



ARBITRATION AWARD

Panellist/s: Karen Kleinot _____
Case No.: PSCBC44-22/23 _____
Date of Ruling: 2 September 2022 _____

In the matter between:

PSA obo Mr. Olivier _____

(Union / Applicant)

And

Department of Correctional Services _____

(Respondent)

Details of the hearing

- 1 The matter was scheduled for arbitration on 24 August 2022 and held on a virtual platform, Zoom. Mr. H Hall represented the Applicant. Mr. M Berry represented the respondent. The matter was recorded.
- 2 Parties submitted a pre-arbitration minute and agreed to present a stated case on the papers. Submissions were made on 24 August 2022 and 31 August 2022.

Issue in dispute

- 3 The issue in dispute is whether the Respondent was incorrect in declining the applicant's Temporary Incapacity Leave after thirty (30) days of receiving the application and thereby prejudicing the applicant as is contained in resolution 7/2000.

Background to the dispute

- 4 Mr. J Olivier the applicant is employed at the Department of Correctional Services at Nigel Correctional Centre.
- 5 Various periods of TIL were applied for, and certain periods were approved.
- 6 The periods 13 July 2020 to 17 July 2020 and 1 May 2021 to 18 October 2021 were declined by the Department after the recommendation from the Health Risk Manager.
- 6 It was contended by the applicant that the respondent had to approve the TIL application within 30 days as per the resolution 7/ 2000. Further that as the respondent failed to comply with the stipulated time frame whether this caused the applicant prejudice.
- 7 If the claim succeeds, Mr. Olivier sought the approval of the above periods and reimbursement of the monies deducted.

Applicant's stated case

- 8 The applicant applied for TIL for two periods 13 July 2020 to 17 July 2020 and 1 May 2021 to 8 October 2021. The applications were submitted on 25 August 2020 and 24 May 2021 and 10 November 2021. The outcome of the application for the period 13 July 2020 to 17 July 2020 was provided on 23 February 2022, 17 months, and 28 days late. The response for the second application, was received on 26 July

2021, four months, and seven days late. For the period 5 October – 8 October 2021 a response was received on 16 January 2022, three months, and five days late.

- 9 Resolution 7/2000 provides in item 7.5.1.b, that *“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.”* The outcome of the investigation stands to be communicated to the applicant within 30 days.
- 10 Policy and Procedure on Incapacity Leave and Ill Health Retirement (PILIR) states *“7.2.3 The Health Risk Manager must acknowledge receipt of the above- mentioned report within 2 working days and confirm in writing that the Employer shall receive feedback on the application within 12 working days. It is incumbent on the Employer to confirm that the Health Risk Manager receives the report and required attachments.” “7.2.9 The Employer must within 30 working days after the receipt of both the application form and medical certificate referred to in paragraph 7.1.4 and 7.1.5, approve or refuse temporary incapacity leave granted conditionally”*
11. The thirty days period was not adhered to, and the applicant was not treated fairly as the time frames in the Resolution 7/2000 were not followed. This was also contrary to the Labour Relations Act item 10 and these applications were not dealt with expeditiously. The respondent has breached the Resolution and failed to provide a justifiable reason for such.

Relief sought

- 12 As the respondent has treated the applicant unfairly the following relief was sought: that the TIL for the periods; 13 July to 17 July 2020, 1 May 2021 to 1 September 2021 and 5 October 2021 to 8 October be approved. That all deductions made from the applicant's salary be reimbursed to him.

Legal Argument

- 13 It was argued that it was only fair that the employee be made aware within a reasonable time as to the status of the application, that is whether it has been approved or declined. This is since if it is declined it has financial consequences for the applicant.
- 14 Where a dispute about a collective agreement arises, the purpose of the collective agreement is to be regarded (**SAMWU v SALGABC & others (2012) 33 ILJ 353 (LAC)**, **Dhanraj & Another v Department of Correctional Services (2010) 9 BALR 909 (PSCBC)**). Applying this principle, Resolution 7/ 2000 intends to regulate the absence of employees from the place of work. It is to assist employees with poor health, and it has measures to limit frivolous applications for sick leave.

- 15 For the respondent to present the outcome of TIL applications, 17 months and 28 days, 4 months and 7 days and 3 months and 12 days after his applications, goes beyond what is provided for in the Resolution. It was argued that even if there were no time frame stipulated the delay in notifying the applicant was unreasonable, and contrary to principle of equity.
- 16 In PSCB924-17/18 the Commissioner indicated that as the respondent had failed to adhere to the 30-day time limit prescribed by the resolution and had failed to investigate the extent of the employee's inability to perform his duties.
- 17 The respondent does not have the right to implement the decision to reject the TIL if they failed to adhere to the 30-day period as per **POPCRU & Another v Department of Correctional Services (D642/15) (2016) ZALCD**. The court held that a later determination of an employee's application of additional leave as lamentable as this, and 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.

Respondent's stated case

- 18 The applicant applied for TIL on 25 August 2020, 24 May 2021, and 11 October 2021.
- 19 Feedback was provided by the Department relating to the applications submitted for TIL as follows: period 13 July 2020 to 17 July feedback was provided on 23 February 2022. For the period 01 May 2021 to 01 Sept 2021 this feedback was given on 26 July 2021. The period 5 October 2021 to 8 October 2021 feedback was provided on 16 January 2022.
- 20 It is the argument of the applicant that the respondent failed to deal with the application for incapacity leave as per the agreement which allows for the respondent to deal with the application within the 30 - day time frame.
- 21 An independent company was appointed to deal with TIL application, Alexander Forbes and they function as the Health Risk Manager (HRM). The HRM declined the working days applied by for by the applicant. The HRM is an external provider and cannot be influenced by the respondent. The consideration of the application is based on documentation received such as medical reports.

- 22 The Department considered the recommendations from the HRM. The HRM considers sick leave history, patterns of sick leave cycles of previous periods/years, and the utilization of normal sick leave and recommends whether it should be granted or not.
- 23 The process is prescribed in the Determination of Leave, PILIR and read with resolution 7/2000.
- 24 PILIR provides that the purpose of TIL is as *"7.1.1 ...additional sick leave granted conditionally at the Employer's discretion, as provided by the Leave Determination and PILIR"*. Further in terms of *"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"*.
- 25 It is apparent that TIL is in addition to the employee's normal sick leave cycle and that the employer has a discretion to approve or decline it. It was submitted that it is not an outright right of an employee.
- 26 The PILIR policy reflects that such TIL is granted conditionally meaning that it can be recommended or declined, there is no certainty that the application will be approved.
- 27 Item 7.1.2 of PILIR reflects that the TIL application is processed while the applicant receives full pay. The issue in dispute emanates from the PILIR and Determination of Leave of Absence in Public Service. Both these policies effect 7.5.1 of Resolution 7/2000.
- 28 The Determination of Leave of Absence does not vest the Department of Correctional Services with the power to grant conditional TIL for a long period. Clause 15.8 .1 states *"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"*.
- 29 From the above it was submitted that the Department could only conditionally grant the TIL application with full pay to Mr. Olivier.

30 Resolution 7/2000 in item:

“7.5.1 (a) An employee whose normal sick leave credits in a cycle have been exhausted and who, according to the relevant practitioner, requires to be absent from work due to disability, which is not permanent, may be granted sick leave on full pay provided that:

(i) her or his supervisor is informed that the employee is ill; and

(ii) a relevant registered medical and or dental practitioner has duly certified such a condition in advance as temporary disability except where conditions do not allow

(b) The employer shall, during 30 working days, investigate the extent of inability to perform normal official duties, the degree of inability and the cause thereof. Investigations shall be in accordance with item 10(1) of Schedule 8 in the Labour Relations Act of 1995.

(c) The employer shall specify the level of approval in respect of applications for disability leave.”

31 There is no dispute that resolution 7/2000 applies to the applicant. For a TIL application 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 that the condition is temporary.

32 Resolution 7/2000 must be read with the Determination of Leave of Absence in the Public Service and that the interpretation of these clauses must be seen in context of the policies of the Department of Correctional Services.

33 The TIL application was declined, and the respondent treated the leave as unpaid leave and instituted deductions from the applicant's salary. The Determination reflects that leave may be granted conditionally at the employers' discretion. In this case the periods were lengthy. It was argued that a reasonable employee ought to have considered the possible implications if the applications were declined.

34 The HRM commented that Mr. Olivier had a poor sick leave profile and that many sick leave days were taken prior to a weekend, and for short periods where the reason for the leave was unknown to the HRM. The HRM indicated that 61 days post hospitalization was considered sufficient for the applicant to adjust to his medication and for his condition to stabilize.

35 The reliance on the delay of the respondent to respond within 30 days should not be regarded as not rendering a service. An employee should reasonably be aware that even if a response is delayed there could be financial implications that follow. An employee cannot merely rely on his or her own medical

Practitioner's assessment as the respondent has the right to refer an employee to another medical practitioner for assessment.

- 36 In **POPCRU and L E E Mbongwa v The Department of Correctional Services and other** delivered by judge Whitcher on 23 November 2016, the learned judge considers the time period and whether due to the non-adherence of the stipulated 30 days whether this creates an entitlement of the TIL. The judge further considers the 'Gouvea' judgement where the court found that it was unfair to claim back the monies from a TIL application "*as it would offend the prohibition against retrospectivity*". The court in the 'Gouvea' matter further found that "*the consequence of retrospective effect is that it amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee*". Judge Whitcher in the 'POPCRU' matter finds that the TIL application was granted conditionally and that a delay in informing the employee of the outcome does not create an entitlement.
- 37 "[26] *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 the 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 or additional leave is considered. This consideration should be over in 30 days. However, if the period the employer takes to decide the application exceeds the 30 days as 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 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 and 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.*"
- 38 It was argued that this ratio applies to the present case in that Mr. Olivier applied for TIL this was conditionally granted and subsequently declined by the HRM and communicated to the Department which accepted such recommendation. Mr. Olivier was informed about the deductions that would be made from his salary for unpaid leave. It was argued that the applicant received monies that were not due to him while he was awaiting the assessment of the TIL application. Given that the TIL application was declined this is indicative that he was not warranted such leave and therefore the payment for these

periods was not due to him. The failure to finalize the application does not give rise to an entitlement to be paid for the leave of absence.

- 39 The submission of documents by the applicant does not entitle him to a favourable outcome of his application. Even if the employee complies the employer may still decide not to grant such leave or partly approve such leave.
- 40 From the submissions of the applicant there is no dispute as to the meaning of the provisions of the Resolution or PILIR with respect to the 30-day time frame mentioned. Further it was common cause that the respondent did not comply with the 30-day time frame. For if the dispute turned on the time- period of 30 days a dispute would have been referred after the expiry of the 30 days. The respondent could have then been ordered to comply and finalize the investigation. Thus, it was argued that the true nature of the dispute is not an interpretation and application dispute but rather the exercise of discretion by the respondent based on the recommendations of the HRM, and if so then matter stands to be referred as an unfair labour practice. If this is the true nature of the dispute the Council lacks jurisdiction.
- 41 Consequently it was argued that the respondent correctly interpreted and applied Resolution 7/2000 read together with PILIR and Determination on Leave.

Analysis of the submissions

- 42 An interpretation and application dispute examine the group of people that the Collective Agreement is applicable to or can be applied to and the meaning of the words, contained within various clauses.
- 43 When determining a dispute pertaining to the interpretation and application of a Collective Agreement such as Resolution 7/2000 the golden rule applies, that is the ordinary meaning of the words to the clause are applied. According to Grogan (Workplace Law tenth edition, 2012) "The constitutional injunction that where possible, all legislation must be interpreted to give effect to fundamental constitutional rights, rather than limit or exclude them" It is important to ensure that an absurdity does not result.
- 44 In **SAMWU v SALGBC & Others (2012) 33 ILJ 353 (LAC)** the court held "I am satisfied therefore that the commissioner properly applied his mind to the issues before him, that he considered all the material before him, and adopted an approach that gave effect to the purpose of the collective agreement in a manner that achieved equity and fairness amongst eThekweni's employees."

45 The court set out the test that applies in interpretation and application disputes, in **National Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)** the court held that “Interpretation is the process of attributing meaning to the words used in a document, be it legislation or 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 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 unbusiness like results or undermines the apparent purpose of the document. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document”.

46 It is common cause that the respondent did not comply with the 30- day period as specified in the Resolution or in PILIR.

“Item 7.5.1 Temporary Disability Leave

- a) *An employee whose normal sick leave credits in a cycle have been exhausted and who according to the relevant practitioner requires to be absent from work due to a disability which is not permanent, may be granted sick leave on full pay provided that:*
 - i) *her or his supervisor is informed that the employee is ill; and*
 - ii) *a relevant registered medical and or dental practitioner has duly certified such a condition in advance as temporary disability except where conditions do not allow*
- b) *The employer shall, during 30 working days, investigate the extent of inability to perform normal official duties, the degree of inability and the cause thereof. Investigations shall be in accordance with item 10(1) of Schedule 8 of the Labour Relations Act of 1995.*
- c) *The employer shall specify the level of approval in respect of applications for disability leave.”*

47 This must be read with the Policy Procedure on Incapacity Leave and Ill Health Retirement (PILIR) 7.2.9 which states “*The employer must within 30 days after receipt of both the application form and medical certificate referred to in paragraphs 7.1.4 and 7.1.5 approve or refuse temporary incapacity leave granted conditionally*”.

- 48 Applying the golden rule where the words take their ordinary meaning, the word “shall” is peremptory, obligating the respondent to complete the investigation within 30 days. The outcome of the investigations for various periods were communicated to Mr. Olivier between three months and seventeen months later. Compliance with a collective agreement is not a discretionary matter. Collective Agreements have the status of subordinate legislation. The thirty days thus mentioned is a time frame that the respondent is obliged to honour. The word “shall” is peremptory and there is no discretion on the respondent to depart from the time frame mentioned.
- 49 The courts have considered the effect of non-adherence to the 30-day timeframe and in **PSA obo HC Gouvea v PSCBC and Others LC D751/09** “[20] *The limited facts of the 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 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 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*”.
- 50 This was confirmed in **Dept of Roads and Transport v JC Robertson & Others LC PR40/14 delivered on 15 February 2017**, the court held “[9] *The arbitrator’s interpretation of clause 7.5.1 of Resolution 7 of 2000 which is based on the decision in PSA HC Gouvea cannot be faulted. When exercising the discretion to grant or refuse TIL, the applicant was enjoined by Resolution 7/2000 to take into account provisions of item (10)(1) of schedule 8 of the Labour Relations Act. The interpretation the arbitrator gave to clause 7.5.1 (c) is consistent with the letter and spirit of the LRA. His decision is not based only on giving peremptory meaning to the word shall in clause 7.5.1 (c) of resolution 7/2000. He therefore conducted the correct enquiry in the correct manner and reached a reasonable decision.*”
- 51 This is contrary to the decision in the POPCRU matter where judge Witcher found that the delay in providing the outcome did not create an entitlement to the paid leave. This is compelling in terms of the wording of the PILIR policy and the Determination of Leave, a TIL application is granted conditionally pending the investigation process. “7.1.1 ...additional sick leave granted conditionally at the Employer’s discretion, as provided by the Leave Determination and PILIR. In item 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”.

- 52 There is no dispute that the TIL application is granted conditionally that is subject to approval. What is in dispute is the consequence of claiming back monies to which the respondent argued that the applicant was not entitled to and had benefitted from. This may well fall within the scope of an alleged unfair labour practice, were the applicant to claim that the respondent has exercised its discretion arbitrarily and unfairly and that it had waived its right to reclaim the monies due to the delay. This does not fall within the scope of an interpretation and application dispute.
- 53 Regard is had to the **Constitutional Court in CCT/6/17 PSA obo Olufunmillayi Itunu Ubogu and HOD of Health Gauteng and Others**, the court had to determine whether the employer could recover monies directly from the employees' salaries in the absence of an agreement or collective agreement. The court stated “[14] *In terms of section 34 of the BCEA an employer cannot make deductions from an employee's salary to set off past overpayments without the employee's prior agreement or court order. The state can absent and agreement between it and the concerned employee, or a collective agreement, or a court order, or an arbitration award, unilaterally decide on whether overpayment has been made and if so, can decide on the method of recovery and the period over which such recoveries may be made*”.
- 54 Considering the above jurisprudence it is beyond the scope of the arbitrator to order that the TIL be granted and that the monies be paid back considering the above case law.

Award

- 55 The respondent has materially complied with Resolution 7/2000.



Signature:

Panellist/s: Karen Kleinot