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ARBITRATION AWARD

Panellist/s: Motseki A. Mokoena
Case No.: GPBC 937/2021
Date of Award: 23 July 2022

In the ARBITRATION between:

PSA obo C. PETERSON

(Union / Applicant)

and

DEPARTMENT OF CORRECTIONAL SERVICES

(Respondent)

Union/Applicant's representative: Mr. NCEBA BAARDMAN

Respondent's representative: Ms MARILIE BERRY

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

The arbitration process was scheduled on virtual platform on 27 June 2022.
The Applicant Mr. C. Peterson was represented by Mr N. Baardman an official of the union (PSA). The Respondent Department of Correctional Services was represented by Ms. M. Berry Labour Relations official. The proceedings were digitally recorded.

ISSUE TO BE DECIDED:

I must decide whether or not the alleged conduct of the respondent amounts to unfair labour practice.

BACKGROUND TO THE MATTER:

The following issues are common to parties: The applicant submitted an application/request for Temporary Incapacity Leave (TIL) from 19 July 2019 to 03 January 2020.
The respondent has appointed an independent company (HRM) to deal with its Temporary Incapacity Leave (TIL) applications. The applicant had applied for Temporary Incapacity Leave and the respondent through Health Risk Manager (HRM) declined some days.

The Health Risk Manager (HRM) approved only 76 working days for the period 17 July 2019 to 30 September 2019. The final outcome of the respondent was received on the 01 October 2020.
The Respondent did not comply with the 30-day time frame indicated in **Resolution 7 of 2000** and **PILIR Policy** document.

The Applicant prays for the approval of Temporary Incapacity Leave (TIL) and that the decision to deduct R57 963,84c be set aside. He further prays for twelve (12) months compensation.
The Respondent's prayer is that this matter should be dismissed as the Respondent has not committed any unfair labour practice. The applicant submitted a bundle and it was named "***Bundle A1***" and the ones for the respondent "***Bundle R1***" and "***Bundle R2***".

SURVEY OF EVIDENCE AND ARGUMENT:

EVIDENCE OF THE APPLICANT

The **1st witness: Garreth Cecil Peterson testified under oath as follows**:

He is the Human Resources Manager at Bethulie Correctional Centre. He had credit of 27 leave days from the previous cycle (**Page 2 R Bundle**). He received a letter form the respondent on the 11 March 2021 instructing him to make repayments arrangement. He suffered a loss of income in that he had to make arrangements to pay back R 57 963,84c [**Page 58 A Bundle**] (ie the money he received between 01 October 2019 and 03 January 2020).
If the respondent had given the decision within the required PILIAR regulations he could not have suffered this much loss as he could have used 27 credit leave days. He was not given any reason for the delayed outcome. He would like to be paid back the money as that amounted to unfair labour practice as procedures were not

followed. He wants the deductions to stop and be given 12 months compensation. Under cross examination he testified that he would like to be compensated 12 months for the prejudice suffered and unfair labour practice.

CLOSING ARGUMENT AS SUBMITTED BY THE APPLICANT

Resolution 7 of 2000 as amended by PSCBC Resolutions 5 of 2001, 15 of 2002 and 1 of 2007 (Referred to herein as R 7/200072) amongst other things at paragraphs 7.4 and 7.5 covers normal sick leave, and incapacity management i.e. (TIL) and (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. PILIR was introduced by the DPSA in order to guide departments to properly manage applications for sick and incapacity leave (TIL/ PIL & IHR) in accordance with R 7/2000 and to control and streamline procedures to expedite such processes. In addition, *The Determination and Directive on Leave of Absence in the Public Service* (DLA) made by the Minister for the Public Service and Administration (MPSA) in terms of section 3(5) and 5(6) of the Public Service Act, 1994 as amended, amongst other things, gives effect to clause 7 of R 7/2000.

PSCBC Resolution 7/2000 makes provision for incapacity management relating to temporary and permanent incapacity in excess of the 36 days normal sick leave and Ill Health Retirement (IHR) at Par 7.5. Par 7.5.1, PSCBC Resolution 7 of 2000, 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

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:

(a) her or his supervisor is informed that the applicant is ill, and

(b) *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.*

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.

The DPSA introduced PILIR in order to properly manage applications for sick and incapacity leave including Ill Health Retirement (IHR) in accordance with R 7/2000 and to control and streamline procedures to expedite such processes. Provision was made for training and for the expeditious management of incapacity leave and the inclusion thereof in the performance agreements of the Heads of Department and the Senior Management Service. R 7/2000 refers to the employer taking the necessary decisions, and as stated above the HRM is appointed to advise and make recommendations to the employer in respect of applications for incapacity and IHR.

The responsibility for making such investigations and for taking such decisions within the time frames agreed in R 7/2000 however rests on the respondent, not the HRM. In so far as it may be relevant, no directive or act of a minister / functionary may be contrary to a collective agreement that concerns conditions of employment of employees appointed in terms of the Public Service Act.

The clear purpose of Par. 7.5. 1 of PSCBC Resolution 7/2000 (and PILIR, see above) is to ensure that

employees' incapacity is dealt with in a controlled and orderly manner, properly managed, addressed and **resolved within the relevant time frames**, which if followed would result in TIL being confirmed / declined, alternatively the accommodation of the employee (but within the time frame provided) in line with the principle of effective, fair and speedy resolution of labour disputes.
Where incapacity leave is declined, the employee should be required to return to work, leave without pay instituted alternatively misconduct proceedings or possibly dismissal for incapacity.

If the employee is not satisfied with the employer's decision, the employee may lodge a grievance and dependent on the outcome refer a dispute to the relevant bargaining council for the purpose of resolvingthedispute.

The applicant has suffered prejudice in that he could not use these 27 days to cover the decline TIL because the outcome came outside the leave cycle.
The applicant had 27 days credit for 2019 (see Respondent's Bundle – page 2) which if the PILIR was managed accordingly these days would have been used to replace the decline TIL.

On 11 March 2021, the applicant received the notice of intention to recover the amount of R57 963.84 for the TIL which was declined for the period between 01October 2019 and 03 January 2020. (Page 58 of the applicant's bundle).
In the matter of ***PSA and Another v PSCBC and Others*** **(D751/09) [2013] ZALCD (*Gouvea*), the Labour Court**, in dealing with the failure of an employer to render a decision regarding the approval or disapproval of TIL within the 30-day period, per Cele J stated as follows:

[par 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 of 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 court in this matter was confirming what is read on the PILIR which is peremptory in nature (Page 80 of the applicant's bundle – 7.2.9).

In Apollo Tyers South Africa (Pty) Ltd v CCMA and others (DA 1/11) [2013] ZALAC 3; [2013] 5 BLLR 434 (LAC); (2013) 34 ILJ 1120 (LAC) (handed down on 21 February 2013) The Court held the definition of benefit, as contemplated in section 186(2)(a) of the LRA was not confined to rights arising ex contractu or ex lege, but included rights judicially created as well as advantage or privileges employees have been offered or granted in terms of a policy or practice subject to the Employer's discretion and that in this instance the early retirement scheme constituted a benefit.

In **SAPO Ltd v Kriek and others (P 190/12) [2016] ZALCPE 12 (handed down on 22 April 2016)** the Employer had refused the Employee Temporary Total Disability (TTD) benefits. In addition, deductions were made from the Employee's salary for benefits previously paid. The Commissioner found that the refusal of TTD

benefits, based on the evidence before him, constituted an unfair labour practice and ordered the Employer to grant such benefits to the Employee and to refund her any deductions made to recover TTD benefits, as previously paid. On review, the Labour Court dismissed the points in limine that the TTD benefits were determined by the Sanlam policy and that it was not the Employer, but the insurer, who had refused the benefits. The review on the merits was also dismissed, but the Court remitted the matter back to the CCMA for a quantification of the deductions made.

In **Skhosana v CCMA and others (JR 2160/15) [2019] ZALCJHB 39 (handed down on 5 March 2019)** the Court held that in the case of an unfair labour practice dispute relating to benefits, it is often difficult to draw a clear distinction between what is the substantive justification for the conduct of an Employer, and what can be seen to be procedurally fair in the course of such conduct. In the end, it is a single holistic enquiry, with the view to deciding whether the decision taken by the Employer was fair. It is not appropriate to separate it into substantive and procedural components. There is no distinct and separate requirement of procedural fairness, in unfair labour practice disputes relating to benefits, as would be, for example, the case where it comes to dismissals. The unfair labour practice doctrine is intended to protect against irrational, mala fide and arbitrary decision making by an Employer, and any decision by an Employer must be evaluated on that basis, and not the basis of the dual fairness requirement of substantive fairness on the one hand, and procedural fairness on the other.

It is the submission of the applicant that the respondent had committed an unfair labour practice looking into the authorities above. The applicant would have made arrangements that his leave be converted to cover the declined TIL should the respondent followed the timelines as contemplated in the policy. We therefore view the decision by the respondent **irrational, mala fide and arbitrary.**

Section 194 (4) of the Labour Relations Act[1] provides “The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all circumstances but not more than the required 12 months remuneration”.
The Labour Appeal Court in the ***Ferodo v De Ruiter,*** in dealing with the issue of compensation in an unfair labour practice under the 1956 Labour Relations Act, formulated following guidelines which are in my view apposite even under the current labour regime;
There must be evidence of actual financial loss suffered by the employee claiming compensation
There must be proof that the loss was caused by the unfair labour practice. The loss must be foreseeable.
The decision of the Labour Appeal Court in ***Johnson & Johnson v Cwiu***[2] is also instructive on the approach to be adopted when dealing with the issue of compensation although the decision dealt with section 194 prior to the 2002 amendments of the LRA. The Court held that even if it is acceptable that compensation means a sum of money for the loss suffered by an employee, the loss suffered is not necessarily the actual loss suffered as a result of the procedural unfairness. Compensation in terms of Johnson & Johnson included **payments in solace for the loss of a right**.

EVIDENCE OF THE RESPONDENT

The respondent did not call any witness.

CLOSING ARGUMENT AS SUBMITTED BY THE RESPONDENT

Resolution 7 of 2000 as per paragraph 7.5.1 sub-paragraph (a) (i) and (ii), (b) and (c) indicates as follows:

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:
her or his supervisor is informed that the employee is ill; and
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.

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.

The employer shall specify the level of approval in respect of applications for disability leave.

According to the Applicant the Respondent has failed to adhere to the time frames as indicated in Resolution 7 of 2000 and that the Health Risk Manager (appointed and utilized by the Department of Correctional Services), took extremely long to provide the outcome regarding the application submitted by the Applicant for his Temporary Incapacity Leave (TIL).

For an application for Temporary Incapacity Leave (TIL) to be considered, the employee must provide sufficient proof that he/she is too ill to work satisfactorily and attach a medical certificate from a registered medical practitioner certifying the condition as temporary with his/her application.

Resolution 7 of 2000 must be read with the relevant clauses in the Determination of Leave in the Public Service.
In the Leave Determination in the Public Service paragraph 15.1 with regard to Temporary Incapacity Leave (TIL) it is indicated as follows:
Incapacity leave **is not an unlimited number of additional sick leave** days at an employee's disposal. Incapacity leave is additional sick leave granted conditionally at the employer's discretion, read with the Policy and Procedure on Incapacity Leave for Ill-health Retirement determined by the Minister for Public Service and Administration in terms of the Public Service Act, 1994, (hereafter referred to as PILIR).

The period of absence is relatively long and a reasonable employee ought to have considered the possible implications should the Temporary Incapacity Leave (TIL) not be granted even if all application(s) have been submitted in this regard.

The reliance on the delay of the Respondent on the 30 days response time should not to be regarded as not rendering a service.
An employee must be aware that even if the response is delayed that there could be implications that will follow that might have financial implications on the employee.

The POPCRU and L E E Mbongwa v The Department of Correctional Services and other delivered by **Judge Whitcher** on the 23 November 2016 has provided new direction in dealing with temporary incapacity leave.

The following are recorded from the judgment and where necessary the applicant's submissions are incorporated in the finding:

"WHITCHER J
Clause 3.1 of the respondent's Policy and Procedure on Incapacity Leave and III-Health Retirement Policy (PILIR) provides that if an employee has exhausted his or her normal sick leave of 36 working days in a sick leave cycle of 3 years, the respondent, may at its discretion, grant temporary incapacity leave (TIL). The PILIR Policy of 2005 is additionally a ministerial determination determined in terms of section 3 (3) (c) of the Public Service Act of 1994. It amplifies a collective agreement, Resolution 7 of 2000, concluded in the Public Service Bargaining Council.

Clause 7.1.1 of PILIR provides that incapacity leave is granted **conditionally** at the employer's discretion.

Clause 7.3.3 provides that the employer must within 5 working days from receipt of the written application for incapacity leave conditionally grant a maximum of 30 consecutive working days temporary incapacity leave with full pay subject to the outcome of its investigation.

Clause 7.3.5 provides that the employer must within 30 working days after receipt of the application approve or refuse temporary incapacity leave granted conditionally on conditions that the employer may determine.

Clause 7.3.5 provides further that if the employer (i) approves the temporary incapacity leave granted conditionally, such leave must be converted into temporary incapacity leave; or if the employer (ii) refuses the temporary incapacity leave granted conditionally, the employer must notify the employee in writing of the refusal, the reasons thereof, that the employee has the right to lodge a grievance against such refusal.

The first page of the application form contains a number of warning notes to the applicant.

Note 4 warns that the application for temporary incapacity leave is subjected to an investigation and in Page 8 of 12 light hereof, the employer shall grant temporary incapacity leave conditionally for a maximum period of 30 working days with full pay subject to the outcome of the investigation.

Note 5 further cautions the applicant that if the application is declined based upon the outcome of the investigation the period of temporary incapacity leave shall be converted to either annual leave or unpaid leave.

Section 38 (1) of the Public Service Act, 1994 provides that if a state employee has, in respect of his salary, including any portion of any allowance or other remuneration or any other benefit calculated on his salary or awarded to him by reason of his salary, been overpaid or received any such other benefit not due to him, an amount equal to the amount of the overpayment shall be recovered from him by way of the deduction from his salary of such instalments as the head of department, with the approval of the Treasury, may determine.

The applicant is employed by the respondent and was booked off on sick leave and part of her leave was granted and the rest was declined. The employer commenced deductions from her salary.

The Applicant prays for an order in the following terms: The Respondent incorrectly applied the provisions of Resolution 7 of 2000 in relation to the Applicant's application for Temporary disability Leave (Clause 7.5.1 (b)) by failing to respond to the applicant within 30 days after receipt of the application. The respondent gave results for these applicants out of time frame as suggested by the collective agreement/ resolution;

The Applicant was not at work from the 10.06.2011 to 31.07.2015 and according to the employer she has still not returned to work despite being asked to do so. The applicant's submissions:

The applicant contends that the deductions are unlawful because the respondent failed to make a decision and notify her thereof within the time periods prescribed in the PILIR (the 30 working day period referred to in clause 7.3.5) and because the respondent failed to afford her a hearing prior to taking the decision to effect the deductions.

At the hearing of this matter (not in his founding affidavit), it was contended on behalf of the applicant that when he did not hear from the respondent after the 30 working day period, and thus advised the applicant timeously that his leave had only been partially granted.

It was further contended at the hearing that if the respondent had complied within the 30 days period, and thus advised the applicant timeously that his leave had only been partially granted, he would have reconsidered his position, which may have included returning to work to avert financial prejudice. It was contended that the policy implicitly provides the applicant with this right and the respondent's failure to afford him same caused the financial loss. Page 9 of 12

Lastly, the applicant contended, section 38 of the Public Service Act, 1994 does not have application to his case because the payments made to him do not constitute "overpayments" of remuneration arising from "an error" in calculating his remuneration. The respondent's submissions:

It is evident from the respondent's opposing affidavits that the processing of incapacity leave applications is cumbersome and time consuming. The application proceeds through various departments before it ends up at Proactive Health Solutions (PHS), the service provider tasked to assess all applications for temporary incapacity leave and to make recommendations thereon. The recommendation from the PHS also proceeds through various departments for approval before the employee is notified of the final outcome.

According to the respondent, it only received the recommendations from PHS in April 2013. Thereafter the recommendations were sent for approval to another department, the approval was granted in May 2013 and the applicant was informed of the outcome in April 2014

The respondent submitted that the policy and guidelines on temporary incapacity leave clearly warns applicants that temporary incapacity leave is only conditionally granted subject to the proviso that where leave is not approved and the employee has exhausted all sick and annual leave, then the sick leave taken will be regarded as leave without pay. The policy clears indicated that the employee assumes a risk: a risk that temporary incapacity leave may not be granted, and, if so, any leave taken will be regarded as either annual leave or unpaid leave.

The respondent pointed out that nowhere in his founding affidavit did the applicant alleges that he assumed the leave had been granted and that he would have reconsidered his position if he had been timeously advised of the final outcome. It is obviously an afterthought conceived by his counsel and is thus irrelevant and inadmissible.

The policy in clause 7.3 permitted the applicant to lodge a grievance against the outcome of his leave application, but he had failed to do so.

Section 38 of the PSA applies to the applicant's case in that he received remuneration not due to him- he was paid while on leave without pay.

Finally, to allow the applicant to retain the money will amount to irregular and wasteful expenditure, which is contrary to the provisions of the Public Finance Management Act, 1999 (PAAM) as the applicant did not render any services during the said period. Analysis and findings:

I am aware of the judgment of my learned brother, **Cele, J in Public Service Association of South Africa and Another v PSCBC, Gouvea and Others1** in [2013] ZALCD 3 (at para 20), unreported in this he finds that where an application for temporary incapacity leave is declined outside the 30 day investigation period, any deduction from an employee's salary for the period (outside the 30 day period) that he or she Page 10 of 12 was awaiting a decision from the employer would offend the prohibition against retrospectivity. Cele, J states, "the consequence of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee". This has been takes to mean that "employees cannot be subjected to leave without pay/monthly deduction for TIL/IHR is declined for a period they have been off work sick) or stoppage of salary unless the application is declined with 30 days or unless they have been given a date to return for work and have failed to do so, 2 Bezuidenhout / Department of Health: Eastern Cape (2014) 23 PSCBS 4.2.2,

The decision in Gouvea flowed from an analysis of clause 7.5.1 (b) of PSCBC Resolution 7 of 2000 which is identical in operation to clause 7.3.5 in PILIR? PILIR, a ministerial determination, indeed amplifies the earlier PSCBC Resolution 7 of 2000.

In my view this interpretation of PILIR is not sustainable in light of the fact that an employee applying for temporary incapacity leave has not been granted it yet. 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 was not entitled does not produce a decision that retrospectively deprives the employee of a right to the payment in question. An employee seeking additional sick leave in terms of PILIR has conditionally been paid a salary while their application for additional leave is considered. This consideration should be over within 30 days. However, 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 into an entitlement after the 30 day investigation period lapses. Nor, in light of clause 7.2.2.2, 7.3.3.2 and note 4 of PILIR, should a reasonable employee applying for additional leave assume that, should a 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 promoted an employee to seek additional sick leave, is assessed not to have warrant 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.

I also agree with the respondent's submission that section 38 of the PSA applies to the applicant's case in that he received remuneration not due to him."

[The POPCRU and L E E Mbongwa v The Department of Correctional Services and other delivered by **Judge Whitcher** on the 23 November 2016]
In the case of Mr. Peterson, the Applicant applied for Temporary Incapacity Leave (TIL) and was informed that a portion of the application was disapproved by the Health Risk Manager utilized by the Department of Correctional Services to assist with the approval / disapproval as well as recommendations of Temporary Incapacity Leave (TIL) applications by DCS Officials.

The feedback provided by the Health Risk Manager was as follows:

"Based on the medical information at hand the HRM notes that Mr. Peterson had already utilized 26 days of normal sick leave for recovery from the condition. The period of hospitalization for two weeks, a month prior to the period applied for has been noted. The HRM acknowledges that Mr. Peterson presented with some cognitive impairments during the period applied for. However, based on the medical information at hand, a period of 76 days post hospitalization is considered to have been sufficient for his adjust to medication and for his condition to stabilize considering two treatment reviews noted in July 2019 and again in September 2019".

"We wish to advise the employee that future applications for temporary incapacity leave due to psychiatric disorder should be accompanied by detailed medical evidence from the treating psychiatrist, detailing the exact nature and severity of his symptoms, and the treatment plan and response to prescribed treatment. A progress report from the treating clinical psychologist and occupational therapist will also be required, failure to submit this report might result in the application being declined".
(See page 56 of the Applicant's Bundle).

In the same feedback provided by the Health Risk Manager it is also indicated in the **Applicant's Bundle on page 57**, that:
"Should Mr. Peterson not be satisfied with the recommendation, he may lodge a grievance as contemplated in the terms of the rules made by the Public Service Commission. The employee would also be required to submit new and materially different medical evidence than that which accompanied this application".

The Temporary Incapacity Leave (TIL) was declined and the leave was treated as unpaid leave by the Employer and deductions had commenced from the salary of the Applicant.

Mr. Peterson, the Applicant was informed regarding the outcome / decision of his applications for Temporary Incapacity Leave (TIL) and that deductions will be made from his salary for the "unpaid leave". He consented to these deductions.

In **page 2 of the Respondent's Bundle R1** there is an indication that the applicant had 27 days current leave credits, however on **page 1 of the Respondent's Bundle R1,** the following is highlighted form paragraph 4:

"To this end you must keep in mind that should you not give the required consent or fail to give your consent within the 5 working day period or in the event where your annual leave credits are not sufficient, this department will proceed to cover the period concerned with unpaid leave".

Thus, the period was covered with unpaid leave, as the leave credits indicated was not sufficient or already utilized, therefore unpaid leave was instituted.
In light of the above-mentioned Judgment and the contents of the Resolution as well as the PILIR the Respondent is of the opinion that the Applicant received remuneration that was not due to him, whilst he awaited the assessment of his application for Temporary Incapacity Leave (TIL).

The fact that the application was disapproved is an indication to the Respondent that the Applicant, Mr. Peterson have not warranted such leave and therefore the entitled payment received during these periods was not due to him.

This process as mentioned above is prescribed in the Determination of Leave, the PILIR read with PSCBC Resolution 7 of 2000.

The Policy and Procedure on Incapacity Leave and ill-Health Retirement of April 2009 (herein after "PILIR") is clear with regard to the purpose of Temporary Incapacity Leave (TIL):

> 7.1.1. Incapacity leave is not an unlimited amount of additional sick leave days at an employee's disposal. Incapacity leave is additional sick leave granted conditionally at the Employer 's discretion, as provided for in the *Leave Determination* and *PILIR*.
>
> 7.1.2. An employee who has exhausted his/her normal sick leave, referred to in paragraph 12 of the *Leave Determination*, during the prescribed leave cycle and who according to the treating medical practitioner requires to be absent from work due to a temporary incapacity, may apply for temporary incapacity leave with full pay on the applicable application forms prescribed in terms of *PILIR* **in respect of each occasion**.

Paragraph 15 of the Directive on Leave deals with Temporary Incapacity Leave (TIL) and states clearly in paragraph 15.2 that it is additional to an employee's normal sick leave cycle and that the employer has a discretion to approve it or not. It is therefore not an outright right of an employee.

Paragraph 7.1.1 of the PILIR policy is also clear as it is indicating that the Temporary Incapacity Leave (TIL) is granted conditionally meaning the application can still be recommended or not recommended. It is not given that the application will be approved.

Paragraph 7.1.2 of the PILIR policy is also clear as it is indicating that the Temporary Incapacity Leave (TIL) application is done while the applicant is receiving full pay.

Public Servants are paid an annual salary, implicating that they are paid per day, whether they are working or not working – all the days of the year, a week and or a month.

It is clear that the issues relating to the dispute are emanating from two Policy documents, the Determination on Leave of Absence in the Public Service and the Policy on Incapacity Leave and Ill-Health Retirement ("PILIR").

The first is the Determination on Leave of Absence in the Public Service (July 2009), made by the Minister of Public Service and Administration (hereinafter "the Determination on Leave of Absence").

The second is the Policy and Procedure on Incapacity Leave and ill-Health Retirement of April 2009 (herein after "PILIR").

Both the Determination on Leave of Absence and the PILIR give effect to, inter alia, the provisions of clause 7.5.1 of Resolution 7 of 2000. These two policy documents set out, inter alia, the procedural steps to be followed by both the employer and the employee regarding an application for temporary incapacity leave.

The Determination on Leave of Absence, however, does not vest the Department of Correctional Services with the power to grant a conditional temporary incapacity leave for such a long period. Clause 15.8.1 of the said Determination reads thus:*" The Head of Department, must within 5 working days from the receipt of the employee's application for temporary incapacity leave 15.8.1 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 illness/injury".*

From the above it is apparent that the Department of Correctional Services could only have conditionally granted "temporary incapacity leave with full pay" to Mr Peterson.

In the matter between **Popcru and Another v Department of Correctional Services and Another (D642/15) (2016) ZALCD (23 November 2016)**, the Labour Court held that "A late determination of an employee's application for additional leave, as lamentable as this is, and a subsequent instruction to pay back the money to which the employee was not entitled does not produce a decision that retrospectively deprives the employee of a right to the payment in question. An employee seeking additional sick leave in terms of PILIR has conditionally been paid a salary while their application for additional leave is considered. This consideration should be over within 30 days".

As **Whitcher J** correctly put it, the failure of the respondent to finalise the decision in regard to the application within 30 days does not entitle the applicant to be paid for his leave of absence.

The fact that the Respondent did not comply with the time frame summarized in Clause 7.5.1(b) of the Resolution and PILIR is not disputable, however the Respondent did provide the Applicant with the outcome and required response to his application for Temporary Incapacity Leave (TIL).
The submission of all documents by the Applicant does not entitle him to a favourable outcome of his application. Even if the employee complies with the requirements as set out in Paragraph 7.5.1(a)(i) and (ii), the employer may still decide not to grant such leave or only partly approve such leave.

The origin of this dispute would then have been whether or not Clause 7.5.1 (b) of Resolution 7 of 2000 and paragraph 7.3.5.1 (e) of the PILIR Policy can be evoked.

The center of this dispute is the fact that the Respondent failed to finalize the decision on the submitted application within the prescribed 30-day period, and therefore the applicant alleges an Unfair Labour Practice.

In terms of Resolution 7 of 2000, paragraph 7.5.1 (b) it is prescribed that: "The employer shall during 30 days, investigate the extent of the inability to perform normal official duties, the degree or inability to perform normal official duties, the degree or inability and the cause thereof".

Investigations shall be in accordance with item 10(1) of Schedule 8 of the Labour Relations Act of 1995.

The Applicant's submission as it relates to paragraph 7.51 is that the employer must finalize the investigation on incapacity leave application within 30 working days and provide feedback. It is not clear from the Applicant's submissions that if the investigation is not concluded within 30 working days then how should this paragraph be interpreted safe to say it can be inferred from the reading of the relief sought, that the applicant case is that the employer cannot take the decision not to approve the incapacity leave beyond 30 working days of the investigation.

Our submission is that the paragraph does not provide for deemed approval in the event that the investigation is not concluded within 30 working days nor does it make provision to abandon the application if the investigation is not concluded in 30 working days – therefore there is no unfair labour practice from the side of the Respondent.

The submission of all documents by the Applicant therefore does not entitle him to a favourable outcome of his application. Even if the employee complies with the requirements as set out in Paragraph 7.5.1(a)(i) and (ii), the employer may still decide not to grant such leave or only partly approve such leave.

The Applicant argues that as a direct result of the Respondent's inability to keep to the collectively agreed upon timeframes, the Respondent should lose its discretionary powers in terms of the Resolution and the Applicant's Temporary Incapacity Leave (TIL) should be approved and not be regarded as unpaid leave.

ANALYSIS OF EVIDENCE AND ARGUMENT:

It is trite law that he/she who alleges must prove, thus the applicant has a duty to convince the Council that he is entitled to succeed with his claim. The applicant referred a dispute of Unfair Labour Practice relating to benefits.
In terms of sec.186(2) of the Labour Relations Act, Unfair Labour Practice means *any unfair act or omission that arises between an employer and an employee involving (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about the dismissals relating to probation) or training of an employee or relating to the provision of benefits to an employee.*

The crux of the application is that disapproval of TIL which emanates from Policy and Procedure on Incapacity Leave and Ill Health Retirement (hereinafter "PILIR" policy) amounts to Unfair Labour Practice as it is not in line with Resolution 7 of 2000. This Resolution (ie 7/2000) directs that within 30 days the incapacity enquiry should be finalized. There rest of the issues are common cause.

The Policy and Procedure on Incapacity Leave and ill Health Retirement ("PILIR" Policy) state the following: 'An employee who has exhausted his/her normal sick leave, referred to it in paragraph 12 of the Leave Determination during the prescribed leave cycle and who according to the treating medical practitioner requires to be absent from work due to temporary incapacity, may apply for incapacity leave with full pay on the applicable application forms in terms of PILIR in respect of each occasion'.

The applicant received the final decision of the respondent on 01 October 2020 (thirteen months from the date of application for TIL).
PILIR policy offers employees Temporary Incapacity Leave benefit and the evidence and submissions of the parties require me to determine whether in the present instance the employer exercised his discretion fair or not by not granting applicant the leave.
The issue which requires circumspection is the refusal of the respondent to grant leave to other days which impacted on the applicant. In order for the respondent to succeed with his decision not to extent the TIL, it must be shown that the applicant failed to act in a particular way and when one inspects the facts the circumstances were not favourable to act accordingly.
One has to take a step further by asking the question whether at the time when application was declined the applicant was in a position to exercise any other option, and the definite answer is, he did not have other options because the decision came more than a year after his submission of the application for Temporary Incapacity Leave (TIL).
If the process was finalized within thirty days the applicant would have enjoyed that benefit without any troubles.
It will be unfair to conclude without applying one's mind that the applicant knew that his application could be declined.
It is clear that at the time when the Health Risk Manager's (HRM) report was received the applicant had already resumed duties implying his health state was good.
The employer did not submit anything to try to convince me that it was possible for the applicant to comply with the HRM report.
The applicant testified that had he known that his TIL would be declined he could have used his 27 leave days from the previous cycle and I find it plausible. The Applicant's case is sparked by the delay caused by the respondent.

The fact that Health Risk Manager (HRM) is the third party assigned to by the respondent to deal with its TIL should not be understood to mean that the respondent is exonerated from its responsibility. It is my attitude that HRM should not be the excuse by the respondent.
It is my conviction that it was impossible for the applicant to obtain the medical evidence at the time he received the final outcome, that is to say, when it was brought to his attention that there is medical evidence required it was months after that period and surely the clinical psychologist, occupational therapist and psychiatrist would not have been in a position to determine what was the applicant's state of affairs then.

When viewed in all quarters the conduct of the respondent amounted to unfair labour practice. The unfair conduct of the respondent led it to the decision to recover **R57 963.84c** from the applicant.
If I allow the respondent's decision declining the applicant Temporary Incapacity Leave thirteen months after such application to stand, I will be allowing an ambush on the applicant.

The decision in ***PSA and Another v PSCBC and Others (D751/09) [2013] ZALCD 3 (Gouvea)*** is similar to this one of the applicant as Ms. Gouvea took leave and when it was later declined she had already used almost all the days. The circumstances of the applicant are similar to that of this case and I believe it is proper for me to find in favour of the applicant.

The applicant further prays for twelve months compensation for unfair labour practice and prejudice suffered.
I do not find anything in his evidence which suggests that the he deserves such compensation.
In view of the above I must therefore conclude that the respondent committed unfair labour practice.

AWARD

I hereby make the following order:

That the Respondent, Department of Correctional Services set aside the decision to deduct R 57 963,84c (Fifty-seven thousand, nine hundred and sixty-three rands and eighty-four cents) from the applicant's salary.

The respondent has until the 31 September 2022 to reverse the decision in the preceding paragraph.

Name:
Motseki A. Mokoena
(Council name) Arbitrator