IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL
HELD VIRTUALLY

CASE NO: PSCBC46-24/25

PSA obo Swanepoel and 2 Others **APPLICANTS**

and

Department of Correctional Services **RESPONDENT**

AWARD

DATE OF ARBITRATION	:	12 July and 07 October 2024
CLOSING ARGUMENTS	:	16 October 2024
DATE OF AWARD	:	28 October 2024
ARBITRATOR	:	I de Vlieger-Seynhaeve

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The matter was set down for arbitration on 12 July and 07 October 2024 through a Zoom hearing. Mr Kilian, from the PSA, represented the applicants. The Respondent was represented by Ms Berry. The proceedings were recorded digitally. The parties handed in documents which constitute part of the record. The parties decided to lead evidence at the hearing and argue the case in writing.

1.2 The proceedings were recorded digitally.

2. ISSUE TO BE DECIDED

2.1 The issue to be determined is whether the respondent was in breach with Resolution 7 of 2000 when it stopped the applicants leave for occupational injuries and diseases.

3. SURVEY OF EVIDENCE

3.1 The following facts were common cause: The applicants are employed as correctional officials at St Albans Maximum Security Correctional Service and were involved in an assault. They made an application for injury on duty. The applicants' dispute emanates from par 7.6 of the Resolution.

3.2 The applicants called one witness:

3.2.1 **Mr De Ridder** stated under oath that on 28 July 2023, he and Mr Jonk were feeding the inmates in the dining room. One inmate stabbed Mr Swaenepoel. He, together with Mr Jonk, were able to get the inmate off and away from Mr Swaenepoel. The inmate tried to stab other people as well. They were granted IOD leave after this incident. He went to see a psychiatrist who referred him to Dr Steyn after which he was admitted to hospital for two weeks. At the end of February 2024, he was informed that the IOD leave was stopped and that they need to use their normal sick leave and TIL. They all submitted TIL applications of which one application was denied. They are still waiting on the outcome of the other applications. The respondent did not comply with s 7.6 (a) of the Resolution. The same facts apply to the other applicants.

3.2.2 During cross examination it was asked what the nature was of the IOD. The witness replied that it was PTSD. It was then stated that IOD leave lasts for three months and that it then needs to be reviewed. The witness replied that nothing was done after the three months.

3.3 The Respondent called two witnesses:

3.3.1 Mr Smith, the Manager for Personnel Administration, was the first witness and testified under oath that he has been tasked with IOD cases since 2012. He explained the process that needs to be followed for the IOD to be registered. When a professional finds the employee fit to go back to duty, they will start a reintegration process. If an employee has been assaulted, they need to report the trauma separate from the psychical injuries to the Compensation Commissioner. He was involved in the applicants' matters and assisted in the reporting of the incident. After three months they did a review and informed the applicants that all G111 authorisations and occupational injuries' leave is to be stopped from 28 February 2024. Normal sick leave and use of medical aid benefits apply as from 01 March 2024 in the event that they did not return to work. They had reached out to the applicants, but they did not attend the reintegration meeting. As their cooperation is needed, they decided to stop the IOD leave.

3.3.2 During cross-examination, it was put to him that the applicants were never invited to a reintegration meeting. The witness replied that he did not do so himself but that the centers confirmed informing the applicants.

3.3.3 Mr Netshivhazwaula, the Area Commissioner of St Albans Management Centre, was the second witness and testified under oath that the authority to manage and control all leaves on behalf of the National Commissioner was delegated to him. The COIDA Act needs to be read together with the guide of the DPSA. It must be noted that offenders need to be searched and this was not done in this instance. It seems that the person who was stabbed was not vigilant and that the employees were not following the mitigation risk plans. There was a serious breach of security which was willfully done. Section 22 of COIDA places limitations and the applicants no longer qualified. However, even if the applicants breached the rules, they did not punish them and still gave them sick leave and access to TIL. They had found that there was an abuse of IOD cases in St Albans where no reviews were taking place. Consequently, they decided to manage this better by starting to engage with them. They reintegrated 27 employees. In terms of the guidelines of COIDA, an employer must review cases every three months. But the applicants did not present themselves and did not cooperate. They had to refer the document to a competent body, the HRM, who decided that they were not meeting the standard. The applicants are not that incapacitated that they cannot be accommodated.

3.3.4 During cross-examination, it was stated that the applicants were never invited for a review. The witness replied that the letters were sent to the Head of Centre.

4. SURVEY OF ARGUMENT

4.1 **Mr Kilian** submitted that the respondent decided to stop the IOD leave as the applicants did not attend the reintegration meeting. The applicants did not receive such an invitation and the respondent could not submit such. The applicants were never declared fit to return to work nor were they sent for a second opinion. It is furthermore the Compensation Commissioner who declines or approves applications. In line with section 24 of the BCEA, TIL is not applicable to IOD incidents. Furthermore, section 7.6 a of the Resolution uses the word "shall". This word is peremptory and does not grant the employer a discretion. The applicants wish to convert their absence back to IOD leave from the date of withdrawal until they are declared fit for duty.

4.2 **Ms Berry** stated that COIDA does not find application where an employee became incapacitated due to his own conduct/fault. It could not be the intention of the authors of Resolution 7 of 2000 that an employee should be granted occupational injuries or diseases leave in the absence of an approved and/or adjudicated IOD that are submitted to the Department of Labour. Only after feedback from the Department of Labour is received, will the respondent apply/institute the IOD for the relevant officials. The respondent has the right to propose alternative placement in the interim. Should the officials refuse alternative placement, the TIL route could be followed. The respondent investigated the extent of the applicants' inability to perform their normal duties, the degree of inability and the cause thereof. The respondent informed the applicants that their IOD would be reviewed every three months. In terms of the wording of s 7.6 (a): the word "shall" imply a measure of discretion. The commissioner cannot grant the order sought by the applicants as the dispute is not pertaining to a benefit but to the interpretation and application of a collective agreement. The termination of IOD leave was done pending the adjudication by the Department of Labour and on the guidance received from the HRM.

5. ANALYSIS OF EVIDENCE AND ARGUMENT

5.1 I have considered all the evidence and argument, but because the LRA requires brief reasons (s 138(7)), I have only referred to the evidence and argument necessary to substantiate my findings and decision.

5.2 A dispute over the interpretation of a collective agreement exists when the parties disagree over the meaning of a particular provision and a dispute over the application of a collective agreement arises when parties disagree over whether the agreement applies to a particular set of facts or circumstances. I therefore do not have to determine the fairness or unfairness of the respondent’s actions.

5.3 When interpreting collective agreements, arbitrators should follow the judgement of the LAC in *North-East Cape Forests v SAAPAWU & Others (2) 1997 (18) ILJ 971 (LAC)*: "*A collective agreement in terms of the Act is not an ordinary contract and the context within which a collective agreement operates under the Act is vastly different from a commercial contract. Froneman DJP has indicated that the primary objects of the Act were better served by a "practical approach to the interpretation and application of collective agreements rather than by reference to purely contractual principles*". This is not to say however that the ordinary principles of interpretation of contract are never appropriate when interpreting and applying collective agreements. In Northern Cape Forests, the Court merely stressed that the interpreter should ask the further question whether an interpretation yielded by these principles accords with the objectives of the LRA. The fact is that a collective agreement is a written memorandum which is meant to reflect the terms and conditions to which parties have agreed at the time that they concluded the agreement. The courts and arbitrators must therefore strive to give effect to that intention. Thus, the courts frequently apply the "parole evidence" rule - that is that evidence outside the written agreement itself is not generally permissible when the words of the memorandum are clear - when interpreting collective agreements."

5.4 The applicants stated that they suffered from Post Traumatic Stress Disorder after an incident that took place at work on 28 July 2014. They reported the matter as an Injury on Duty which would trigger leave for occupational injuries and diseases, see section 7.6 of Resolution 7 of 2000 (which states: *a) Employees who, as a result of their work, suffer occupational injuries or contract occupational diseases shall be granted occupational injury and diseases leave for duration of the period they cannot work*). The applicants had been on IOD leave for three months until the respondent ended their IOD leave on 28 February 2024. The letter ending the IOD leave stated the following: *You are herewith informed that management has reviewed your claim in conjunction with medical reports and the amended COIDA legislation. All G111 authorisation and occupational injuries' leave is hereby stopped as from 29 February 2024. Normal sick leave and use of medical aid benefits apply as from 01 March 2024 in the event you do not return to work. The COID Act requires the co-operation of the injured party, and the employer remains committed to assist in your recovery and healing through reasonable accommodation and alternative placement in the workplace. Your illness is not disputed, until such time as the Compensation Commissioner adjudicates on your claim no further medical assistance and occupational injuries' leave will be considered. It remains your responsibility to submit progress medical reports regularly to HR office for updating of your claim and IOD administration.*

5.5 I first would like to refer to the Compensation for Occupational Injuries and Diseases Act (Act 130 of 1993) which states under definitions that an *occupational injury is an injury sustained*

as a result of an accident. Furthermore, the act was amended in 2002 and a circular instruction regarding Compensation for Post Traumatic Stress Disorder was issued on 19 July 2002. That Circular sets guidelines on how to deal with this specific type of injury. In Clause 1: definition, it states that *PTSD is a mental disorder following an exposure to an extreme traumatic event or unusual stressor. This event is outside the individual's normal realm of experience and overwhelms the individual's usual psychological defences. PTSD is regarded as an occupational injury; therefore, the extreme trauma or unusual stressor should be an unforeseen incident, or an accident as required by COIDA statute. The incident is unexpected, sudden and non-routine. A claim for PTSD shall not be eligible for benefits under the Act unless:*

1. *The individual was exposed to an extreme trauma or unusual stressor, and*
2. *The employee experienced extreme trauma or unusual stressor that arose out or in the course of employment, and*
3. *The employee experienced symptoms of the PTSD within 6 months of the incident, and*
4. *The employment-related trauma or stressor was a positive factor in the development of PTSD or played an active role in the course of the PTSD, and*
5. *Notice of the claim for PTSD was made within a year after the date of diagnosis.*

The PTSD that the applicants suffered complies with all requirements listed above. Therefore, this illness qualifies as an occupational injury or disease.

5.6 In terms of the Public Service Act s 41(3), the Minister may issue directives which are not inconsistent with this Act to elucidate or supplement any regulation. The DPSA issued The Determination and Directive on Leave of Absence in the Public Sector which states in section 19: *An employee who, as a result of his/her work, suffers an occupational injury or contracts an occupational disease, shall be granted occupational and disease leave for the duration of the period they cannot work.* The DPSA further issued the "Application of the Compensation for Occupational Injuries and Diseases act in the Workplace: A Guide for Government Departments" dated April 2005. Part 2 of the guide details in section 2 the responsibility for the administration and management of COIDA: *2.1 COIDA is under the control of the Director-General of the Department of Labour, who delegates many of his functions to the Compensation Commissioner, whose duties are a wide range such as the following: to receive notices of accidents and occupational diseases and claims for compensation, to enquire into accidents and occupational diseases, to adjudicate on claims, to decide any question relating to the right of compensation, the award, withholding, review, discontinuance etc.* Section 5 deals with limitations. *5.1: If an accident is attributable to the serious and willful misconduct of the employee, no compensation benefits are payable unless the accident results in serious disablement or the employee dies leaving a dependent or dependents financially dependent*

upon him. The compensation commissioner will decide on the merit of each case. Section 7: deals with misconduct on the part of the employee; *7.2: In the event that the Compensation Commissioner decides that any accident in the workplace arose out of serious and willful conduct on the part of the employee, no payment of compensation benefits will be made. There are, however, certain circumstances in which the Compensation Commissioner may consider payments, even though the accident arose from willful misconduct of the employee.* Section 9 deals with COIDA and common law. 9.1: *In terms of COIDA, all benefits under the Act are automatic and cannot be withdrawn or refused by any employer*.

5.7 It seems from the letter, dated 28 February 2024, written by the Area Commissioner, that they had decided to end the applicants' occupational injures' leave. The reason that was proffered in the letter was because management had reviewed their claim. The evidence of the respondent's witnesses further focused on the fact that; 1) the applicants had been guilty of misconduct and the fact that 2) they refused to cooperate with the review process.

5.8 In terms of the misconduct: the Guide on COIDA is clear in section 5 that it is solely the Compensation Commissioner who can make a decision in terms of cases involving misconduct. It is not up to the respondent to do so.

5.9 In terms of the review: There is nothing in the COIDA legislation which states that the employers need to do a three-monthly review. The respondent stated that they had wanted to meet up with the applicants to discuss the way forward, but this was denied by the applicants. When the respondents' witnesses were asked to provide evidence that the applicants were invited for a meeting the invitations could not be found. A letter that was sent to all Heads of Correctional Centres and Community Corrections by the Area Commissioner was submitted which mentioned a review of the occupational and diseases management at St Albans Management Area. That letter was not an invitation to a meeting but consisted of operational instructions such as:

- All incidents must be investigated and where injured officials are found to be at fault;
- IOD benefits are forfeited, and they may be subjected to disciplinary action;
- Going forward IOD investigations will be conducted by the Area Commissioner's office to supplement the departmental investigation;
- Officials must be visited to ensure that they are recuperating, and doctors’ reports must be monitored for progress;
- Where there is doubt in respect of an alleged injury, the employer will report the incident to the Compensation Commissioner but will withhold or limit the authorization of a G111 to cover medical treatment until such time as the Compensation Commissioner adjudicates on the claim;

- You are requested to bring the content of this communication to the attention of all officials at your respective centers and acknowledge receipt of this communication by Wednesday 6 December 2023.

5.10 The respondent claimed that the last paragraph indicated that all applicants were informed. I beg to disagree with that contention. There is no mention of any meeting in that letter and definitely not an instruction to the Heads to arrange reintegration meetings with the applicants. There is therefore no proof that the respondent took any steps to include the applicants in their so-called reviews. It must be noted that I have nothing against the respondent trying to meet up with the applicants to discuss alternative employment but there is nothing in the Act or the guide that states that this should be done. So, even if the respondent wanted to discuss reintegration with the applicants, the successful or unsuccessful completion of such talks could not have any impact on their claim as it is up to the Compensation Commissioner to decide on the claims.

5.11 It's important to note that the respondent cannot unilaterally decide to withdraw the IOD leave. This is confirmed in the liability letter that was sent by the Compensation Commissioner to the Department of Correctional Services when the claim was submitted. It stated: "*The compensation commissioner has received your claim and, on the information supplied, liability has been accepted on behalf of your Department. Therefore, your administration is liable for payment of the employees' full salary in terms of the staff personnel Code for as long as he is unable to perform normal duties as a result of this injury/occupational disease as well as reasonable medical expenses incurred".* The applicants had furthermore not provided a doctor's report which stated that they were fit for duty. The respondent is not a medical doctor and can therefore not decide that the applicants should be able to report for duty on 01 March 2024 and stop the IOD leave.

5.12 The respondent finally claimed that the HRM had evaluated the claim and had declined it. It must be noted that the HRM is appointed to deal with TIL claims and not with IOD leave. The HRM had evaluated one TIL claim from the applicants. This evaluation was related to a period after the IOD leave was withdrawn by the respondent and just deals with a snapshot of the applicants' illness/injuries.

5.13 The practice of the respondent, to force an employee to take up his/her annual leave and sick leave until the IOD has been granted conflicts with the above-mentioned legislation. It is confirmed by section 24 of the BCEA that leave for OID is not the same as sick leave. The COIDA Act states specifically that the employer is responsible for the payment of compensation DURING temporary disablement. It says DURING and not AFTER. The

respondent therefore had to grant leave for occupational injuries from the moment the incident took place, and the applicants were booked off until the applicants are declared fit for duty.

5.14 The respondent is in breach with PSCBC Resolution 7 of 2000.

6. AWARD

6.1 The respondent breached PSCB Resolution 7 of 2000 and needs to reinstate the occupational diseases and injuries' leave as from 01 March 2024.

6.2 There is no order as to costs.

Signed at Cape Town on this 28 October 2024

I De Vlieger-Seynhaeve
PSCBC Panelist