IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL
HELD VIRTUALLY

CASE NO: PSCBC187-24/25

IN THE MATTER BETWEEN:

PSA obo I Z G Kole **APPLICANT**

and

Department of Employment and Labour **RESPONDENT**

ARBITRATION AWARD

DATE OF ARBITRATION	:	20 February, 08 April, 26 May and 16 July 2025
CLOSING ARGUMENTS	:	27 July 2025
DATE OF AWARD	:	08 August 2025
ARBITRATOR	:	I de Vlieger-Seynhaeve

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The matter was set down for a virtual arbitration hearing through Zoom on 20 February, 08 April, 26 May and 16 July 2025. The Applicant was represented by Ms Ralawe from the PSA. The Respondent was represented by Ms Mbovane.

1.2 The proceedings were recorded digitally.

2. ISSUE TO BE DECIDED

2.1 The issue is about the interpretation and/or application of Resolution 7 of 2000. The issue to be determined is whether the respondent correctly interpreted and applied the provisions of Resolution 07 of 2000 and Resolution 05 of 2001.

3. SURVEY OF EVIDENCE & ARGUMENT

3.1 The matter is about declined TIL applications for the following periods:
1) 29/09/23 - 27/10/23 (21 working days), outcome received on 14/05/24
2) 30/10/23 - 30/11/23 (24 working days), outcome received on 14/05/24
3) 22/03/23 - 21/04/23 (21 working days), outcome received on 14/05/24
4) 17/02/23 - 20/02/23 (2 working days), outcome received on 14/05/24
5) 19/01/23 - 17/02/23 (22 working days), outcome received on 14/05/24
6) 19/12/22 - 18/01/23 (20 working days), outcome received on 14/05/24
7) 17/10/22 - 16/11/22 (23 working days), outcome received on 14/05/24
8) 19/09/22 - 14/10/22 (20 working days), outcome received on 14/05/24
9) 12/04/21 - 07/05/21 (19 working days), outcome received on 10/08/21
Both parties called witnesses and submitted closing arguments in writing.

Applicant's evidence

3.2 Mr Kole was the first witness and testified under oath that he has been on sick leave since 2018. He was hospitalised in 2018 and 2021. He would get a sick note and submit it to the office together with his leave form. The respondent had lost some of the sick notes which resulted in them instituting unpaid leave for the following periods:
02/01/20 - 15/10/20
04/01/21 - 08/03/21
13/09/21 - 11/12/21

15/05/22 - 16/09/22

He tried to engage with Mr Tau, the office manager, who told him to go back to the doctor. However, the doctor could not re-issue the certificates but gave him a letter confirming his absence. He lodged a grievance in 2023 where the respondent acknowledged that they lost the sick certificates. He received the outcome on 14 May 2024. He then lodged another grievance. There were also 5 periods for which there was no response. The periods are as follows:

1) 22/04/23 - 22/05/23
2) 23/05/23 - 23/06/23
3) 24/06/23 - 26/07/23
4) 27/07/23 - 27/08/23
5) 28/08/23 - 28/09/23

A second opinion was then received. He then returned to work but no duties were assigned to him.

3.3 During cross-examination, it was put to him that he submitted application forms regularly although he did not see a doctor each month. The witness replied that on days that his sick leave would end, he would get a new certificate. He would submit it without seeing his doctor for a consultation. He would go for a consultation every 3 to 4 months. It was then asked if he submitted new evidence when the applications were denied. The witness stated that he did not do so.

3.4 Ms Moseki, a labour inspector and a colleague of the applicant, was the second witness and testified under oath that her TIL application was also declined after a long period of time. The respondent also lost some of her sick notes.

Respondent's evidence

3.5 Mr Dassie, a Chief Personnel Officer working at HR Administration, was the first witness and testified under oath about the procedure that is followed when a TIL application is received. He stated that the applicant used 1 appendix for all his TIL applications. He also did not submit his applications within the required framework. The applications that were not dealt with were not compliant. The applicant was informed about what was needed and he only submitted the correct appendix form the following year.

3.6 During cross-examination, it was asked what a secondary assessment was. The witness replied that because the applicant was absent for a prolonged period of time, they had to send him for a second opinion. If the HRM is not satisfied with the provided information that

is received from the applicant, they can request more information and a secondary assessment can be done.

3.7 Mr Tau, the Deputy Director Labour Relations Operations, was the last witness and testified under oath that they had followed the recommendations made by the HRM. It was then put to him that the respondent had lost some sick certificates. The witness denied that and stated that the applicant had to apply for sick leave but he had applied for TIL instead.

4. ANALYSIS OF EVIDENCE AND ARGUMENT

4.1 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.

4.2 Section 24 of the LRA deals with how disputes about collective agreements should be dealt with. Section 138 (9) LRA provides that *"the Commissioner may make any appropriate 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 award."

4.3 The scope of an arbitrator in an interpretation/application dispute is to determine whether the respondent failed to apply or interpret the provisions of a particular Collective Agreement. A dispute over the interpretation of a collective agreement arises only when the parties disagree over the meaning of a particular provision of an agreement, whilst a dispute about the application of that agreement pertains to disagreement over whether the agreement applies to a particular set of facts or circumstances, or whether it should be applied in a particular way. (See J. Grogan: Workplace Law 2009 at pp361 to 362).

4.4 In ***North-East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others (1997) 18 ILJ 971 (LAC)***, Froneman DJP stated that a collective agreement is unlike other ordinary contracts and that the primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements. This, it was stated, was better suited to promote the "effective, fair and speedy resolution of labour disputes". In ***NEHAWU v Department of Social Services and Population Development [2005] 11 BALR 1140 (PSCBC)***, it was further acknowledged 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 when interpreting collective agreements, evidence outside the written agreement itself is not generally permissible when the words of the memorandum are clear.

4.5 Paragraph 7.4 and 7.5 of the PSCBC Resolution 7 of 2000 deal with normal sick leave and with incapacity management in excess of the 36 days normal sick leave. An employee, who has exhausted its 36 days sick leave, MAY be granted additional sick leave (TIL) on full pay where the provisions of paragraphs 7.5.1 (a) (i) & (ii) of Resolution 7 of 2000 are complied with and the employer, after investigations, including investigations in accordance with item 10(1) of Schedule 8 of the LRA, so decides. Resolution 7 of 2000 is amplified by the Policy and Procedure on Incapacity Leave and Ill-Health Retirement (PILIR), determined in terms of section 3 (2) of the Public Service Act 1994, as amended by the Minister for Public Service and Administration. The employer has a discretion to grant the TIL, although it needs to exercise its discretion properly (must take into account relevant information, follow laid down procedures and act within the framework of the Collective Agreement). Not every failure on the part of the employer to comply with the Collective Agreement will necessarily result in a claim of right on the part of the employee. The employee still needs to show that he qualified for the relief sought, that the employer failed to comply with the agreement and in doing so prejudiced him (see also PSCB601-11/12).

4.6 A lot was said about the reintegration of the applicant and the involvement of the EAP. However, this dispute is not about his re-integration but about the declined TIL applications.

4.7 Resolution 7 of 2000 states in paragraph 7.5.1 (b): “*The employer shall, during 30 working days, investigate the extent of the 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”.*

4.8 The applicant stated that the respondent was in breach with the Resolution as he took more than 30 days to respond to the TIL applications. The respondent stated that they were within the time frame but that they waited for the HRM as they were delayed. Seeing that the whole application needs to be investigated within 30 working days, the delay of the HRM is calculated within those 30 days. The respondent was therefore in breach with the Resolution when it did not comply with this.

4.9 Although the applicant is claiming that the respondent breached the Resolution by not giving feedback on time, it must be noted that he also did not always comply with the time frames. A TIL application needs to be submitted within 5 days after the first day of absence. There

were many TIL applications submitted and some were declined, and some were not dealt with. There is no obligation on the respondent to accept TIL applications received out of time. The applicant gave a list of TIL applications that were not dealt with:

1) 22/04/23 - 22/05/23
2) 23/05/23 - 23/06/23
3) 24/06/23 - 26/07/23
4) 27/07/23 - 27/08/23
5) 28/08/23 - 28/09/23

4.10 In terms of 1) the applicant signed the application on 19 April 2023 and the manager signed for receipt on 21 April 2023. This application was therefore not submitted late and should have been considered by the respondent.
In terms of 2) The applicant signed the form on 31 May 2023 while the manager signed for it on 06 June 2023. This application fell outside the 5 working days for submission.
In terms of 3) the applicant signed the form on 01 November 2023. There is no information when the manager received it but the application was submitted late.
In terms of 4) the applicant signed on 18 January 2024 while the manager signed on 19 January 2024. This application is also late.
In terms of 5) the applicant signed on 11 January 2024 and the application was not signed by the manager. This application is late too.

4.11 There is therefore one application that was received within the required timeframe but was not considered. Although the applicant has been told by the HRM that he should not submit a backdated application, this is the case in this instance. This is because the applicant keeps on submitting applications for short TIL while he is actually on long TIL and should submit a form accordingly. Be that as it may, the respondent should have accepted this application.

4.12 The respondent did accept a number of applications, even when they were received out of the time frame. I refer to the email where Mr Tau reminded the applicant that he had used an outdated Appendix Form for the applications nr 3), 5), 6), 7) and 8) mentioned in par 3.1. Although this caused a delay, the respondent still accepted those applications. And by accepting them, they condoned the delay. I will therefore deal with these applications now.

4.13 When a TIL application is declined, the employee has the opportunity to lodge a grievance and address the issues that were raised in the rejection letter. He could therefore submit a more detailed doctor’s report. Especially in a case where someone is absent for a prolonged period of time, the HRM will need to see a more detailed evaluation than a simple doctor’s certificate booking the employee off. This is explained in the HRM report which declined the

periods 17/10/2022 – 16/11/2022; 9/09/22 – 14/10/22 and 19/12/22 – 18/01/23. The HRM states *that they note with concern the prolonged continuous absence without treatment being optimized, as well as a lack of comprehensive medical information. There is no evidence of any referral of Mr Kole for psychotherapy, and any impact of the stated diagnosis on functional capacity, treatment and management plan instituted, including hospitalization, and/or titration of medication during the period applied for. The medical certificate is also backdated and thus invalid for the TIL under consideration*. *Mr Kole is reminded that TIL applications require consultation with the medical practitioner on the first day of absence. Any deviation from this requires substantiating evidence to be provided with the application. Future TIL applications due to the same or related medical condition should be accompanied by a detailed medical report from the treating specialist psychiatrist detailing reason for absence, clinical presentation and limitations rendering the employee unable to attend to his normal duties*. Although I am aware that the applicant did not receive the HRM report he received a letter stating the same. However, he did not submit new medical evidence. Seeing that the TIL applications are decided by medically trained people and I am not such a person, I cannot substitute their findings in relation to whether TIL should be granted or not.

4.14 It is clear that the respondent breached the time frame and did not finalise the TIL application within 30 working days. I hereby like to refer to the judgment in the matter ***PSA obo H C Gouvea v PSCBC and Others, LC 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 finalized 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 01 July 2008. From the given facts, as I understand them, a report was issued by the HRM declining the application for a periodical TIL for 04 December 2007 to 30 June 2008. This report sought to have retrospective effect in that it amounts to an unreasonable and arbitrary exercise of a discretion with unfair consequences to an employee.* This finding was confirmed in the matter of ***Department of Roads and Transport v JC Robertson & Others, LC No PR 40/14 dated 15 February 2017*** which refers to *clause 15 of the Determination of Leave of Absence in the Public Service and clauses 7.1 and 7.3 of the Policy and Procedure on Incapacity Leave and Ill-Health Retirement (PILIR). These clauses require of an employer to conditionally grant an applicant employee a maximum of 30 consecutive working days as temporary incapacity leave with full pay. These clauses further prescribe a time limit within which the employer must approve or refuse the TIL which has been granted conditionally. Under the Determination and PILIR, the employer has a period of 30 working days within which to approve or refuse the TIL which has been granted conditionally. The Determination does not vest the respondent with the power to grant temporary incapacity leave for such a long period. The respondent could only have conditionally granted the applicant a maximum of 30*

consecutive working days TIL with full pay. To conditionally grant Mr Potgieter's application for TIL from 09 March 2009 to 30 June 2009 with full pay far exceeded the maximum of 30 consecutive days denoted by clause 15.8.1 of the Determination.

4.15 I also like to refer to the matter ***POPCRU obo Mbongwa & Department of Correctional Services & Others (Case D642/15) LC***. In that matter, Judge Whitcher stated that the interpretation in the Gouvea judgment is not sustainable as: "*A late determination of an employee's application for additional leave, as lamentable as this is, and a subsequent instruction to pay back money to which the employee is not entitled does not produce a decision that retrospectively deprives the employee of a right to the payment in question. The employee has conditionally been paid a salary while his application was considered. If the period the employer takes to decide the application exceeds the 30 days set out in PILIR, I do not see how the conditionality of payments to an employee, subject to a medical assessment, hardens any entitlement after the 30 days investigation lapses. Nor should a reasonable employee applying for additional leave assume that should the medical assessment go against them, even if delayed, they are entitled to be paid for their absence from work. It seems to me that, if the underlying medical condition which prompted an employee to seek additional sick leave, is assessed not to have warranted such leave, this fact must determine what happens to any payments they received while applying and not the employer's delay in attending to the application".*

4.16 The judgments confirm that the PILIR policy provides that the 30 working days conditionally granted TIL and the 30 working days given to the respondent to investigate the TIL application should coincide. In order words, the decision on an employee's application for TIL must be made well within the same period as the conditionally granted maximum of 30 consecutive working days TIL. This has as a consequence that an employer who, for example received a TIL application for 60 days, would need to decide on the TIL application within 30 working days and also cannot grant more than 30 working leave of conditional TIL leave. If the employer does not comply with the timeframe and only decides on the application 5 months down the line, the employer cannot claim more money back from the employee than the conditionally granted 30 days. The delay in their investigation will not result in conditionally granting more than 30 days TIL leave.

4.17 I also read the judgment of Whitcher in ***POPCRU obo Mbongwa & Department of Correctional Services & Others (Case D642/15) LC*** as being applicable to a matter where the employer did not comply with the investigation period of 30 days but also did not grant more than 30 days conditional leave. The judgment cannot be read as giving permission to

the employer to deduct monies for long periods of TIL when only 30 days conditional leave could have been granted.

4.18 In the current matter, the applicant only applied for short periods of TIL. This means that with every application, the employer could conditionally grant 30 days TIL. If the applicant had applied for a long period of TIL, the employer could only grant 30 days' once off. All the applicant's applications were for a period of less than 30 days which means that the number of conditionally granted days in each application was not exceeded by the respondent.

4.19 A lot was said about sick certificates that were submitted but were lost by the respondent. These TIL applications were for the periods:
02/01/20 - 15/10/20
04/01/21 - 08/03/21
13/09/21 - 11/12/21
15/05/22 - 16/09/22
However, those TIL applications were not submitted and I have no information on whether these were rejected because of lack of medical certificate or if it was for the same reason as the other rejections (lack of a comprehensive report).

4.20 Seeing that the TIL applications were considered, although some very late, the respondent could take steps to recover the conditionally granted leave days. The applicant stated that he had not given his consent to the salary deductions when the TIL applications were declined. It is correct that the Constitutional Court declared section 38 (2)(b)(i) of the Public Service Act unconstitutional (see ***PSA obo O I Ubogu v Head of Department of Health, Gauteng and Others [2017] ZACC 45***). While section 38(2)(b)(i) is restricted, overpayments can still be recovered through other legal processes such as court actions or processes compliant with the Basic Conditions of Employment Act. If the respondent did not follow the required procedure, the remedy here is to seek urgent relief or an interdict. The Labour Court possesses such powers under section 158 (1)(a)(i)(ii) of the LRA.

5. AWARD

5.1 The respondent breached the Resolution when it did not comply with the 30 working days' requirement within which it needs to investigate the TIL applications. The respondent is hereby ordered to comply with the Resolution.

5.2 The TIL application dated 22/04/23 - 22/05/23 was not considered by the respondent without a valid reason not to do so. The respondent has hereby 30 working days, from receiving the award, to investigate the TIL application and give feedback to the applicant.

5.3 The respondent was entitled to recover any monies conditionally granted through legal processes such as court actions or processes compliant with the Basic Conditions of Employment Act. This was not done in this instance. However, the PSCBC has no jurisdiction over a dispute in terms of non-compliance with the processes that need to be followed in terms of deductions.

5.4 There is no order as to costs.

Signed at Cape Town on 08 August 2025

I De Vlieger-Seynhaeve
PSCBC Arbitrator