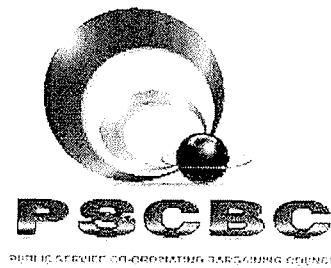


2020 -08- 26

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ARBITRATION AWARD

Case No: PSCB611-18/19

Date: 23 August 2020

Panellist: Vuyiso Ngcengeni

In the matter between

PSA obo Mthembu CT**Employee****And****Department of Education - KZN****Employer**

Union / employee representative: Perfect Zulu

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Employer representative: Mbongiseni Mtshali

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sinethemba.daniso@kzndoe.gov.za

DETAILS OF HEARING AND REPRESENTATION

1. This is the award in the arbitration between parties cited above, in which I briefly record the arguments presented to me by the parties for the purposes of making a determination.
2. The matter was heard under the auspices of the Public Service Co-ordinating Bargaining Council (the Council) in terms of section 24 (4) 24 (5) of the Labour Relations Act, No 66 of 1995 as amended ("the Act") and is about interpretation and /or application of Resolution 7 of 2000.
3. The matter was set down for arbitration 14 July 2020 and it was heard virtually.
4. The Employee was present and she was represented by Mr Perfect Zulu, whilst the Employer was represented by Mr Mbongiseni Mtshali.
5. With the parties having submitted signed pre-arb minutes in which they clearly stated the issues of common cause and the issues in dispute amongst others, I ordered them to submit arguments in writing.
6. I received the Employees arguments on 06 August 2020 and the Employer's on 31 July 2020. On 12 August 2020, I sent an email to the Council, enquiring about the reply from the Employee, and I also requested the Council to remind the Employee representative of such.
7. On 21 August 2020, there was still no reply from the Employee, and I therefore started with the award.
8. The parties submitted the bundles below:
 - Pre-arbitration minutes (signed by both parties)
 - Letter from the Department regarding the alleged overpayment.
 - Consultation file note with the Employee.
 - Annexure B - Application form for the Temporary Incapacity Leave (TIL) – long period.
 - Employer's response to the Employee's TIL application.
 - Thandile Health Risk Manager's final report regarding the application.
 - Annexure E – Head of Department's response to Health Risk Manager for ill-health retirement.

ISSUE TO BE DECIDED

9. I have to determine whether the Employer has correctly interpreted and applied the Resolution 7 of 2000, when it allegedly issued the outcome of the application for TIL outside OF the 30 working days period determined by the Resolution.
10. Also, when the Employer made deductions from the Employee's salary without her consent.
11. The Employee wants to be refunded the monies deducted from her salary from November 2018 to date and that further deductions be stopped.

BACKGROUND ISSUES

12. The dispute arose on 19 September 2018 and it was referred to the Council for Resolution on 10 October 2018. After a certificate of non-resolution was issued, the Employee referred the dispute for arbitration.
13. The parties submitted the below issues as of common cause: -
 - 13.1 The Employee is employed by the Department of Education as an educator since 28 January 1988.
 - 13.2 She applied for TIL on 09 August 2017, for the period of 01 April to 30 October 2017.
 - 13.3 She challenges the period 01 April 2017 – 30 October 2017, that leave without pay should not have been invoked.
 - 13.4 The application was received by the Employer (at District level) on 18 August 2017.
 - 13.5 The application was sent to Thandile Health Risk Manager (Thandile) on 25 August 2017.
 - 13.6 The outcome from Thandile was dated 21 September 2017.
 - 13.7 The Employee acknowledged receipt of the outcome on 09 November 2017.
 - 13.8 The Employee lodged a grievance and it was signed on 08 February 2018.
 - 13.9 The grievance form was received by the DGO on 13 February 2018.
 - 13.10 The outcome of the grievance was received by the Employer on 21 May 2018.
 - 13.11 The grievance outcome was communicated to the Employee on 25 May 2018.

SURVEY OF EVIDENCE AND ARGUMENT

PSA obo the Employee submitted the following:-

14. The Employee got injured in a car accident and she permanently lost use of her strong arm as the arm was permanently dislocated. She has been on sick leave since then as she still undergoes medical attention. The whole arm is dysfunctional.
15. The Employee was obliged to apply for medical boarding as she cannot perform her duties as an educator due to her being incapacitated, but the Employer turned the application down.
16. As a result of an Accident, she applied for TIL on 9 August. The Employer responded to the application for TIL on 21 September 2017 but the response was not given to the Employee on the same day.
17. The Employee was told to sign for the response on 29 November 2017 which was outside the time frame of 30 days.
18. The Employee did not put a date to the document however the Employer endorsed his own date in her absence. There was therefore no date that was put on the letter on the day the Employee acknowledged receipt thereof. The letter was informing her that her application was declined.

19. The outcome of the application resulted in leave without pay amounting to R 197 244,17, which became an overpayment to the Employee and a deduction of R 3 000 per month was effected since November 2018.
20. It is the common cause that the Employee lodged her grievance on 8 February 2018.
21. The outcome of the grievance was communicated to the Employee on 25 May 2018 formally declining the approval TIL.
22. She was hospitalised for a long time and was not back to work until the date when she came back to work to apply for TIL, hence her application was done on 9 August 2017.
23. According to PSCBC Resolution 7 of 2000 it is stated as follows regarding this matter on paragraph 7.5.1:
 - (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 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 still ill; and*
 - (ii) *A relevant registered medical/dental practitioner has duly certified such condition in advance as a temporary disability except where conditions do not allow.*
 - (b) *The employer shall, during 30 working days, investigate the extent of inability and the cause thereof. Investigations shall be in accordance with item 10 (1) of the Labour Relations Act of 1995."*
24. The Employee was sick and was hospitalised for a very long time and the Employer was aware of her accident and hospitalisation.
25. The Employee applied for TIL on 09 August 2017. The Employer, according to paragraph 7.5.1 of the Resolution was obliged to have concluded an investigation on the application of the Employee within 30 days and should have given the outcome of such an application.
26. The Employer did not respond within 30 days.
27. The Employer went on to deduct the amount of R 197 244, 17 in instalments of R 3000. 00 per month from November 2018 to date.
28. The Employee feels that the action of the Employer to decline her application for TIL outside the prescribed timeframe was unfair to her. The Resolution is a legally binding document that should be respected by all that are signatories to it.
29. The Employee meets all the requirements mentioned in paragraph 7.5.1 as the Employer was aware of the accident and the Employee provided all the proof that she was in an accident. The Employer never expressed lack of knowledge about the Employee's sickness.
30. The Employee further feels that she was treated unfairly by the Employer when it deducted money from her salary without her consent. Procedurally she was supposed to consent to the deduction in writing and that never happened. If the Employee refused to give consent the

Employer was supposed to go the route of Court which is a legal route. This never happened as well.

31. In relation to HRM Circular No. 55 of 2014 paragraph 13, which states as follows:
“it must be emphasised that, with regard to granting of leave without pay, the Department is obliged to implement measures to avoid fruitless, wasteful, and avoidable expenditure. In this regard, it must be noted that any overpayment that cannot be recovered, due to unacceptable delays on the part of the supervisor, the principals of schools and/ or HR Personnel in dealing with the matter, may be from the employee that causes such a delay quite apart from any disciplinary steps that may be taken against such employee”.
32. I believe that any reasonable person would agree with me when I say this Circular does not affect the Employee in any way. It is directed to administrative procedures that should be followed in case the people in administration are failing to do their duties. It does not refer to the ordinary employee.
33. The Employee did not put a date to the document however the Employer endorsed his own date in the absence of the Employee. There was therefore no date that was put on the letter the Employee acknowledged receipt of. The Employee does not know whose handwriting it is that is on the letter. It talks directly to the unacceptable delays caused by the Supervisors/Principals of schools and/ or HR Personnel. The Employee is neither one of that.
34. It is worth mentioning that there was no overpayment done in relation to the Employee. The Employer is talking about overpayment and monies owed by the Employee. There are no monies owed by the Employee to the Employer and there is no overpayment that was received by the Employee in her salary.
35. The fact is that the Employer has failed to abide with the timeframe that is stipulated in the Resolution.
36. As a result of that, they allowed the situation of controlling the leave to go out of hand. If the Employer had respected and abided by this Resolution in terms of the time frame we would have avoided the situation where they unlawfully deduct monies from employees without following the necessary procedures to do so.

The Employers submitted the following:-

37. The Employee lodged a dispute in September 2018 alleging that:
 - (a) The outcome of her application was outside the timeframes in terms of the Resolution.
 - (b) There was no consent from her for the Employer to make the deductions it made.
38. Clause 7.5 of the Resolution which the Employee relies on states:
“7.5.1 Temporary disability leave:

- (a) *An employee whose normal sick leave credits in a cycle have been extended 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-*
 - (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 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 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) *The employer shall specify the level of approval in respect of application for disability."*

39. In terms of the Resolution an Employee may be granted sick leave on full pay provided the supervisor is informed that the employee is sick and a relevant registered medical practitioner has duly certified such condition in advance as temporary disability except when conditions do not allow.
40. In this matter, the Employee's condition was supposed to be certified by the medical practitioner in advance. That means that should have been before 01 April 2017 as she was applying for leave with effect from 01 April 2017.
41. In this matter, the period in dispute is with effect from 01 April 2017 to 31 October 2017 and the Employee was on sick leave from 2016 as per page 2 of the bundle. As per p 9 of the same bundle, only the right elbow was affected before 2016.
42. The Employee only suffered from the elbow condition, she was able to submit the application for leave in advance but did not. The same Employee is relying on the Employer not complying with the Resolution, but herself did not comply.
43. She only submitted her application in August 2017 which is five months late. There was no obligation for the Employer to investigate her condition to determine whether she could be granted sick leave on full pay.
44. The Employer gave the Employee the benefit of doubt and investigated her condition, although the application was very late.
45. It is the dispute of the Employee that the Employer failed to comply with the Resolution in that the Employer failed to investigate the extent of her inability to perform office duties, the degree of inability and the cause thereof within 30 working days.
46. The application was received by the Employer on 18 August 2017 and Thandile issued outcome on 21 September 2017. It took the Employer less than 30 working days to investigate and that is in compliance with the Resolution. The investigation was therefore timeous, that is without undue delay.
47. The Employee might complain about the receipt of outcome, which was 09 November 2017, but she was aware that her application was forwarded to Thandile. At no stage, despite making

an application, did she try to find out about the outcome, which means she understood that the investigation might take longer than 30 working days. At no stage did the Employer's conduct suggest that sick leave with full pay could be granted. Such grant is subject to the discretion of the Employer, based on facts relating to the alleged indisposition to work, with due regards to all relevant circumstances.

48. There is no suggestion that she suffered any prejudice when she received the outcome on 09 November 2017, based on her actual alleged indisposition. She got the opportunity to lodge a grievance which she did on 13 February 2018. It must be mentioned that she was asked to lodge a grievance on or before 13 November 2017. It took her three months to lodge the grievance. This means investigation was within time and the grievance was also attended to despite lack of urgency from her. There was substantial compliance with the key and material aspects of the Resolution to make informed decision on the application.
49. In the grievance itself, the Employee did not raise the issue in respect of the time-frames. She was comfortable and satisfied about the way her application was being dealt with. The only time she complained was when the Employer started to deduct leave without pay.
50. The Resolution does not say what should happen if the Employer does not finalise the investigation during 30 working days, it does not imply that the sick leave should be granted even if not deserved. That would be abuse of sick leave and of the intent of the Resolution to cater for considered discretionary grant of additional sick leave in the form of TIL.
51. The purpose of the Resolution was to emphasise action of investigation by the Employer. This was done within 30 working days as we count from 18 August to 21 September 2017.
52. The Employee is complaining about the time she received the outcome, at no stage did she enquire about the outcome. She was comfortable with the way things were done and she did not suffer any prejudice.
53. Although the Employee received the outcome on 09 November 2017, the purpose of the Resolution is for the Employer to investigate and that was not way out of the ordinary. The Employee accepted the outcome and did not raise any issues in respect of the time frames in the grievance.
54. This dispute should be dismissed.
55. On the issue that there was no consent from the Employee to the deductions, there is no item in terms of the Resolution with respect to how deductions should be made, therefore the Council does not have jurisdiction to deal with this part of the Employee's argument.
56. Should the Commissioner decide that he has the powers to determine the issue of consent, the Employer submits that since the Employee submitted her application, she was aware that sick leave is subject to discretion and it may be granted on full pay or not.
57. She applied for TIL in August 2017 for the period with effect from 01 April 2017 to 31 October 2017. In August 2017 she knew that she was not working and she did not apply for leave. She

was aware that she was not entitled to any salary. The principle of “no work no pay” was enacted in the Act.

58. Any overpayment arising from leave without pay is an administrative matter, and therefore does not require the employee to give consent.
59. The practice of the Employer as per the document on p 7 of the bundle is that the employee would be informed about leave without pay and be given a choice to either utilise capped leave or deductions of overpayment as a result of leave without pay be made. The Employee was given the choice.
60. HRM Circular No 55 of 2014 paragraph 13 states:
“It must be emphasised that, with regard to granting leave without pay, the Department is obliged to implement measures to avoid fruitless, wasteful and avoidable expenditure. In this regard it must be noted that any over-payment that cannot be recovered due to unacceptable delays on the part of the Supervisors/Principals of schools and/or HR Personnel in dealing with the matter, may be recovered from the employee that causes such delay quite apart from any disciplinary steps that be taken against such employee.”
61. The Employee therefore knew or ought to have known that any over-payment arising from leave without pay would be recovered to avoid fruitless, wasteful and avoidable expenditure.
62. At no stage did she lodge a grievance in respect of the deductions. By her conduct, she was consenting to the deductions. She was informed about the deductions and she did not object.
63. The Employer therefore was reasonable and rational when dealing with the Employee's TIL in terms of the Resolution.

ANALYSIS OF ARGUMENTS

64. In POPCRU and Another v Department of Correctional Services and Another (D642/15) [2016] ZALCD 25 (23 November 2016), J Whitcher held as follows “... A late determination of an employee's application for additional leave, as lamentable as this is, and a subsequent instruction to pay back the money to which the employee was not entitled does not 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 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 investigative period lapses. Nor, in 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

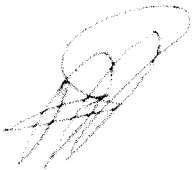
leave, is assessed not to have warranted such leave, this fact must determine what happens to any payments they received while applying and not the employer's delay in attending to the application."

65. A number of issues in this matter are of common cause and as I have outlined them above, I do not intend to repeat them at this stage, save to say that I will focus only on the disputed issues.
66. Firstly, the Employee's submission is based on clause 7.5.1 of the Resolution.
67. The Employee stated that she applied for TIL on 09 August 2017. She further stated that the Employer responded on 21 September 2017. However, the response was not given to her on the same day and she signed for it on 29 November 2017, which was outside the time frame of 30 days.
68. It is common cause that the application was received by the Employer on 18 August 2017, and Thandile issued outcome on 21 September 2017, as evinced by the Employee, was communicated to her on the same day.
69. The Employer submitted that it took less than 30 working days to investigate and that is in compliance with the Resolution, and further that there was substantial compliance with the key and material aspects of the Resolution to make informed decision on the application.
70. It is important to note the fact that the Employee in her own submission, acknowledges that she was informed of the outcomes of the investigation on 21 September 2017.
71. It is on the basis of the foregoing that the Employer submitted that the response was done within 30 working days.
72. Indeed, when one counts working days from 18 August 2017 to 21 September 2017, the total number of days is 24, which certainly is less than 30 days.
73. In light of the above, the claim by the Employee to say that the Employer responded beyond 30 days is clearly unfounded.
74. Even if one only recognises the written response which was given to the Employee on 09 November 2017, which would have been beyond 30 days, the *POPCRU* case above serves to put such matter to rest. Particularly in this matter when the Employee was informed timeously of the outcomes of her application.
75. On the second issue of the deductions that were made without the Employee's consent, the Employee submitted that procedurally, she was supposed to consent to the deduction in writing and that never happened.
76. The Employer submitted that on the issue of their having been no consent from the Employee to make the deductions, there is no item in terms of the Resolution with respect to how deductions should be made, therefore the Council does not have jurisdiction to deal with this part of the Employee's argument.

77. Although the Employee mentioned that having consent from the Employee before starting with the deductions was a procedural issue, she failed to specify what procedure governs such deductions, and given the dismissive response from the Employer, the Employee failed to align such consent to the Resolution.
78. To this end, the Employee has failed to show a direct link between the issue of consent and the Resolution and thus the claim has to fail.

AWARD

79. The Employer has correctly interpreted and applied the Resolution in this matter.
80. The application is dismissed.



Commissioner / Panellist

Vuyiso Ngcengeni