ARBITRATION AWARD

Panellist/s: Nkosinathi Mkhize
Case No.: PSCB153-18/19
Date of Award: 24 April 2019

In the ARBITRATION between:

PSA obo Mthombeni BD

(Union / Applicant)

and

Department of Home Affairs – Northern Cape

(Respondent)

Union/Applicant's representative: Mr. Henry Visagie
Union/Applicant's address: No. 2 Kekewhich Street
Kimberley 8301
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Respondent's representative: Mr. Solly Ramokopelwa
Respondent's address: Private Bag
Pretoria

DETAILS OF HEARING AND REPRESENTATION

1. This is the award in the matter between PSA obo Mthombeni BD ("the applicant") and the Department of Home Affairs – Northern Cape ("the respondent").
2. The arbitration was held at the offices of the Department of Home Affairs, Upington on 08 March 2019.
3. The applicant was present and represented by Mr. Henry Visagie, a PSA Fulltime Shopsteward.
4. The respondent attended and was represented Mr. Solly Ramokopelwa its Official –Labour relations.
5. The proceedings were manually recorded.
6. That the parties agreed on a stated case and applied for the permission to submit written arguments as follows:
    - Founding submission – 19/03/2019
    - Answering submission - 25/03/2019
    - Replying submission – 28/03/2019

The parties filed their founding and answering statements but no replying statement was filed at the time of the award.

STATED CASE

7. The applicant applied for temporary incapacity leave for a period 28/09 – 06/10/2017. There was no dispute about the application having been made.
8. The applicant was granted conditional approval on the 11/10/2017 – see page 29
9. The applicant received a final response to her application on 08/02/2018 – see pages 24 & 25.

What needed to be determined

10. Whether the respondent correctly interpreted and applied Resolution 7 of 200 in declining the TIL application of the applicant.

Relevant clauses

11. Resolution 7 of 200, clause 7.5.1 (a - c)

Determination on leave of absence in the public service

12. Page 24 of 58, clauses 15.1 – 15.16.
13. Dispute starts on 7.2.2.2 on page 9 PILIR.
14. The parties may include any other information they deem relevant.
15. In the event any party would rely on case law, such party must provide a full citation thereof (reported cases) or full judgment (for any other cases).
16. The proceedings were manually recorded.

SURVEY OF EVIDENCE AND ARGUMENT

APPLICANTS' SUBMISSION – Mr. Henry Visagie

17. Mr. Visagie submitted in writing that Ms. BD Mthombeni applied for Temporary Incapacity Leave on different occasions as per page 29 of their bundle. The letter on page 29 indicated that the applicant made a TIL application dated 03 October but received by the respondent on 10 October 2017. The application was for 07 days, 28 September 2017 till 06 October 2017.
18. The application was acknowledged and approved on the 11/10/2017. The same application was also declined by Ms. S Botha in her capacity as Deputy Director: HR Business Partnering and was received by the applicant on 08/02/2018, which was 44 days later than what the Resolution prescribed at clause 7.5.1.
19. There is no common law right to pay TIL and the right which they rely on stems from clause 7.5.1(b) of Resolution 7 of 2000 as per page 49 of the bundle.
20. Their contention for the declined TIL stemmed from clause 7.5.1 of Resolution 7 of 2000. That clause provided that:
21. *(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:*
22. *i) her or his supervisor is informed that the employee is ill; and*
23. *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.*
24. *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.*
25. There was no documentary evidence that the respondent had adhered to the provisions of the Resolution / TIL policy related to short term application coupled to the dispute. They were arguing that the failure by the respondent to investigate the applicant's inability to work meant that it had failed to apply the Resolution. The respondent failed to investigate the applicant's incapacity within the prescribed 30 days whilst the inability was still apparent. That was why the declination of the application was part of the 30 day period.
26. *The respondent should specify the level of approval in respect of application for disability leave.* That the Leave Determination Policy and PILIR Policy must be read in tandem. They explain the process which has to be followed in relation to the processing of an employee's TIL application. The salient features being that:

27. An employee whose normal sick leave has been exhausted and in the opinion of the treated doctor, has to be booked due to incapacity, may apply for TIL with full pay on the prescribed form in respect of each occasion in which such leave was required.

28. For the employee's application for TIL to be considered, the employee must submit sufficient proof that she too ill / injured to perform his / her work satisfactory and the application form must, regardless of the period of absence, be accompanied by a medical certificate issued and signed by medical practitioner that certifies his / her condition and if the employee has consented, the nature and extent of the incapacity (pages 40 – 42).

29. The employee is afforded the opportunity (and encouraged) to submit together with his / her application form, from any medical evidence related to the medical condition of the employee, such as medical report from a specialist, blood test results, x-ray results or scan results, obtained at the employee's expense, and any additional written motivation supporting his / her application.

30. The employee is requested to give his or her consent that medical information / records be disclosed to the employer and his / or its Health Risk Manager and to undergo further medical examination.

31. An employee must submit his / her application for TIL in respect of clinical procedures in advance, unless the treating medical practitioner certifies that such procedure had to be conducted as an emergency. If overcome by sudden incapacity, the employee must personally notify his / her supervisor or manager immediately. A verbal message to the supervisor / manager by a relative, fellow employee or friend is only acceptable if the nature and / or extent of the incapacity prevents the employee to inform the supervisor / manager personally.

32. An employee must submit the prescribed application form personally or through a relative or fellow employee all her obligations as per the Resolution.

33. The declination letter appeared on page 28 for the period referred to the Health Risk Manager's recommendation going forward. Clearly it started what should happen with the future applications for the illness. That being the case it remained that had the applications been an undertaking of the recommendation. The nature of illness then becomes cardinal in that argument since the very letter referred to the diagnosis and conditions.

34. The applicant's contention was that it was impossible for her to get to work. What was vital was that the respondent was obligated to ensure that a secondary assessment was conducted and in doing so, could then instruct the employee to return to work.

35. The Policy further provided that if the employee failed to make a TIL application within the prescribed period, her manager / supervisor should inform the employee that if such application was not submitted within 2 working days, the sick leave period will be deemed to be leave without pay. If the employee has failed to conform to that advice, the manager / supervisor must advise personnel section / office that the employee's absence must be covered by annual leave (with the employee's consent) and / or unpaid

leave if insufficient annual leave credits are unavailable and if the employee has failed to notify the employer of his / her choice.

36. That the employer / respondent shall within 5 working days of receipt of the application, verify that the employee has completed the form and attached the necessary documents (failing which the form must be returned to the employee). If the application was in compliance with the Policy, conditionally grant a maximum of 30 consecutive working days temporary incapacity leave with full pay subject to the outcome of his/her investigation into the nature and extent of the employee's incapacity and that the employer should immediately complete the department's report to the Health Risk Manager in the required form and refer the application form to the Health Risk Manager together with the employee's sick leave and annual leave and other leave records for the corresponding records.

37. The Employer must within 30 working days after the receipt of both the application form and medical certificate referred to above, approve or refuse temporary incapacity leave granted conditionally. In making a decision, the employer must apply his/her mind to the medical certificate (with or without describing the nature and extent of the incapacity) contemplated in paragraph 7.1.5.2, medical information/records (if the employee consented to disclosure), the Health Risk Manager's advice, the additional information supplied by the employee (if any) and all other relevant information available to the employer and based thereon approve or refuse the temporary incapacity leave granted conditionally, on conditions that the employer may determine, e.g. to return to work, etc.

38. If the Employer approves the TIL granted conditionally, such leave must be converted into TIL. If however it refuses the temporary incapacity leave granted conditionally, it must notify the employee in writing of, amongst other things, the refusal, the reasons for the refusal, and the employee's right of recourse.

39. The HRM must within 2 working days of receipt of the employer's report, acknowledge thereof in writing within 2 working days and confirm that the employer shall receive the report within 12 working days. The HRM must then undertake the assessment of the report. The HRM must advice the employer about amongst other things, the validity of the TIL application, the need for ongoing TIL, determine the appropriate duration of the leave, the management of the condition and recommend full health assessment, if applicable.

40. Clause 7.5.1 of the Resolution is not peremptory in nature but rather grants the employer a discretion as whether or not to grant paid TIL. This is in contrast to clause 7.6 of the Resolution and such discretion was repeated in the Leave Determination and PILIR policy: *"Incapacity leave is not an unlimited amount of additional sick leave granted conditionally at the employer's discretion, as provided for in the Leave Determination and PILIR."* The process that must be followed in the exercise of that discretion is mandatory. The employer must approve or refuse the TIL within 30 working days. That position has been confirmed by amongst others the PSCB916 – 17/18 Award (PSA obo Van Zyl / Department of Correctional Services).

41. In the matter of PSA on behalf of Swartz and Department of Correctional Services (2006) 27 ILJ 653 (BCA), ILJ 653 (BCA), the arbitrator found the employer to have failed to comply with the conditions of the Resolution, on account of its failure to investigate the extent of the employee's incapacity with the allotted 30 days,

42. The applicant did not grant the respondent her consent for the respondent to deduct money from her salary for the purpose of the declined TIL.

43. The applicant also made reference to decisions in PSA obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others CCT6/17, CCT17/17 to show that the unilateral decision of the employer to deduct for the employee's salary was unlawful and that section 38(2)(b) of the PSAct was found to be unconstitutional.

44. The applicant also relied on the decision of the Court in the PSA and Another v PSCBC, Gouvea and Others, D751/09 wherein the Court explained the process for the approval of the TIL and the impact of the retrospective application of salary deduction.

RESPONDENT'S ARGUMENT AND VERSION

Mr. Solly Ramokopelwa ("Solly")

45. Solly submitted that the respondent disputed the claim that it failed to investigate the incapacity as a without basis submission. The respondent used the services of HRM to assess the applicant's application.

46. The allegation that the application of the applicant was never referred to HRM was baseless and lacks merit. The respondent mentioned that the non approval of her application was on the recommendations of TIL.

47. There was no obligation on the HRM to refer applications for secondary assessment. Every case is treated on its merits. There was also no obligation on the HRM to disclose the full reason for declining an application.

48. The applicant's application was about the interpretation and application of Resolution 7 of 2000 and not deduction of money. Even the statement of case signed by both parties could attest to that version of the respondent.

49. The citation PSA obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others CCT6/17, CCT17/17 was irrelevant to this matter, in so far as what the commissioner must determine.

50. The cited case of PSA and Another v PSCBC, Gouvea and Others, D751/09, therein the Court noted the report had the potential of retrospectively and did not agree to the effect whilst it accepted the employer's discretion on TIL matters.

51. Their submission was that the investigation was correctly done by HRM and accordingly and procedurally declined.

52. There was no dispute that the applicant was notified after 30 days. The question was whether the failing to grant of refuse the application within 30 days by HRM, automatically meant that the application was granted.

53. The respondent was in favour of the interpretation of PILIR and clause 7.5.1 of the Resolution as it was accorded in the judgment of POPCRU and Mbongwa v Department of Correctional Services and Minister of Correctional Service.

54. The respondent prayed for the application to be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENTS

55. The applicant was diagnosed as incapacitated and booked off for the period of 28/09/17 until 06/10/2017. She then made an application for the Temporary Incapacity Leave in terms of clause 7.5.1 of the Resolution. That application for 07 days was approved (see page 29 of the bundle) but later declined on the b08/02/2018 – see pages 24 and 25 of the bundle.

56. The approval letter dated 2017/10/11 communicated to the applicant that her application for paid TIL had been conditionally approved with full pay subject to the outcome of the HRM prescribed investigation and where after a final decision would be taken. It further communicated that as part of the investigation and assessment, the applicant may be required to submit additional medical proof and / or be subjected to additional medical examination. It further communicated that within a period of 30 days thereof and based on the recommendations by the HRM, the TILL leave would be granted or refused and in the event it was refused, it would be recovered either as unpaid leave a=or through the applicant's annual leave.

57. It was common cause that the response to the applicant's TIL application was received on the 08/02/2018 which was well outside the prescribed 30 days and the period stated by the letter in page 29. That seems to have been the source of the dispute underway. The applicant submitted that since the response was given to her outside the prescribed 30 days, it should mean that the respondent cannot seek to recover the conditionally granted TIL which was later refused. The respondent submitted as a way of question that the fact that the response was given outside the 30 day period, should it mean that automatically the application was approved.

58. The letter on pages 24 and 25 communicated a final decision of the respondent on that application. It could be inferred that the applicant returned to work on 09 October 2017 and logically, when the final outcome was delivered, she was already back at work. It was also logical then that the recovery had retrospective effect in that it was for a period the applicant remained at home and that there was no instruction for her to return to work and even if there could have been, it could have been after the period of 30 days.

59. Factually, the applicant's application for the TIL was conditionally approved within 30 days, even though it was later declined well after the prescribed 30 day period. I have noted that in the letter addressing the

reasons for declining of the TIL application, the respondent makes mention of the pattern of abuse of sick leave. It appeared however that the true and main reason for declining such leave was that, the respondent and HRM by extension, even though they acknowledged that the applicant might have been involved in a car accident that caused her to apply for TIL, there was no sufficient motivated or verified case for such leave – *"In this regard, as no information whatsoever has been provided pertaining to the nature or severity of these injuries, your resultant functional limitations or the treatment required therefore, we are of the opinion that your claim of temporary incapacity over this seven day period has not been adequately motivated or verified".* See page 24 of the bundle, paragraph 2. As I have indicated above that the conditional approval had conditions and probabilities, one of which was that (see page 29 – paragraph 3) as part of the investigation and assessment, the applicant may be required to submit additional medical proof and / or subject herself to further medical examinations. That was not done. The Resolution requires that the investigation into the applicant's incapacity be done in terms of clause 10.1 of Schedule 8 of the LRA. The applicant submitted that there was no investigation in terms of that prescripts and that version was never challenged. The Court in the matter of Public Servants Association on behalf of Swartz and Department of Correctional Services (2006) 27 ILJ 653 (BCA), ILJ 653 (BCA) upheld the decision of the arbitrator wherein he had found that the respondent had failed to interpret and apply correctly the Resolution where it was found that the respondent failed to investigate the application for TIL in terms of clause 10.1 of Schedule 8 to the LRA. I have no reasons to depart from that conclusion in this matter. The respondent, had it conducted the investigation in that manner, would have been in a better position to assess the injuries sustained by the applicant, the extent and severity thereof, and perhaps adapt her work to accommodate the temporary incapacity. It was also baffling as to why the respondent having advised the applicant that she may be required to submit additional information, as to why such approach was abandoned as clearly, what caused her application not to success was lack of clarity and information in some respect.

60. Having already found that the communication dated 2017/12/11, its effect and implementation had retrospective effect, the Court in Cele J, the **Public Service Association of South Africa and Another v PSCBC, Gouvea and Others, D751/09** gave the meaning to interpretation to be that "*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those who are responsible for its production". He further gave meaning to that process to be that" Once all investigations pertaining to the temporary disability leave are finalised and a decision is taken by the third respondent and communicated to Ms*

Gouvea, then and only is the moment reached when she could be called back to work, should the decision go against her". There was no reason why that same meaning could not apply to the applicant in this matter and accordingly, the return to work or pay should have commenced after the 07 May 2018. He further concluded that: "*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 a discretion with unfair consequences to an employee. Nowhere in clause 7.5 of Resolution 7 of 2000, is there a suggestion that the employer may not grant further sick leave after the lapse a 30 day period. On the contrary, as investigations shall be in accordance with item 10 (1) of Schedule 8 of the Act, a further sick leave period may be granted to the employee".* There was no reason why the same analysis or principle should *not allow in this matter. The applicant did not absent herself post notification (which* was tendered after the *prescribed 30 day period*) of non approval and therefore should be no deductions.

61. The Court in the matter of **Dept. of Roads and Transport v J C Robertson & others, LC Case No PR 40/14, delivered on 15 February 2017**. The Court found at paragraph 9: "The arbitrators' interpretation of clause 7.5.1 of Resolution 7 of 2000 which is based on the decision in PSA HC Gouvea (supra) cannot be faulted. When exercising the discretion to grant or refuse TIL, the applicant was enjoined by Resolution 7/2000 to take into account provisions of item 10(1) of schedule 8 of the Labour Relations Act. The interpretation the arbitrator gave to clause 7.5.1 (c) is consistent with the letter and spirit of the LRA. His decision is not based only on giving a peremptory meaning to the word 'shall' in clause 7.5.1 (c) of resolution 7/2000. He therefore conducted the correct enquiry in the correct manner and reached a reasonable decision."

62. My view was that the collective agreement (Resolution) between the parties must be respected and parties must keep to its terms and conditions. It was therefore my finding that the respondent did not interpret and apply correctly the provisions of clause 7.5.1 of the Resolution 7 of 2000.

63. There is no legal basis why the prayer for the estoppels of further deductions and refund of whatever monies already deducted should not be consolidated with this dispute. The deductions, the applicant prayed for in terms of the decision in ***PSA obo Olufunmilayi Itunu Ubogu v Head of Department of Health, Gauteng and Others CCT6/17, CCT17/17.*** I have found that the reliance on that decision was misdirected as there was no evidence as to the respondent having invoked section 38(2)(b) of the Public Service Act. I have however found that the deductions were unfair and not in keeping with the proper interpretation and application of the Resolution as per the decision of Cele J *supra.*

64. However there was also a judgment of Witcher J (as she was then), as relied on by the respondent. The Court in **Popcru and Another v Department of Correctional Services and Another (D642/15) [2016] ZALCD 25; (2017) 38 ILJ 964 (LC) (23 November 2016)** found that "a late decision does not harden to a salary entitlement". That decision in my view, failed to deal with the effect of retrospective implementation of negative decisions like deductions and the effect of collective agreements and the issue

of why the timelines were inserted in those agreements. It is for that reason that Cele J decision accords better with the purport and spirit of Resolution 7 of 2000.

65. Whereas as a principle, the approval of the TIL is at the employer's discretion but such must be exercised judiciously. The Court in **Aries v CCMA & Others (2006) 27 ILJ 2324 (LC)** *held that there are limited grounds on which an arbitrator, or a court, may interfere with a discretion which has been exercised by a party competent to exercise that discretion. The reason for this is clearly that the ambit of the decision making powers inherent in the exercising of discretion by a party, including the exercise of the discretion, or managerial prerogative, of an employer, ought not to be curtailed. It ought to be interfered with only to the extent that it can be demonstrated that the discretion was not properly exercised. It further held that an employee can only succeed in having the exercise of a discretion of an employer interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner.* In this matter, it was probable that the discretion was capriciously exercised or was not properly exercised, hence a need for the commissioner to intervene.

AWARD

66. That the respondent failed to interpret and apply correctly the Resolution 7 of 2000, particularly clause 7.5.1.
67. That the call for the applicant to consent to the use of his annual leave to cover the period of 07 days of TIL is reviewed and set aside.
68. That the deductions of money from the applicant's salary for the purpose of declined TIL be refunded to her and that no further deductions shall be made from the salary of the applicant for reasons related to the TIL application in dispute.
69. That the applicant's leave records be amended to reflect the decision in this award.
70. There is no order of costs.

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Nkosinathi Mkhize
Panellist/s