ARBITRATION AWARD

Panellist/s: Annelie Bevan
Case No.: PSCB 108 -16/17
Date of Award: 12 December 2016

In the matter between:

PSA obo LEHIHI, B H & 1 OTHER
(Union / Applicant)

And

DEPARTMENT OF SOCIAL DEVELOPMENT
(Respondent)

Union/Applicant's representative: Z Graaff of the PSA
Union/Applicant's address: No 19 Molopo Road
Mahikeng
2745

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Respondent's representative: P Monyatsi (Labour Relations Official of Respondent)
Respondent's address:

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DETAILS OF HEARING AND REPRESENTATION

1. The arbitration into the abovementioned interpretation and application of collective agreement; Resolution 7 of 2000 was set down to be heard at 13h00 on 18 November 2016 at the offices of the Respondent, in Mafikeng.
2. The Applicant was present and represented by Z. Graaff of the PSA and the Respondent was represented by P Monyatsi a Labour Relations Official of the Respondent.
3. The proceedings were electronically recorded.
4. At the beginning of the proceedings the parties indicated that the matter can be decided on paper; the Applicant to submit arguments on 25 November 2016, the Respondent to answer on 2 December 2016 and the Applicant to reply on 7 December 2016.

ISSUE TO BE DECIDED

5. I am required to determine whether or not the Respondent correctly interpreted and applied the clauses 7.5.1 of Resolution 7 of 2000 and secondly, whether or not the Respondent failed to investigate and give feedback within 30 days of the Applicant's application for Temporary Incapacity Leave ("TIL").
6. The Applicant is seeking the following relief:
   - 6.1 That the Respondent's interpretation of the abovementioned clauses is incorrect.
   - 6.2 That the Respondent approved the Applicants' application for TIL for the following periods: Ms Lehihi – 8 September to 12 September 2016 and Ms Pico – 12 to 13 February 2015;
   - 6.3 That the Respondent is ordered to make the Applicant's TIL periods in question with full pay.

BACKGROUND TO THE MATTER

7. The Applicants lodged grievances on 29 March 2016 with the Respondent relating to the fact that the Respondent has declined their applications for temporary incapacity leave ("TIL") for the following periods: Lehihi for 8 September to 12 September 2014 and Pico for 12 February to 13 February 2015 and they were informed that said periods will be covered by unpaid leave to be deducted from the Applicants' salaries.
8. The Applicants referred the dispute to the Council relating to the interpretation and application of Resolution 7 of 2000 to the Council on 23 May 2016. The dispute remained unresolved and a certificate of non-resolution was issued during June 2016, where after the matter was set down for arbitration on 18 November 2016.

SUBMISSIONS OF THE PARTIES

Applicants' arguments:

9. In terms of Resolution 7 of 2000 par 7.5.1(A4) 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:
   (a) a 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 days investigate the extent of inability to perform normal official duties, the degree of inability and the cause thereof.

10. Looking at the above provision (b) requires that the employer **shall** during 30 working days; investigate extent of inability to perform normal duties.

11. The above Resolution should be read together with The Determination and Directive on leave of absence in the Public Service the Head of the Department must within 30 days after receipt of both the application form and medical certificate referred to in paragraphs 15.10 of the Directive approve or refuse temporary incapacity leave granted conditionally.

12. In terms of clause 15.6 of the Determination and Directive on leave of absence in the Public Service, the Head of Department must within 5 working days from the receipt of the employees application for temporary incapacity leave conditionally grant a maximum of 30 consecutive working days temporary incapacity leave with full pay subject to the outcome of his investigation into the nature and extent of the employees illness/ injury and in terms of the same determination refer the application with all supporting evidence immediately to its Health Risk Manager in accordance with the PILIR for an assessment and advice -
    (a) on whether the employees illness or injury justifies the granting of incapacity leave; and
    (b) which steps if any in accordance with the procedures contained in item 10(1) of Schedule 8 of the Labour Relations Act 1995 read with clause 7.5.1 of PSCBC Resolution of 7 of 2000 as amended by PSCBC Resolutions 5 of 2001 and 15of 2002 are necessary.

13. Schedule 8.10 of the LRA (1) states that "Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances the employer should investigate the extent of the incapacity or the injury." There is however no evidence that shows that an investigation was conducted as provided in schedule 8.10 of the LRA.

14. It is therefore also evident that the Respondent did not comply with the collective agreement as well as relevant policies determinations and legislation for TIL and took longer than 30 days to provide feedback and the outcome.

15. The final decision to grant TIL lies with the Respondent and it is believed that this authority has been given to the Respondent for a reason. The Respondent is however the person who knows his employees best and not the health risk manager, who only recommends, hence the requirement in terms of the LRA, schedule 8 for an investigation by the Respondent.

16. It is the Applicants' argument that the 30 days conditionally approved days gave the employer enough time to lodged an investigation as required, but still this was not done.

17. As the Resolution is binding on both parties, the Respondent has thus an obligation to adhere to the provisions pertained in the Collective Agreement since it prescribe a time limit within which the Respondent must approve or refuse the TIL which has been granted conditionally. The provisions of both mentioned policies are peremptory and not conditional. Employer therefore has a duty to finalize the application within the 30 days as stated.

18. In view of the above, there is no good reason why the employees should suffer by paying for leave taken because the Respondent did not follow procedures. It is obvious that parties to the Resolution intended that such applications should be dealt with promptly.

19. In the Labour Court in the matter of *Public servants Association of South Africa obo A Potgieter* the judge ruled that there are time lines for the employer to do certain things. It is not for the employee as a matter of obligation to either remind or follow up with the employer on what it must do in terms of the Determination on Leave of Absence and the PILIR. The judge also states that a decision on an employee's application for TIL must be made well within the same period as the conditionally granted maximum of 30 consecutive working days.

20. The Applicants therefore pray that the Respondent be kept liable for the incapacity leave which is not approved because of the response which was inordinately delayed by the Respondent. The Applicants TIL should be approved and not converted into unpaid leave.

The Respondent's evidence:

21. Reference is made to the provision of Resolution 7 of 2000 clause 7.5.1 which seem to be the bone of contention in the matter. The resolution provides that:

    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 of 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. Investigation shall be in accordance with item 10 (1) of schedule 8 of the Labour Relations Act of 1995.*

22. Ms Lehihi applied for temporary incapacity leave for the dates 08 September 2014 to 12 September 2014, amounting to 5 days. M Pico applied for temporary incapacity leave for the dates 12 to 13 February 2015, amounting to two days.

23. Both officials' matters were investigated and the report and outcome of their applications from SOMA (the Health Risk Manager) was issued to them (Annexure A and B). It must be accepted that SOMA was contracted by Government to assist in dealing with cases of temporary/ permanent incapacity based on their requisite expertise to deal with matters of this nature.

24. **In terms of the outcome in respect of Ms Lehihi SOMA provided a report with a specific recommendation on the matter and it is as follows:** "With respect to the current application for TIL, the employee has applied for 5 days on the basis of post-operative complications. While we note that the employee may have undergone surgery during the period preceding this absence and that she is reported to have suffered post-operative complications during the period in question, however the nature of surgery in this context is unknown and therefore due to lack of objective medical information suggesting the severity of the employee's condition, presenting symptoms at the time and treatment measures undertaken, we are unwilling to view the current application for TIL" **(See annexure C)**.

25. **In terms of the outcome in respect of Pico the recommendation is:** "In respect of the current 2-day absence on the basis of a gynecological problem, we note that no additional medical evidence was submitted detailing the exact nature and extent of the employee's gynecological problem, her functional limitations at the time of this absence and details of the exact management received. The employee must be informed that TIL a privilege granted solely at the discretion of the head of department and is not simply an extension of, or in addition to, normal routine sick leave, simply validated by the mere submission of medical certificate and that the onus of proof in respect of the justification of TIL rests entirely with the employee (**Annexure D**).

26. Due to high volume and complex nature of employee applications which in most instances do not have sufficient supporting information like in the case of the two employees, Soma made a recommendation based on the information at their disposal. Therefore the argument that the matters were not handled within 30 days period cannot be used as a justification for approval of TIL in both cases. It would be understood is the report and outcome was not issued at all and then the argument would be justifiable. It must be accepted that the said outcomes were based on expert recommendation which the department has adopted.

27. The Respondent further wish to submit that the plea for approval of TIL for both applicants is way beyond the scope of the commissioner and is used to run away from doing the right thing. More so that the resolution is silent on what should happen if the 30 days period is not complied with. There is also no evidence to proof that if the Respondent adhered to the 30 days period the outcome could have been different. The applicant should rightfully be pleading for resubmission with the necessary supporting detailed documents for further assessment by the Health Risk manager which the Respondent is more than willing to facilitate.

28. The Respondent therefore prays that the Applicants' cases be dismissed; alternatively to resubmit their applications for further assessment of the health risk manager.

ANALYSIS OF THE SUBMISSIONS

29. I intend to offer brief reasons in my analysis as per Section 138 (7) of the *LRA* as amended, which provides that, *"Within 14 days of the conclusion of the arbitration proceedings – the commissioner must issue an arbitration award with brief reasons"*.

30. This dispute revolves around the interpretation of paragraph 7 (dealing with leave) of PSCBC Resolution No 7 of 2000. Paragraph 7.1(a) of the Resolution made provision that the annual leave dispensation may be further refined. This was done when the Determination and Directive on Leave of Absence in the Public Service was approved in 2012 ("the Directive") and later amended in 2015. The Directive is applicable to all those that are employed either on full-time, part-time, permanent or temporary basis in terms of the Public Service Act and fall within the scope of the PSCBC and gives effect to clause 7 of PSCBC Resolution 7 of 2000, as amended by PSCBC Resolutions 5 of 2001, 15 of 2002; 1 of 2007 and 1 of 2012 (see part IV of the Directive).

31. It is evident from the status of the Directive (as set out in paragraph 30 above) that it gives effect to clause 7 of PSCBC Resolution 7 of 2000, which is the topic of this dispute.

32. The dispute was primarily referred in terms of Paragraph 7.5.1 of Resolution 7 of 2000 which determine that:

"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 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.*

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

33. Paragraph 15 of the Directive deals with TIL and states clearly in paragraph 15.2 that it is additional to an employee's normal sick leave cycle and that the employer has a discretion to approve it or not. It is therefore not an outright right of an employee.

34. I therefore have to decide how this paragraph should be interpreted and also whether it is applicable to the Applicant's position.

35. In the matter of ***Northern Cape Forests v SA Agricultural & Allied Workers & others (1997) 18 ILJ 971 (LAC)*** it was stressed that the interpreter of a collective agreement should in addition to applying the ordinary principles of interpretation of contracts ask the question whether the interpretation yielded by these principles accords with the objectives of the LRA.

36. In ***Scottish Union and National Insurance Co Ltd v Native Recruiting Corporation LTD 1934*** **AD** it was decided that "in construing every kind of written contract, the court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining the meaning, we must give to the words their plain, ordinary and popular meaning unless, unless it appears clearly from the contract that both the parties intend them to bear a different meaning…."

37. According to this principle, the starting point is to try and determine the intentions of the parties from the words used. The words appearing in clause 7 of the PSCBC Resolution 7 of 2000 must therefore be attributed their ordinary, literal and grammatical meaning. It is only if there is an ambiguity in the plain language that an additional approach to interpretation becomes necessary.

38. When applying these principles of interpretation and reading the said paragraph 7.5.1 (a) it is clear that TIL <u>may</u> be granted by the employer provided that certain requirements are met. These requirements include that the employee's supervisor must be informed that the employee is ill and a registered medical/dental practitioner must in advance have certified the condition as temporary disability.

39. In using the word may, the parties agreed that the employer has discretion and not an obligation to grant such further temporary incapacity leave on full pay. Even if the employee complies with the requirements as set out in Paragraph 7.5.1(a) (i) and (ii), the employer may still decide not to grant such leave or only partly approve such leave. Whether such decision is fair (both procedurally and substantively) is a different question to be decided in a different forum.

40. In terms of paragraph 15.8 of the Directive the Head of Department must within 5 working days from the receipt of the employee's application for TIL, conditionally grant a maximum of 30 consecutive working days TIL with full pay subject to the outcome of his/her investigation into the nature and extent of the employee's illness or injury and refer the application with all the supporting evidence immediately to its Health Risk Manager for assessment and advice.

41. It is evident from the submissions of both parties that this paragraph of the Directive has been complied with.

42. The next portion of the paragraph, 7.5.1(b) puts a more definite obligation on the employer to investigate the said inability within 30 working days and to conduct such investigation in accordance with Item 10(1)

of Schedule 8 of the LRA. This clause is reiterated in paragraph 5.10 and the Head of Department's responsibility in this regard is expounded upon as follows: *"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.;"*

43. This is the part of the Resolution and the Directive that is in dispute between the parties. Although the Respondent did not indicate it clearly in its submissions, it seems common cause that the Respondent did not comply with the timeframes prescribed by the Resolution and the Directive. The Applicant argues that as a direct result of the Respondent's inability to keep to the collectively agreed upon timeframes, the Respondent should lose its discretionary powers in terms of the Resolution and the TIL for both Applicants should be approved and not be regarded as unpaid leave. The Respondent argues that such interference by a Commissioner into the realm of the Respondent's prerogative would go beyond the powers that a Commissioner has in terms of an interpretation and application of a collective agreement dispute.

44. In the matter of ***Hospersa OBO Tshambi v Department of Health, Kwazulu Natal [2016] 7 BLLR 649 (LAC)*** the Labour Appeal Court has warned Commissioners against accepting the parties characterization of the dispute at face value. It should be interrogated to determine whether the Applicant's characterization of his dispute was, objectively, correct. An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined (see ***Wardlaw v Supreme Mouldings (Pty) Ltd (Wardlaw), (2007) 28 ILJ 1042 (LAC)***).

45. The Constitutional Court in ***CUSA v Tao Ying Industries and Others (2008) 29 ILJ 2461 (CC)*** at para 66 has summarized it as follows:

'A commissioner must, as the LRA requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard

forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'

46. That approach has been reaffirmed by this Court in ***NUMSA (Sinuko) v Powertech Transformers (DPM) and Others (2014) 35 ILJ 954 (LAC)***.

47. The Labour Appeal Court in ***HOSPERSA obo T S Tshambi-case*** found further that a dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked.

48. The ***HOSPERSA obo T S Tshambi-case*** furthermore explained that a breach of a right that derives from a collective agreement is not automatically a dispute contemplated by section 24 of the LRA and quoted ***Martin Brassey: Employment and Labour Law, Vol III, Commentary on the Labour Relations Act, A3-46,*** who expresses the opinion that a general rule exists that section 24 of the LRA "....is inapplicable to disputes for which remedial processes are especially created in the statute".

49. It seems from the submissions made by the parties that there is no difference of opinion about what the provisions of the Resolution means with specific reference to the 30 day period in which the Respondent is suppose to investigate the extent of the Applicant's inability to perform normal official duties, the degree of inability and the cause thereof. The true nature of the dispute can therefore not be an interpretation dispute.

50. If this was a true application dispute, then one would have expected the Applicant to refer the dispute as soon as the 30 working day period had lapsed in terms of Clause 7.5.1(b). The basis of the dispute would then have been whether or not Clause 7.5.1 (b) can be evoked. The resulted relief that could have been ordered in such circumstance would have been to order the Respondent to finalise the investigation as prescribed in Clause 7.5.1(b) and to inform the employee of the level of approval in respect of the application for TIL as prescribed in terms of clause 7.5.1 (c). Such a timeous referral of the dispute would also have limited the financial prejudice that the Applicant is now facing. However, the relief sought by the Applicant goes beyond an application dispute and therefore I am not convinced that the true nature of this dispute is one of application of a collective agreement.

51. It remains however a fact that the Respondent did not comply with the 30 day prescribed time frame encapsulated in clause 7.5.1(b) of the Resolution, although both Applicants did receive comprehensive responses to their applications for TIL. However, as explained in the ***HOSPERSA obo T S Tshambi-case*** above, a breach of a right that derives from a collective agreement is not automatically a dispute contemplated by section 24 of the LRA. Section 24 of the LRA is inapplicable to disputes for which remedial processes are especially created in the statute.

52. I am therefore of the opinion that the Council does not have jurisdiction to determine the dispute, as a specific remedial process was created in the LRA in the form of the unfair labour practice dispute relating to benefits which will cover the Applicant's dispute. Under the unfair labour practice dispensation both the procedural aspect, relating to the non-compliance with timeframes and the substantive aspect, that goes to the reasons for declining the application can be addressed. The fairness of the process will therefore be scrutinized.

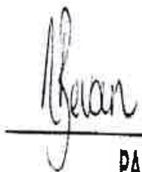
53. Although I have read and considered the court case referred to by the Applicant in support of her arguments, I submit that the latest Labour Appeal Court decision trumps that decision.

54. The Applicant is not without a remedy in this regard and can therefore refer an unfair labour practice dispute to the relevant Council, coupled with an application for condonation, or submit the additional evidence required by the Respondent to the Health Risk Manager.

AWARD

55. The Council does not have jurisdiction to determine the dispute.

56. The case is dismissed.



PANNELIST: ANNELIE BEVAN