretion to deviate from the time frames as set out. In **PSA obo Liebenberg v Dept of Defence and Others (2013) 22 LC 4.2.1** the Court found that where the employee and her union were dissatisfied with the employer's refusal to grant TIL and the procedure for granting or refusing such leave was governed by the collective agreement, her remedy lay in the referral of a dispute over the application of the agreement to the bargaining council in terms of 24 of the LRA. In **PSA and another v PSCBC & Others (D751/09) [2013] ZALD 3 (26/01/2013)** the court held that where the state exceeds 30 days in investigating and giving an employee a response on his /her application it cannot penalize the employee. The court found that in **PSA obo Olufunmilayatiunu Ubgo v HOD Gauteng and Others [2017] ZACC** that an employer cannot make a decision on recovery of monies due by an employee without agreement.

Respondent's submissions

- 14 The applicant is appointed as an administrative clerk at the Albert Luthuli Central Hospital.
- 15 The applicant's use of sick leave was assessed including trends such as taking short periods of sick leave and temporary incapacity leave adjacent to weekends and public holidays and sick leave used as midweek breaks.
- 16 The analysis demonstrated that from 2019 to 2021 he was habitually absent from duty.

- 17 His sick leave was exhausted in 2019.
- 18 The HRM recommended temporary incapacity leave of (2) days out of 5 day and the other days should be leave without pay.
- 19 It is notable that currently the applicant is fit and attending to work. It was argued that the applicant is not faithful to the employer and abandoned the patients that he was supposed to serve without a valid reason.
- 20 The issue is one of interpretation and application of Resolution 7/2000 with regard to 7.5.1 (b) and (c). In terms of the Code of Good Practice Schedule 8 of the Labour Relations Act item 10 reflects that when dealing with incapacity that the employer should investigate the extent of the incapacity or injury. If the employee is likely to be absent for time that is unreasonably long in the circumstances, the employer should investigate alternatives short of dismissal.
- 21 According to Resolution 7/2000 an employee is required to submit an application for temporary incapacity within 5 working days after the first day of absence. Temporary incapacity leave is not an unlimited amount of additional sick leave, it is granted conditionally at the respondent's discretion. In terms of PILLIR temporary incapacity leave is subject to the outcome of an investigation. PILLIR cautions employees that if the application is declined based on the outcome of the investigation such leave will be converted to annual leave or unpaid leave. The resolution provides the opportunity for employees to make an application for temporary incapacity leave it does not grant them such leave. The discretion to grant such leave rests with the employer.
- 22 In terms of S38 of the Public Service Act if an incorrect salary level or scale or reward is given to an employee the relevant executive authority shall correct it with effect from the date upon which reward was received. According to **POPCRU obo Lindani Earl Emmanuel Mbongwa and the Dept of Correctional Services** it was held that a late determination on an application for additional leave as lamentable as this is and a subsequent instruction to pay back money to which the employee was not entitled does not produce a decision that retrospectively deprives the employer of a right to the payment in question". In **Department of Justice v Constitutional Development** the court held that "It is important to take cognizance that employees are not entitled to temporary incapacity leave. The resolution merely provides that they are entitled to make such application.

23 Further in the arbitration **PSA obo Zondi and Dept of Health** it was held that “an employee must be aware that even if the response is delayed implications may follow that may have a financial impact on the employee. The reliance on **PSA obo Ndlovu v Department of Health** is misplaced as the commissioner did not deal with the dispute but declared that it involved an unfair labour practice.

24 It is submitted that the respondent interpreted Resolution 7/2000 correctly.

ANALYSIS OF EVIDENCE AND ARGUMENT

25 The applicant party argued that Resolution 7 of 2000 has not been interpreted or correctly applied.

“7.5.1 Temporary Disability Leave

a) An employee whose 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 a 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 of the Labour Relations Act of 1995.

c) The employer shall specify the level of approval in respect of applications for disability leave.

26 The Determination states that if the head of department – refuses the temporary incapacity leave granted conditionally, s/he must notify the employee in writing- (a) of the refusal, (b) the reasons for the refusal.

27 The PILIR policy states in item 7.2.10.2 “refuses the temporary incapacity leave granted conditionally, s/he must notify the employee in writing- (a) of the refusal, (b) for the reasons for the refusal. This policy also states that the person applying may lodge a grievance if not satisfied. This was done by the applicant.

- 28 In this instance the applicant handed in his application within the time frames as reflected in the PILIR document the department did not notify the applicant within 30 days that his application was partially successful. Further there is no evidence of an investigation as per Schedule 8 of the Code of Good Practice item 10.
- 29 In **PSA and HC Gouvea v PSCBC, Commissioner Lyster NO and Department of Land Affairs (D751/109) [2013] ZALCD** the court held that an employer's decision in exercising its discretion in terms of a collective agreement may not apply retrospectively as this amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee. In a subsequent labour court matter **Department of Roads and Transport v Robertson and Others [2017] ZALCPE** the court confirmed the earlier judgement of 'Gouvea' finding that, in declining applications outside the prescribed period and proceeding to recover remuneration from the employee was in breach of paragraph 7.5.1 (b) of the PSCBC resolution applicable to incapacity leave.
- 30 Considering the above jurisprudence and the fact that there was no consent to deduct the amount of R2 112, 60 the respondent has not complied with Resolution 7/2000.

AWARD

- 31 The respondent has not complied with Resolution 7 of 2000.
- 32 The respondent is to repay the amount of R2 112, 60 to the applicant withing 14 days of receipt of this award.

A handwritten signature in black ink, appearing to be 'K Kleinot', written in a cursive style.

Panelist/s: Karen Kleinot