ARBITRATION AWARD

Panelist: John Cheere Robertson
Case No.: PSCB669-11/12
Date of Award: 23 March 2014

In the ARBITRATION between:

PSA obo JC Ralph (PERSAL No. 00857947)
(Union / Employee)

and

South African Police Service
(Employer)

Employee's representative:	Mr M Maxakana / Mr V Esau (PSA)
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Employer's representative:	Brigadier P De Kock / Colonel MR Mahloromela
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DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for arbitration at Cradock on several dates, the final date being 17 February 2014. At the previous hearings Mr Maxakana (PSA) represented Ms J Ralph (employee). Mr V Esau (PSA) represented the employee at the final hearing. Initially Colonel A De Witt represented the South African Police Service (SAPS) (employer) on behalf of Colonel MR Mahloromela, who via telephonic contact represented the South African Police Service at the final hearing. The delays were due to the difficulties the parties experienced in locating the documents relevant to the employee's claims. At an earlier hearing the parties agreed that they would, on locating the documents, prepare a common bundle, stated case and closing arguements and submit this to the arbitrator for decision, without the necessity for a further hearing. On receipt of the closing arguments, which were not accompanied by a stated case and complete bundle of documents, it was not possible to make a decision, and the matter was again set down for hearing. On 17 February the parties agreed on a stated case, see below and to submit written closing arguments by 3 March 2014. The respondent submitted their closing arguments on 18 March 2014. As at date hereof the applicant has not submitted their closing arguments and the time limits have expired. I shall however have regard to the employee's earlier written closing arguments in so far as they are relevant.

ISSUE IN DISPUTE

2. The issue to be determined is whether the employer complied with Resolution 7/2000 in refusing the employee's applications for TIL as set out below.

BACKGROUND TO THE ISSUE

3. The parties agreed on the following as common cause and which forms the background to this dispute:

"*3.1 The employee, an Inspector, Provisioning Administration Officer, is stationed at the Cradock Police Station*
3.2 Employees are entitled to 36 working days sick leave on full pay within a cycle of 3 years commencing on 01 January calculated form 01 January 2001 (Para 7.4 PSCBC R7/2000, DLA 3.1, NI 2/2004 Para 3(1)(b)
3.3 The annual leave cycle of 12 months commences on 01 January of each year
3.4 The employee's applications for TIL, the periods she was off duty (sick) and the decisions of the employer in respect of such TIL applications are set out in the table below:

Item	***Period/s***	***Nature of Leave***	***Date & Outcome***
1	*18 08 2006-31 08 2006*	*TIL [10 days]*	*26 09 2007: Not Approved (A14(b))*
2	*08 09 2006-15 09 2006*	*TIL [6 days]*	*08 07 2007: Not Approved.* *24 03 2010: Approved on re-presentation (A24)*
3	*18 09 2006-06 10 2006*	*TIL [14 days]*	*08 06 2007: Not Approved (A6)*
4	*24 10 2007-30 11 2007 [2007 10 24-2007 10 26 &* *2007 10 29-2007 11 30]*	*TIL [28 days]*	*03 06 2008: Not Approved (A14)*
5	*15 02 2008-14 03 2008*	*TIL [21 days]*	*26 05 2008: Not Approved (A15)*
6	*17[14] 03 2008-15 04 2008*	*TIL [20 days]*	*26 05 2008: Not Approved (A15)*
7	*16 04 2008-05 05 2008*	*TIL [11 days]*	*26 05 2008: Not Approved (A24)*

3.5 It is accepted for purposes of this dispute that the employee's supervisor was informed and applications for TIL were submitted timeously

3.6 The employer refused the applications for TIL above on the basis as set out in the employer's letter dated 24 March 2010 (A24)

3.7 The employer deducted the amount of R 55 522.43 from the employee's salary over the period 31 December 2009 to 31 October 2012 to cover the periods of TIL that were not approved and which have been treated as unpaid leave (A1(a)- A1(g).

Issue for determination

3.8 The issue to be determined is whether the employer complied with Resolution 7/2000 in refusing the employee's applications for TIL as set out above.

Relief Sought:

Employee

3.9 The employee seeks that her applications for TIL, that were declined, be granted and that she be repaid the amount deducted from her salary in respect thereof

Employer

3.10 The employer seeks that the status quo remain"

SURVEY AND ANALYSIS OF EVIDENCE

The employee's submissions

4. The employee argued to the effect that the employer had exceeded the time period prescribed in R 7/2000, had not investigated the matter within 30 days and further had variously ignored the employee's treating medical practitioner's reports, the reports and opinion of the SAPS social worker and that of a specialist psychiatrist (A11-12 dated 15 April 2008). The employee sought that her respective claims for TIL be granted and the monies R 55 522, 43 (A1(a)-A1(c)) deducted from her salary in respect of the periods of declined TIL, be refunded.

The employer's submissions

5. The employer argued to the effect that whether or not TIL was granted was at the discretion of the National Commissioner, this was evident from paragraph 7.5.1 of R 7/2000. Further paragraph 3(f) of NI 2/2004 provided that a medical certificate served as a recommendation for the granting of sick leave and that the National Commissioner may refuse the grant of such leave if she was of the opinion that there were sufficient grounds to do so.

6. A perusal of the outcomes (A6, 14 & 15) in respect of the employee's applications for TIL showed that the employer had evaluated the employee's applications and set out reasons for declining them namely:

Item 1 vague and insufficient medical evidence

Item 3 Applications for TIL on psychiatric grounds required a psychiatrist's report and assessment setting out the treatment. No psychiatrists report was submitted.

Item 4 Poor leave record i.e. reporting sick adjacent to weekends and again no psychiatric report

Items 5-7 Applications for long periods of incapacity leave should be supported by detailed medical evidence to support her claim, which the employee did not do. The applicant could not simply wait for the

employer to produce the medical records and in any event the applicant had not submitted the proper or full medical records.

7. In the circumstances the employer argued that the applicant had failed to show that she was entitled to TIL as claimed and sought that her claim be dismissed.

SURVEY AND ANALYSIS OF EVIDENCE AND ARGUEMENT

8. I have made awards on similar facts concerning R 7/2000 and in respect of TIL / PIL / IHR. In so far as the law, reference to R 7/2000 and arguments are concerned, what follows, will where relevant be similar.

Resolution 7 of 2000 as amended by PSCBC Resolutions 5 of 2001, 15 of 2002 and 1 of 2007 (Referred to herein as Resolution 7/2000) amongst other things at paragraphs 7.4 and 7.5 covers **normal sick leave**, and **incapacity management** i.e. **temporary incapacity leave (TIL) and permanent incapacity leave (PIL)** including **Ill Health Retirement (IHR)**. R 7/2000 is amplified by the Policy and Procedure on Incapacity Leave and for Ill Health Retirement (PILIR) determined by the Minister for Public Service and Administration **(dpsa)** in terms of section 3(3) of the Public Service Act 1994[1]. In order to properly manage applications for sick and incapacity leave in accordance with R 7/2000 and to control and streamline procedures to expedite such processes, the department of public service and Administration (**dpsa)** introduced PILIR

9. Paragraph 7.4 of Resolution 7 of 2000, as amended by PSCBC Resolutions 5 of 2001, 15 of 2002 and 1 of 2007 (Resolution 7/2000) deals with normal sick leave and provides as follows:

"***Normal Sick Leave:***

(a) Applicants shall be granted 36 working days sick leave with full pay in a three-year cycle
(b) The respondent shall require a medical certificate from a registered medical practitioner if three or more consecutive days are taken as sick leave
(c) Practitioners shall, for this purpose, include practitioners as defined by the Health Professionals Council of South Africa (Medical and dental practitioners)
(d) An applicant shall produce a medical certificate at the request of the employer where a pattern has been established
(e) Unused sick leave credits shall lapse at the end of a three-year cycle"

[1] PILIR, and the N/I 2/2004 in addition to adding detail in the form of time periods, structures, reporting, nature of and submission of documents and reference to the health risk manager HRM, a company of multi disciplinary medical experts, specializing in occupational medicine, appointed by the **dpsa** and National Treasury: Pensions Administration, who assess and advise the employer on employees' applications for amongst others, TIL, the employer being responsible for the final decision (see e.g. PILIR paragraph 6.4, 6.5, 7.1.1, 7.2.9 & 8; N/I 2/2004 paragraph 2(e), 4(4), 7.), *inter alia* all emphasize that TIL is not an automatic entitlement but is granted at the discretion of the employer and that where TIL is refused the employer must cover the period of absence as requested by the employee or where the employee fails to notify the employer or there are insufficient annual leave credits by unpaid leave (see e.g. See PILIR paragraphs 7.2.11, 7.3.5.1 (g) or 7.3.5.2 (j), depending on whether an application is for Short Period of TIL (1-29 working days requested per occasion) or Long Period of TIL (30 working days or more); N/I 2/2004 paragraph 7(4) & 7(5)). In practical terms this will mean, that where there are no leave credits the employer will effect deductions from the employee's salary to recover the amount already disbursed as salary, to the employee, for the period/s in question. While PILIR and the N/I 2/2004, do not necessarily fall within the ambit of jurisdiction of the PSCBC, they provide the context for a consideration of applications for TIL and in the instant case, the employer is required, at the very least, to comply with its own policy documents relative to sick leave/TIL.

10. Paragraph 7.5 of PSCBC Resolution 7 of 2000 deals with incapacity management relating to temporary and permanent incapacity in excess of the 36 days normal sick leave and Ill Health Retirement (IHR).

11. PSCBC Resolution 7 of 2000, par 7.5.1 provides for the extension of sick leave in the case where an employee has exhausted their 36 working days sick leave in a particular sick leave cycle as follows:

*"**Temporary Incapacity Leave:***
(a) An applicant 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 incapacity which is not permanent, may be granted sick leave on full pay provided that:
i) her or his supervisor is informed that the applicant is ill, and
ii) a relevant registered medical and/or dental practitioner has duly certified such a condition in advance as temporary incapacity except where conditions do not allow.
(b) The employer shall, during 30 working days, investigate the extent of the inability to perform normal official duties, the degree of incapacity and the cause thereof. Investigations shall be in accordance with item 10(1) of Schedule 8 in the Labour Relations Act of 1995"

12. In the circumstances an employee, who has exhausted their 36 working days sick leave *vide* paragraph 7.4, may be granted additional sick (incapacity) leave (TIL) on full pay where the provisions of paragraphs 7.5.1(a) (i) & (ii) of R 7/2000 are complied with and the employer after investigations, including investigations in accordance with Item 10(1) of Schedule 8 to the LRA, so decides. In this regard R 7/2000 lays down no minimum / maximum period. In terms of PILIR, TIL is divided into TIL less than 30 days and Long TIL (LTIL) i.e. 30 days and more.[2] This however is a requirement of PILIR and not R 7/2000

13. Para 7.5.1(a) of R 7/2000 provides that an employee "**may**"[3] be granted sick leave on full pay, in this case TIL. The word "may" signifies that the grant is discretionary. Read with paragraph 7.4 an employee's entitlement to sick leave is limited to 36 days in a 3 year cycle and any further paid sick leave, referred to as temporary incapacity leave (TIL), and is subject to the employer's approval. In the circumstances whether or not an employee is granted TIL depends on the discretion of the employer after investigation and approval as per Para 7.5.1 (b).

14. In summary, with regard to TIL & LTIL where an employee has exhausted their sick leave, is further temporarily incapacitated and:
    - Their supervisor is informed of their illness[4]
    - A registered medical/dental practitioner, certifies in advance (unless this is not possible in the circumstances)[5], that the employee is required to be absent from work, due to a temporary incapacity

[2]See also paragraph 4(4) and 5(1)(c) read with Paragraph 2(g) and 2(m) of NI 2/2004, i.e. long period (30 working days or longer and a short period of up to 29 working days respectively.
[3]See also paragraph 4(4) of NOI 2/2004, "...may at the discretion of the National Commissioner be granted temporary incapacity leave..."
[4] Para 7.5.1 (a)(i) R 7/2000
[5] Para 7.5.1 (a)(ii) R 7/2000

The employer **shall**, within 30 working days, investigate, in accordance with Item 10(1) of Schedule 8 of the LRA, the nature and extent of the incapacity in relation to the employee's duties, the cause of the incapacity[6] and dependent thereon the employee in question, **may be granted additional paid sick leave (TIL)** at the discretion of the employer, according to the terms of the collective agreement. Where an employee is not granted TIL the period is covered by way of unpaid leave, unless the employee has existing leave credits (annual leave or capped leave) that may be used[7].

15. PSCBC R7/2000 provides at paragraph 14 that disputes about the interpretation or application of the agreement are dealt with in terms of the dispute resolution procedures of the PSCBC. The refusal of TIL "i*s not an administrative action or exercise of a public power as contemplated in PAJA*" rather it is the exercise of "*a discretion provided for and governed by resolution 5 of 2001 of the PSCBC*"[8] (the successor to resolution 7/2000).

16. Interpretation refers to the situation where the parties differ over the meaning of a provision of the collective agreement.[9] "Application" includes whether an agreement applies to the facts in question and "the manner in which the agreement is applied, which includes non-compliance."[10]

17. Regarding the interpretation of a collective agreement, our courts have held that the ordinary and popular meaning of the words employed[11], is to be used and to consider the document as a whole when interpreting its provisions and where different parts appear contradictory, to reconcile these in line with the intention of the framers of the document[12]. Subject to the understanding that the meaning of words may be coloured by the context in which they occur,[13] one should be slow to depart from this and resort to external sources, unless there is ambiguity or it will result in an anomaly. In other words, one must attempt to derive the meaning of the collective agreement from the agreement itself, unless to do so will result in an anomaly, or where the word/s are ambiguous and the meaning does not give effect to the intention of the parties. In addition, the meaning of words are interpreted within the context of the agreement, and where there are contradictions in the agreement, they are interpreted so as to reconcile one another in line with the purpose of the agreement / intention of the

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6 Para 7.5.1 (b) R 7/2000

7 See also paragraph 7(4) of NI 2/2004

8 PSA obo WJ De Bruyn and Minister of Safety and Security and others (2009) *ILJ* 1631 (LC) [26]

9 PSA obo Swart v Department of Correctional Services: EC (2006) 27 *ILJ* 653 (BCA), SAMWU v SALGBC [2012] BLLR 334 (LAC) 29 November 2011 [27]

10 Referred to as the wider approach, see *IMATU obo Bubb & others v SALGBC and others* (SALGBC) HQ 051003 dated 7 August 2012 at [27-28] and authorities cited. And see SAMWU v SALGBC [2012] BLLR 334 (LAC) 29 November 2011 [29], [30], [31]

11 See *Food & Allied Workers Union V Commission For Conciliation, Mediation & Arbitration & Others* (2007) 28 ILJ 382 (LC) [31]-[35], [39] and cases cited therein, per Nel AJ, with regard to inter alia, the parol evidence rule, the application of the ordinary and popular meaning, ambiguity and the intention of the parties to the collective agreement.

12 See *CUSA v Tao Ying Metal Industries and others* (2008) 29 *ILJ* 246 CC [90] "The proper approach to the construction of a legal instrument requires a consideration of the document taken as a whole.[46] Effect must be given to every paragraph in the instrument and, if two paragraphs appear to be contradictory, the proper approach is to reconcile them so as to do justice to the intention of the framers of the document. It is not necessary to resort to extrinsic evidence if the meaning of the document can be gathered from the contents of the document."

13 *See CUSA v Tao Ying Metal Industries and others* (2008) 29 *ILJ* 246 CC [92] "… "It is trite that the context in which a word occurs may colour the meaning to be given to a word."

parties[14]. Self-evidently, the aim is to establish the intention of the parties to the collective agreement involved in the negotiations at the time and not that of a party who may be disputing the meaning or arguing for a specific meaning to be attached thereto[15] although this may be the meaning in question[16].

18. The purpose/s of the LRA and values of the RSA Constitution[17] e.g. *fairness and equity[18], to promote orderly collective bargaining[19], to ensure effective and sound industrial relations, the effective fair and speedy resolution of disputes,[20] "to advance economic development, social justice, labour peace and democratisation of the workplace"*[21] as may be relevant to the case in question, also inform the interpretation of a collective agreement.

19. In *PSA obo Liebenberg v Department of Defence & others (2013) 34 ILJ 1769 (LC)* the Labour Court per Steenkamp J reviewed and set aside an arbitration award in which it had been held that the PSCBC did not have jurisdiction to hear a dispute concerning the interpretation or application of a collective agreement relating to temporary incapacity leave.

20. The respondent had cross – reviewed relying on *Minister of Safety & Security v SSSBC & others (2010) 31 ILJ 1813 (LAC) (SSSBC)* arguing that the interpretation and application of R7/2000 was only "an issue in dispute" and that the real dispute was whether its decision to refuse the employee's application for Temporary Incapacity Leave was fair, in which event the PSCBC did not have jurisdiction.

21. The Labour Court considered the judgments in *SSSBC* & *Johannesburg City Parks v Mphahlani NO & others (2010) 31 ILJ 1804 (LAC)* in which the court distinguished between "a dispute" and an "issue in dispute" and found that where the interpretation or application of a collective agreement was merely an issue in dispute which had to be dealt with in order to resolve the real dispute, the bargaining council did not have jurisdiction.

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[14] See *CUSA v Tao Ying Metal Industries and others* (2008) 29 *ILJ* 246 CC [90]

[15] See ***Food & Allied Workers Union V Commission For Conciliation, Mediation & Arbitration & Others*** (2007) 28 ILJ 382 (LC) [31]-[35], [39] and cases cited therein, per Nel AJ, with regard to inter alia, the parol evidence rule, the application of the ordinary and popular meaning, ambiguity and the intention of the parties to the collective agreement.

[16] See PSA, Commissioner R Lyster v PSCBC, Dept of Land Affairs (D751/09) [2013] ZALCD 3 (26 February 2013)

"[17] The review application turns on whether the second respondent applied her mind appropriately in her interpretation of clause 7.5 of the resolution 7 of 2000[16]. 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. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context, it is to make a contract for the parties other than the one that they in fact made[2].

[17] *See CUSA v Tao Ying Metal Industries and others* (2008) 29 *ILJ* 246 CC [103]

[18] *SAMWU v SALGA and others* (LAC) Case No. DA 06/09 dated 29 November 2011

[19] *eThekwini Municipality (Health Department) v IMATU obo Foster (*2012) 33 *ILJ* 152 (LAC) at [26]

[20] *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others*, 1997) 18 ILJ 971 (LAC)

[21] *NEHAWU v UCT and others*. Se also See *CUSA v Tao Ying Metal Industries and others* (2008) 29 *ILJ* 246 CC [95]

However, the court noted that these decisions had to be reconsidered in the light of the LAC judgment *in PSA obo De Bruyn v Ministers of Safety & Security & another (2012) 33 ILJ 1822 (LAC*) which dealt with the issue of granting Temporary Incapacity Leave (PSCBC Collective Agreement R7/2000), and was the most recent decision of the LAC on the point and by virtue of the principle of *stare decisis* the Labour Court was bound thereby.[22]

22. *"That dictum[23] is directly applicable to the facts of the matter before me and I am bound by that decision. Although the LAC in De Bruyn did not refer to its earlier decisions in City Parks and SSSBC, it appears to me that De Bruyn is more directly applicable to the facts of the case before me and thus to the case that served before the arbitrator.* ***De Bruyn makes it clear that, in a case such as the current one, where the employee and her union are dissatisfied with the employer's refusal to grant temporary incapacity leave, and the procedure for granting or refusing TIL is governed by the collective agreement of the bargaining council, her remedy lies in the referral of a dispute over the application of the resolution to the bargaining council in terms of s 24 of the LRA. I also take into account that De Bruyn is the most recent decision of the LAC on this point."***

23. Accordingly where an employee is dissatisfied with the decision of an employer concerning the interpretation or application of a collective agreement, the employee is confined to the remedy in terms of s 24 (read with 32 and 33 in the case of a Bargaining Council) of the LRA and cannot take the employer's decision on review to the Labour Court in terms of S 158(1)(*h*). The employee has formulated her claim as one relating to the interpretation and application of a collective agreement, namely R7/2000 and essentially complains of non-compliance by the employer with the collective agreement relating to TIL.

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[22] The same would apply in respect of PSCBC arbitration. See Public Servants Associates of SA obo De Bruyn v Min of Safety & Security & Others (2012) 33 *ILJ* 1822 (LAC)

"[31] The appellant's complaint clearly concerns the denial of incapacity leave. The alleged right the appellant seeks to assert derives from the provisions of the PSCBC resolution as the Labour Court, correctly in our view, found. The resolution deals with leave of absence and what steps an employee should take in case of a dispute arising regarding attendant matters. There is no doubt that the aspect of leave of absence is an issue falling squarely under the PSCBC resolution. In deciding whether the relief sought ought to be granted the court a quo had to have regard to the provisions of the resolution.

[32] Therefore, the court a quo (although of the opinion that the application before it was in terms of S 158(1)(g) of the LRA) correctly proceeded to consider whether the LRA required the kind of dispute, which existed between the appellant and the respondent to be resolved through arbitration. The court concluded that leave, including incapacity leave and temporary incapacity leave at the respondent's organization, is governed by the provisions of Resolution 5 of 2001 of the PSCBC, which is a binding collective bargaining agreement. This means that the dispute between the parties was required to be submitted to arbitration as it concerned the application and/or interpretation of the provisions of the PSCBC resolution.

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[34] It follows therefore that where an employee...is dissatisfied with a decision by the employer with regard to the issue of leave of absence...his remedy lies in the provisions of the resolution. It follows that the appellant is confined to its remedy in terms of s 24 of the LRA."

[23] PSA obo Liebenberg v Department of Defence and others (2013) 34 *ILJ* 1769 at [37] as follows: *"That dictum ([31], [32] and [34] Public Servants Associates of SA obo De Bruyn v Min of Safety & Security & Others (2012) 33 ILJ 1822 (LAC)*). See also the references in the above footnote, and UASA & another v BHP Billiton Energy Coal SA Ltd & another (2013) 34 *ILJ* 2118 (LC),

24. The appropriate forum for an employee to challenge the employer's decision in refusing the grant of TIL is the PSCBC.[24] In the circumstances I am satisfied, given the recent and binding case law and the nature of the employee's dispute, that the PSCBC has jurisdiction to entertain the employee's claim.

25. Failure by the employer to exercise its discretion properly i.e. take into account relevant information, follow laid down procedures, act within the framework of the collective agreement and provide reasons[25], will invite judicial scrutiny for want of compliance with the collective agreement.

26. The Labour Court has recently held, that an employer's decision, arising out of the exercise of its discretion in terms of a collective agreement, **may not apply retrospectively**, as to do so is an **unreasonable and arbitrary exercise of discretion with unfair consequences** to an employee[26].

27. In the circumstances the discretion to grant or refuse in this case TIL, must be exercised properly, rationally and fairly (e.g. it should not have a retrospective effect resulting in unfair consequences to the employee)[27], must be accompanied by reasons[28], and in accordance with the purpose and provisions of R 7/2000, which in this instance (TIL / LTIL) requires that the employer **"shall" in terms of 7.5.1 (c) conduct investigations in accordance with Item 10(1) of the Labour Relations Act 66 of 1995 (LRA) within 30 working days.**

28. We are only concerned with the periods listed in Item 1, 3, 4, 5, 6 and 7 in the table in paragraph 3 above. The employee was off work (sick) for these periods and submitted applications for incapacity leave. The outcomes declining the said applications were received by the employee as follows:
Item 1 18 06 2006 to 31 08 2006, received 26 September 2007 (A14(b), approximately 1 year after submission.
Item 3 18 09 2006 to 06 10 2008, received 08 June 2007 (A6 & A14(a) approximately 9 months after submission.

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[24] ***PSA obo Liebenberg v Department of Defence & others (2013) 34 ILJ 1769 (LC)*** [29] and see Spies v National Commissioner SAPS [JOL] 21525 (LC) [22] referred to in Janse Van Rensburg and others v Minister of safety and security [2009] 4 BLLR 400 (LC) [25]

[25] See Valuline & others v Minister of Labour & others (2013) 34 *ILJ* 1404 (KZP) [54], [55], [56], [57].

[26] *Public Service Association of South Africa and HC Gouvea v PSCBC, Commissioner R Lyster and Dept of Land Affairs* (D751/09) [2013] ZALCD 3 (26 February 2013): at [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 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."

The employee had applied for TIL covering the period December 2007 to February 2009 and had been required to return to work on I July 2008. The LC found that the employee was entitled to TIL for the period December 2007 to June 2008 and not to TIL for the period 1 July 2008 to February 2009 on which date the employee was required to return to work.

[27] See ***PSA and HC Gouvea v PSCBC, Commissioner R Lyster NO and Department of Land Affairs*** (D751/09) [2013] ZALCD

[28] See Valuline & others v Minister of Labour & others (2013) 34 *ILJ* 1404 (KZP) [54], [55], [56], [57]..

Item 4 24 10 2007 to 30 11 2007, dated 26 May 2008, received 03 June 2008 (A14), approximately 13 months after submission.

Item 5 15 02 2008 to 14 03 2008, received 26 May 2008 (A15), approximately 68 working days after submission

Item 6 17[14] 03 2008 to 15 04 2008, received 26 May 2008 (A15) approximately 48[29] working days after submission

Item 716 04 2008 to 05 06 2008 received 26 May 2008 (A24 & A24(a), approximately 30 working days after submission

29. The employer did not respond within the required time frame in respect of the applications for TIL for the periods set out in Items 1, 3, 4, 5 and 6. The fact that the applications were declined in so far as they may not have had sufficient medical information or specialists reports (psychiatrist), the medical information was vague, medical certificates issued in hindsight or the incorrect forms were filled in does not alter the fact that the employer did not act in accordance with item 10(1) of Schedule 8 to the LRA within the 30 working day time period as prescribed in the collective agreement. The employer declined the employee's application for TIL for the period 18 04 2008 to 5 May 2008 (Item 7) within the prescribed period. I am unable from a perusal of the documents handed up make any determination on the nature of the application and the onus being on the employee she must fail in her claim for this period.

30. An employee may be granted sick leave on full pay where the provisions of paragraphs 7.5.1(a) (i) & (ii) of R 7/2000 are complied with and **the employer after investigations, including investigations in accordance with Item 10(1) of Schedule 8 to the LRA and within 30 working days,** so decides. R 7/2000 is amplified by the Policy and Procedure on Incapacity Leave and for Ill Health Retirement (PILIR). PILIR requires that where TIL is refused the *"employer must cover the period of absence…by unpaid leave"*[30]. In the instant case the decision to refuse the grant of TIL (in respect of the periods 1, 3, 4, 5 and 6) were made outside the prescribed period and not in compliance with R 7/2000.

31. In terms of Section 23 and 32 of the LRA, not only the actual parties to the collective agreement, but each member of the trade unions in question / employer's organisations are also bound, and in this case the parties to the PSCBC[31] i.e. the Union parties and State as employer[32].

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[29]There are on average 22 working days in a month, an additional 18 working days is 4 working days short of a month

[30]See PILIR paragraphs 7.2.11, 7.3.5.1 (g) or 7.3.5.2 (j), depending on whether an application is for Short Period of TIL (1-29 working days requested per occasion) or Long Period of TIL (30 working days or more…)

[31] See also *SAMWU and SALGA and others* (LAC) supra

[32] Section 23 (3) of the LRA provides that:

"[W]here applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by a collective agreement."

Section 32 of the LRA provides that a collective agreement concluded in a bargaining council binds:

"(a) the parties to the bargaining council who are also parties to the collective agreement;

32. The recovery of salary paid for "conditional leave" initially granted, pending the outcome of an application for TIL, is done either by way of deductions from salary, vacation leave credits, capped leave or unpaid leave and is inextricably linked to the decision to decline TIL, a consideration of the one involves the other and accordingly the dispute falls within the interpretation and application of R 7/2000. It follows that the PSCBC has jurisdiction to hear the matter in respect of the award of TIL, recovery of salary paid or appropriation of capped or vacation leave thereanent.

33. Section 138(9) of the Labour Relations Act 66 of 1995 provides that:

"The commissioner may make any appropriate arbitration award in terms of this Act, including but not limited to, an award-

(a) that gives effect to any collective agreement;

(b) that gives effect to the provisions and primary objects of this Act;

(c) that includes or is in the form of a declaratory order"

Awards may vary, depending on the matter at hand[33].

34. In accordance with the decision in ***PSA and HC Gouvea v Commissioner R Lyster NO and Department of Land Affairs*** (D751/09) [2013] ZALCD 3 (26 February 2013), where an employee's application is declined outside of the 30 days in question (*in casu* a range of 48 working days to approximately 13 months), and acts to the prejudice of the employee, (in this case the declining of the TIL applications and the recovery by way of monthly deductions from her salary, for salary paid to her while awaiting the outcome of her applications for TIL), the fact that the decision has a retrospective effect ***"amounts to an unreasonable and arbitrary exercise of a discretion with unfair consequences to an employee"***[34]. In other words employees cannot be subjected to leave without pay / monthly deductions from their salary (in order to recover salary paid, where an application for TIL is declined for a period they have been off work sick) unless the application is declined within 30 days or unless they have been given a date to return for work and have failed to do so. The employer may only recover salary paid, if TIL was declined within 30 days alternatively, if it is declined at a later date, for the period the employee was required to return to work and did not. If not, the refusal of TIL, outside the prescribed time periods, acts with retrospective effect on the employee in question and for that reason is unfair.

(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and

(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employer's organization that is such a party, if the collective agreement regulates-

(i) terms and conditions of employment; or

(ii) *the conduct of employers in relation to their employees or the conduct of the employees in relation to their employers."*

33 Self evidently any relief that may be applicable will vary / be influenced by the nature of the collective agreement in question

34 *Public Service Association of South Africa and HC Gouvea v PSCBC, Commissioner R Lyster and Dept of Land Affairs* (D751/09) [2013] ZALCD 3 (26 February 2013): at [20

35. The fact that employees are aware that their applications for TIL may be declined, and that they have no right other than a right that their application be properly and fairly considered, does not affect the issue as it is the retrospective effect that renders the decision to decline TIL an unreasonable and arbitrary exercise of a discretion with unfair consequences to the employee. In the circumstances I make the following award.

AWARD

36. The employer (The South African Police Service), failed to comply with the provisions of PSCBC Resolution 7/2000 in declining the employee Ms J Ralph's (PERSAL No. 00857947) applications for temporary incapacity leave for the periods set out in the table, items 1, 3, 4, 5 and 6 at paragraph 3 above

37. The employee Ms J Ralph **is not entitled** to temporary incapacity leave for the period reflected in Item 7 in the table at paragraph 3 above

38. The employee Ms J Ralph **is entitled** to temporary incapacity leave for the periods reflected in the table, items 1, 3, 4, 5 and 6 at paragraph 3 above

39. The employer (The South African Police Service) is accordingly not entitled to deduct any moneys from Ms J Ralph's salary paid her in respect of the periods set out in Items 1, 3, 4, 5 and 6 in the table at paragraph 3 above and must repay the amounts deducted from her salary in respect of these periods.

40. The employer is ordered to amend the employee's personnel / leave file accordingly.

41. The employer is required to attend to 38, 39 and 40 above, within 30 days of the date of this award.

John Cheere Robertson
PSCBC Panelist