IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

HELD AT CAPE TOWN

CASE NO: PSCBC600-19/20

PSA obo White, T **APPLICANT**

and

Department of Home Affairs **RESPONDENT**

ARBITRATION AWARD

DATE OF HEARING	:	12 August 2020
CLOSING ARGUMENTS:	:	19 August 2020
DATE OF AWARD	:	31 August 2020
PANELLIST	:	I de Vlieger-Seynhaeve

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The matter was set down for a virtual arbitration through Zoom on 12 August 2020. The applicant was represented by Adv Daniels from the PSA. Ms Le Roux represented the respondent.

1.2 The proceedings were recorded digitally.

2. ISSUE TO BE DECIDED

2.1 The issue to be determined is whether the respondent correctly interpreted and/or applied Resolution 7 of 2000.

3. SURVEY OF ARGUMENT

3.1 The following issues were common cause: The applicant applied for temporary incapacity leave for the period 13 to 14 August 2018. This application was rejected in a letter dated 11 September 2019. In that letter he was instructed to accept one of the two options to have the outstanding days recovered, either through available annual leave or through unpaid leave. The applicant accepted to have the outstanding days taken from his annual leave. He was instructed to take annual leave of the same cycle in which he had applied for TIL, namely 2018. Seeing that the decision to disapprove the application was taken after the annual cycle had ended, the applicant could not take up annual leave for that cycle. He lodged a grievance on 11 October 2019.

3.2 The following issues need to be determined: Does Resolution 7 of 2000 allow for leave to be deducted from the available annual leave at the time of being informed of the outcome of the TIL application? Did the applicant have sufficient annual leave days left when he received the outcome of his TIL application? And is the ultimatum by the department to have the days taken s annual leave or else it will be captured as unpaid leave in violation of section 38 of the Public Service Act.

3.2 The parties did not call any witnesses but relied on written arguments. They also submitted a bundle of documents.

Applicant's submissions

3.3 ***Adv Daniels*** stated that the respondent has issued the Determination and Directive on Leave of Absence in the Public Service, which states in par 15.10 that the department must approve or refuse the application for TIL within 30 days. It is common cause that the respondent failed to do so in this matter. The implications of this delay are huge for the applicant. The respondent demands that annual leave that is taken to cover the period of the unapproved TIL comes from the same cycle as the cycle during which the application has been made, which is 2018. That leave cycle would have expired at the end of June 2019. It would therefore be impossible for the applicant to retain leave credits to cater for the possible TIL rejection since the grievance still had to take place. The employer claims that the applicant should have foreseen the possibility of rejection and should have requested to have leave from the cycle kept over to cater for this. Resolution 7 of 2000 makes it clear that when leave expires after 18 months, only upon application, leave may be paid out. No provision is made for keeping said leave over for any period of time beyond 18 months. Furthermore, set off is also not catered for in either the Resolution nor is it in the Directive. What the respondent wants the applicant to do is an exercise in futility and would amount to being ultra vires. If the employer would have the authority to claim that the leave must be taken from the same leave cycle or that the applicant must foresee the possibility of rejection and must request for the leave to be kept in abeyance and the possible set-off, is then the ultimatum by the department to have the days taken as annual leave or else it will be captured as unpaid leave in violation with section 38 of the Public Service Act? Reference was further made to the judgment issued in *POPCRU and another v Department of Correctional Services and another (2017) 38 ILJ 964 (LC)* where Judge Whitcher stated that s 38 PSA applies to the applicant's case in a TIL application in that he received remuneration not due to him. The parallel can therefore be drawn with this matter. Having no alternative but to accept this, the respondent must then comply with Constitutional Court judgment in *PSA obo Olufunmilayitunu Ubogu and Head of Department of Health Gauteng* in case CCT6/17. The court found section 38 unconstitutional and as a consequence the department would have to take the applicant to court should the applicant not concede to having the amount due for the days owed, deducted from his salary. It became clear from the HR printouts that when the applicant as informed of the outcome in September 2019 he had 7 days annual leave left. With the 2019 cycle ending by 30 June 2020, he obviously used up all his days but his 2020 cycle still had more than enough days available. Concluding, the respondent acted *ultra vires* in providing the applicant with only two options in settling the outstanding days from the rejected TIL application. Furthermore, when an application for TIL is rejected, the department must inform the applicant that he is entitled to

have the owed days taken from the current leave cycles' available annual leave, or that he can authorise the days to be taken as unpaid leave or that the applicant can elect neither, which would then entitle the department to act in terms of section 38 of the PSA to recoup the amount due via the appropriate due process. In this current case, the 2 days owed to the department should be deducted from the available annual leave from the 2020 leave cycle. The money already deducted from the applicant's salary, should be returned within 10 working days.

Respondent's submissions

3.4 ***Ms Le Roux*** stated that section 38 of the PSA gives authority to the Department to recoup any wrongly granted remuneration, for which the employee was not entitled. Such should be recouped as soon as the employer becomes aware of such. Section 38 therefore gives the employer the mandate to implement Leave without Pay. The applicant had exhausted all his annual leave and sick pay at the time of her application for TIL. The annual leave cycle applies to the period 1 January of a specific year until 31 December of that year and concession is made to utilise unused annual leave until 30 June of the following leave cycle. The option of unpaid leave was the only option which could be considered. Although the PERSAL leave records may show that the applicant had 7 days leave available at the time of the outcome, it cannot be used for the disapproved application as it falls within a new leave cycle (2019-2020) and not in the cycle that he applied for TIL. Human Resources has since amended the proforma outcome letter to be in line with the Determination of Leave and it states clearly that it concerns the relevant leave cycle under review. In the letter to the department, the Director-General of the DPSA indicated that: *"The Determination does not permit the use of leave credits from a subsequent cycle to cover a period of absence from a preceding leave cycle. In other words, employees cannot exhaust leave credits within an annual leave cycle and borrow leave credits from a preceding leave cycle. Provision is made only for unused leave credits from a preceding cycle to be utilized within 6 months of a subsequent cycle. Furthermore, paragraph 12 of the Determination provides for the deducting of leave from the subsequent cycle only in circumstances where the employee has been granted annual leave with full pay in excess of that which stood to his credit at that time which was due to a bona fide error".* Hence, the DPSA advised that the declined period of incapacity leave in the previous leave cycle cannot be covered by annual leave from the current leave cycle if the employee's annual leave credits of the previous leave cycle have been exhausted. In this regard the employee's absence must be covered by unpaid leave. Reference was further made to the matter *POPCRU obo L Mbongwa and Department of Correctional Services (D642/2015)* where it was stated that the employer's failure to respond

to an application for TIL within 30 working days does not translate into entitlement to such leave. The applicant's case must therefore be dismissed.

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 argument necessary to substantiate my findings and decision.

4.2 I first would like to deal with the jurisdiction to hear the matter. I hereby refer to the judgements in *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others (2010) 31 ILJ 1813 (LAC)* and *PSA obo De Bruyn v Minister of Safety and Security and Another (2012) 33 ILJ 1822 (LAC)* where it was decided that the BC has jurisdiction to entertain disputes about the application and interpretation of Resolution 7 of 2000 in terms of section 24 of the LRA. "Interpretation" refers to the situation where the parties differ over the meaning of a provision of the collective agreement. "Application" includes both the question whether an agreement applies to the facts in question and the manner in which the agreement is applied, which includes non-compliance.

4.3 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).

4.4 It is the respondent's duty to make a decision ito a TIL application within a period of 30 working days. It was not disputed that the outcome was provided more than one year after

the application was submitted. The applicant submitted an application for TIL for the period 13 August 2018 - 14 August 2018. The outcome was received on 11 September 2019. The applicant was then informed that he had to notify the department if he wanted to cover the said period with available annual leave or unpaid leave. When he stated that he wanted it covered with annual leave the department replied that he had no leave remaining from the 2018 cycle and therefore unpaid leave had to be implemented.

4.5 The Resolution does not deal with the implementation of declined TIL however it is mentioned in section 7.2.10 of the Policy and Procedure on Incapacity Leave and Ill-Health Retirement (PILIR) and in section 15.13 of the Determination and Directive on Leave in the Public Sector. These sections are similar and state that if the Head of Department refuses the TIL granted conditionally, she must notify the employee in writing -

(a) of the refusal;

(b) of the reasons for the refusal;

(c) that if she is not satisfied with the employer's decision, that she may lodge a grievance as contemplated in par 10;

(d) that she/he must notify the HoD in writing within 5 working days of the date of the notice to him/her, whether or not the period of conditional incapacity leave must be covered by annual leave (to the extent of the available annual leave credits) or unpaid leave and that, if he/she fails to notify the HoD of his/her choice, the period will be covered by unpaid leave.

4.6 It is clear from the Directive that the applicant must be given the option to either have the unapproved TIL covered by annual leave, if annual leave credits are available, or by unpaid leave. Nowhere does it mention that it has to be annual leave from the cycle in which the TIL application originated. The reason why this is not mentioned is that if the employer complies with the prescribed procedure and finalises the application within 30 working days, the outcome will be received within the same leave cycle and the employee will be able to take annual leave from the leave cycle in question. However, in this instance, that was impossible as the employer waited for more than one year to inform the applicant of the outcome of his TIL application. No reason was provided as to why there was such a long delay before the applicant was informed. The respondent is therefore in breach with Resolution 7 of 2000 by not abiding by the 30 working days in which to finalise the TIL application.

4.7 I wish 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".*

4.8 I agree with the above judgment and confirm that the applicant's TIL application cannot be approved because of the delay. But the consequence of this judgment is that the respondent feels free to not abide by the 30 days rule as they know it will not result in an entitlement to TIL. And as a consequence of not abiding by the time frame which resulted in the decision being taken during the next leave cycle, the respondent declined the applicant the option to take annual leave. The fact that the respondent is taking this choice away from the applicant could not have been the intention of this Resolution and the Directives. The applicant therefore suffered prejudice because of the delay of the decision in terms of his TIL application. Although it is intended that the TIL application should be finalised within 30 working days and the employee should be given a choice as to how the unapproved TIL can be covered, the respondent took that choice away from the applicant.

4.9 I do take note of the communication from the DPSA about not being allowed to cover temporary incapacity leave from a previous cycle with available leave days in a subsequent cycle. This is accepted as the correct interpretation if the procedure is followed and the respondent responds within 30 days. Seeing that this is not the case, the respondent cannot use part of that communication to benefit them while their breach of the Resolution is the reason why the applicant could not use annual leave credits. The leave records were provided and it indicated that there had been annual leave days available 30 days after the applicant applied for TIL in 2018. If the respondent had followed procedure, the applicant would have been able to use his annual leave credits. Therefore, as a remedy, the applicant is allowed to take annual leave from the current leave cycle to make up the unapproved TIL.

5. ORDER

5.1 The respondent is in breach with Resolution 7 of 2000;

5.2 The respondent must deduct the 2 days owed from the available annual leave from the current leave cycle 2020 on or before 30 September 2020;

5.3 The respondent must further reimburse the applicant with deductions made in terms of leave without pay on or before 30 September 2020;

5.4 I reserve jurisdiction to determine a dispute about the calculations of the amount that needs to eb reimbursed in line with paragraph 5.2;

5.5 There is no order as to costs.

Signed at Cape Town on this 31st day of August 2020

I De Vlieger-Seynhaeve
PSCBC Panelist