



ARBITRATION AWARD

Commissioner: **Retief Olivier**

Case No.: **PSCB 479-16/17**

Date of Award: **12 July 2017**

In the ARBITRATION between:

PSA obo Mokgadi
(Union / Applicant)

and

Department of Social Development – North West
(Respondent)

Applicant representative:

Union/Applicant's address

Zhulfa Graaff - PSA _____

P O Box 2480 _____

Mahikeng _____

2745 _____

Telephone: 018 381 9600 _____

Telefax: 018 381 9611 _____

Respondent:

Respondent's representative:

Department of Social Development _____

P Monyatsi _____

Private Bag X2038 _____

Mmabatho _____

Telephone: 018 388 2880 _____

Telefax: 086 657 9565 _____

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. The arbitration was held on 19 June 2017 at the PSA offices in Mahikeng. Ms Z Graaff, a union official from the PSA, represented the employee, Mr Mokgadi. Mr P Monyatsi represented the respondent, the Department of Social Development - North West.
2. The parties submitted written closing arguments, final arguments received from the Respondent on 10 July 2017 after an extension was granted.

THE ISSUE IN DISPUTE

3. I must decide whether the respondent is in breach of Resolution 7 of 2000 i.e. the interpretation or application of a collective agreement as contained in Sections 24(2) and 24(5) of the LRA and more specifically had the respondent applied the provisions of clause 7.5.1 fairly in declining the Temporary Incapacity Leave (TIL) application.

THE BACKGROUND TO THE DISPUTE

4. Ms Mokgadi had applied for Temporary Incapacity Leave. She applied for the following periods:
 - a. 21/05/15 to 26/06/15 (26 Days)
 - b. 1/07/2015 to 13/07/2015 (09 days)
 - c. 29/09/2015 to 01/10/2015 (3 days)
5. The feedback to these applications were all received together on 22 April 2016. All the applications were denied.

SUMMARY OF EVIDENCE AND ARGUMENT

6. The applicant presented a bundle of documents and parties submitted opening and closing arguments.

Applicant's version:

7. The applicant Ms Mokgadi testified and confirmed and verified the statements made in the opening argument by her representative Ms Graaff. Her applications for all three periods were denied on 22 April 2016. Following this she submitted a grievance on 18 July 2016 and as the matter remained unresolved the applicant submitted a dispute to the PSCBC.
8. It was argued that according to PSCBC resolution 7 of 2000 in Paragraph 7.5.1 it is stated:
 - "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."*
9. It was thus submitted that the Employer has not complied with the timeframe in Sec 7.5.1. 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.
9. On all these periods submitted as noted, which was disapproved, the applicant only received feedback on 22 April 2016. This was approximately six months after the last application. In the case of all the periods that the applicant has applied for, it is clear that the period of 30 days was not adhered to.

10. The final decision to grant temporary incapacity leave lies with the employer. The 30 days leave conditionally granted allows the employer to lodge and investigation into the incapacity in terms of schedule 8 of the LRA. However this was not done.
11. It was therefore requested that the Respondent approve the Temporary Incapacity Leave and that the applicant's leave which was captured as unpaid leave, be approved as paid sick leave and that no deductions be made.

Respondent's version:

12. The respondent submitted that the applicant's case was investigated and the report and outcome of her applications from SOMA (the Health Risk Manager) was issued to her from SOMA (the Health Risk Manager) was issued to her. It must be understood 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.
13. In terms of the outcome in respect of Ms Mokgadi SOMA provided a report with a specific recommendation on the matter and amongst other it highlighted the following:
The temporary incapacity leave on the basis of an unspecified surgical condition, such essentially forms part of the aforementioned continuous absence from work from 4 May 2015. Whilst acknowledging that the employee was admitted to hospital on 29 June 2015 under the care of the attending surgeon for unspecified surgical condition, there is no information regarding her surgical condition. Whilst noted that it is highly likely that her surgical condition was related to recent poly-trauma experience, there is little medical evidence available regarding the employee condition during her extended absence from work from 04 May 2015, and during the current application period under review.
14. Due to high volume and the complex nature of the employees' applications, which in most instances do not have sufficient supporting information like in the case of the Ms Mokgadi, 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 temporary incapacity leave in both cases. It

would be understood if 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.

15. The respondent further submitted that the plea for approval of temporary incapacity leave for the applicant is way beyond the scope of the commissioner and is used to run away from doing the reasonable thing which is submission of comprehensive reports. 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 department 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.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

16. The issue in dispute is whether the respondent is in breach of PSCBC Resolution 7 of 2000.

PSCBC Resolution 7 of 2000, 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, but can be granted at the employer's discretion based on its investigations.
19. It must further be accepted as common cause that none of the applicant's TIL applications had been dealt with in terms of the time frames in the Collective Agreement, as acknowledged by the Respondent. These letters indicate that the feedback was submitted more than 6 months outside of the time frames allowed in the said Collective Agreement. Compliance with a Collective Agreement is however not a discretionary matter, and whoever is responsible for the delay and for what reason does not change the fact that the employer does not comply with the Collective Agreement.
20. 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."
21. Further according to the feedback the respondent indicates there was not sufficient medical evidence to grant the application. The employer argued the applications were declined because the applicant did not submit sufficient medical information.

22. There was no evidence before the arbitrator that the employer requested the applicant to provide more medical evidence **before** the application was declined or that a second medical opinion was requested. It is the employer that deals with the application once it is made, and has to decide whether further medical evidence is required, or whether the applicant should go for a second medical opinion, it can not be used as the reason for declining the application if it was not requested. The policy on PILIR indicates that it is the employer that must request this from either the applicant or the applicant's doctors. How must the applicant know whether the medical evidence submitted is accepted or not or that more extensive medical reports are required?
20. The respondent further argued that it is not within the authority of the commissioner to rule on the matter. However the respondent misconstrues the dispute. It is not a dispute to determine whether the actions of the employer or SOMA for that matter, acted fairly in declining the applications. Is a dispute about the interpretation and application of a Collective Agreement, and is in fact a compliance issue. I find that the employer acted unreasonable and did not comply with the PILIR policy. The evidence before me shows that the respondent had not investigated the applicant's situation thoroughly within the required time frame. I therefore find that it is in breach of Resolution 7 of 2000.
21. 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 discretion with unfair consequences to an employee.**" (my emphasis).
22. I therefore deem it fair to order the respondent to grant the applicant the Temporary Incapacity Leave (TIL) for the periods submitted. As noted the respondent submitted that

it is beyond the scope of an arbitrator to grant the relief sought, namely to grant the temporary incapacity leave. As indicated in the above decision, it was about determining compliance and the relief granted is not compensation, but where the TIL is approved any monies deducted should be paid back or the employer ordered to refrain from deducting monies. This is in fact also what was decided in the matter of **PSA obo Liebenberg and the Dept. of Defense, Labour Court case C 938/2011** by Judge Steenkamp, noting that he followed the LAC case **Minister of Safety and Security & others v PSA obo De Bruyn (2010) 31 ILJ 1813 (LAC)**. Judge Steenkamp noted that there would be no point to lodge an interpretation/ application dispute if the arbitrator could not order a particular respondent to comply with the Collective Agreement.

AWARD

23. The respondent is in breach of Resolution 7 of 2000. I therefore order the following:
1. That the Respondent approve the Temporary Incapacity Leave for the following periods:
 - a. 21/05/2015 to 28/06/2015 (26 days)
 - b. 01/07/2015 to 13/07/2015 (09 days)
 - c. 29/09/2015 to 01/10/2015 (03 days)
 2. That all leave captured as unpaid for these periods, be amended from unpaid leave to paid sick leave, and that no deductions be made from the Applicant.
 3. That the employer implements this award by not later than 31 July 2017.



Arbitrator: Retief Olivier