IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL
HELD AT CAPE TOWN

CASE NO: PSCBC200-20/21

PSA obo Klopper, MM **APPLICANT**

and

Department of Correctional Services **RESPONDENT**

ARBITRATION AWARD

DATE OF ARBITRATION	:	20 January 2021
CLOSING ARGUMENTS	:	27 January and 3 February 2021
DATE OF AWARD	:	5 February 2021
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 January 2021. The Applicant was represented by Mr van der Walt from the PSA. The Respondent was represented by Mr Mofokeng.

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 7 of 2000.

3. SURVEY OF EVIDENCE & ARGUMENT

3.1 Both parties made an opening statement. Seeing that the facts were not in dispute the parties submitted a statement of case and agreed to submit closing arguments in writing. The facts are as follows: The applicant submitted an application for TIL (long term) for the period 6 April 2018 to 1 October 2018. Feedback was not received and the applicant received the report of the service provider on 20 May 2020. The dates on the report are not in line with the period that the applicant applied for. The applicant applied for 74 days but the report indicates 88 days. The applicant had submitted a grievance which resulted in another disapproval. The applicant is retiring at the end of January 2021. The applicant is stating that the respondent is in breach with clause 7.5.1 (b) of the Resolution. The respondent stated that it is not because the Resolution mentions 30 days, that this means that the outcome needs to be provided within 30 days. The delay was caused by the HRM and the respondent cannot be blamed for this.

3.2 In its closing arguments, the applicant's representative stated that the response of the application was received two years late. The report of the HRM however stated that the application for the period 23 May 2018 until 20 November 2018 was approved for a number of 40 days and was declined for a number of 88 days. It stated that the PILIR Champion received the application on 22 May 2018 and was received by the HRM on 30 July 2019. The HRM finalised the application on 4 April 2020. The grievance was received by the HRM on 24 April 2020 and was finalised by the HRM on 20 May 2020.

In its more detailed outcome, the HRM stated that the approved period runs from 23 May 2019 to 17 July 2019. The period that is declined runs from 18 July 2019 to 4 May 2019. The reason for the decline is because the medical certificate which was submitted was issued by a service provider not registered with the HPCSA. The applicant submitted proof of the registration with the HPCSA in her grievance. Besides breaching section 7.5.1 (b) of the Resolution, the respondent is also in breach with the PILIR Policy in par 7.3.1, 7.3.3.2, 7.3.4, 7.3.5.1. The applicant's representative further referred to case law: *PSA obo Olofunmilayo Obogu and the HOD of the Department of Health Gauteng Case J2185/2016*, *PSA obo Gouvea and DRDLR and another, case D751/09, PSA obo Liebenberg and Department of Defence, LC Case C938/2011, SAMWU v City of Cape Town and Others (C701/13) & Department of Roads and Transport and JC Robertson and PSCBC (PR40/14) [2017] ZALCPE.* As a result, the TIL application should be granted and any deductions must be stopped.

3.3 In its closing argument, the respondent's representative stated that the HRM only received the TIL application on 30 July 2019 and finalised the assessment on 20 May 2020. The sick note provided by the applicant only covers the period 21 May 2018 to 20 November 2018. The PILIR Champion received the application on 22 May 2018. The TIL application that the applicant submitted was never handled by the HRM and is therefore defective. The application was not supported by a sick note and it was never received by the HRM. Furthermore, the respondent's failure to respond to the application for TIL within 30 working days does not translate into entitlement to such leave as was decided in *POPCRU obo Mbongwa v DCS*. The application should therefore be dismissed.

3.4 In his replying affidavit, the applicant's representative stated that the HRM indeed had received reports from specialists but that their objection was that the specialist was not registered. The respondent is now raising issues that were never raised by the HRM. Furthermore, the application was forwarded to the HRM on 24 May 2018 and then again on 30 July 2019. Finally, the reasons why the application was partially denied was because of the fact that there was no intervention of a psychotherapist, no other psychiatric intervention, no consultation with a medical practitioner and the medical certificate was issued by service providers who were not registered by HPCSA. However, the HRM noted in its report that it had received the following documents: Medical report (Clinical Psychologist), medical certificate (Special Psychiatrist) and a progress report (Psychotherapist) which is contradictory.

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 In terms of paragraph 7.5.1 (b) of Resolution 7 of 2000: "*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".*

4.7 It must first be noted that the parties agreed at the beginning of the arbitration that all facts were common cause and that after detailing a statement of case, both parties would submit closing arguments in writing. The respondent's representative however, brought in several issues in his closing arguments, which were never discussed during the arbitration hearing. One of the submissions was that the TIL application was never received by the HRM in 2018 and therefore the application was defective. This submission is incorrect. It is reflected in the HRM report that the TIL application was received by the PILIR Champion on 22 May 2018. The PILIR Champion is an employee at the respondent's office who will check the forms for completeness and will then forward the application to the HRM. The fact that the application was never forwarded to the HRM is not the applicant's fault and does not make the application defective. In his other submissions, the respondent's representative explained the reason for declining the application. First of all, the respondent never declined the TIL application as the applicant only received the report of the HRM after enquiring about the status of her application. The reasons provided by the HRM are different than the reasons provided by the respondent in his closing arguments. It would be unfair to now forward reasons for the disapproval which were never communicated to the applicant before. I therefore

focused on the HRM's report and not on the additional reasons provided by the respondent as they were placed before the parties only during closing arguments and were not the reason why the HRM recommended the rejection of the application.

4.8 The applicant received the recommendation of her application for temporary incapacity leave in 2020 from the service provider. She never received a letter from her employer informing her that her application was disapproved. The respondent is therefore in breach with Resolution 7 of 2000 in terms of section 7.5.1 (b). It is the respondent who should make the decision to approve or decline a TIL application. This decision is based on certain factors which includes the recommendation of the HRM. It seems that although the HRM recommended to decline part of the application, the respondent never made a final decision which is in breach with s 7.2.9 of the Policy and Procedure on Incapacity Leave and Ill-health Retirement (PILIR).

4.9 Furthermore, whenever a TIL application is denied, the respondent must give the employee the option to use annual leave or unpaid leave to cover the period of absence. This was never done. The Policy and Procedure on Incapacity Leave and Ill-health Retirement (PILIR) prescribes this in 7.2.10.2 and 7.3.5.1(f). The respondent also breached those clauses.

4.10 In terms of determining a remedy, 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".*

4.11 I agree with the above judgment and confirm that the applicant's TIL application cannot be approved because of the delay.

4.12 The above judgment would be applicable if only the time frame was breached and if the respondent had made a decision. However, in this matter the report of the HRM which is the only document recommending the rejection of the TIL application does not make sense at all. First of all, the application is for the period 6 April 2018 until 1 October 2018. The HRM report refers to the application period as from 23 May 2018 until 20 November 2018 on its first page. However, in its analysis the HRM splits up the period in two: a first period from 23 May 2019 to 17 July 2019 and a second period from 18 July 2019 to 4 May 2019. If I accept that a typo was made and that the dates should have read 23 May 201**8** – 17 July 201**8** and 18 July 201**8** to 4 May 2019, the first period that is approved makes sense as the date of the medical certificate is from 23 May 2018. However, there is no explanation for the second period as the dates are completely wrong. Furthermore, the HRM mentioned that the application was partially denied because of the fact that there was no intervention of a psychotherapist, no other psychiatric intervention, no consultation with a medical practitioner and the medical certificate was issued by service providers who were not registered by HPCSA. However, the HRM noted in its report that it had received a Medical report (Clinical Psychologist), medical certificate (Special Psychiatrist) and a progress report (Psychotherapist) which is contradictory. The HRM does not seem to have applied its mind to the application in terms of dates and reason. Based on that, I order the respondent to approve the partially declined TIL application for the period 18 July 2018 – 1 October 2018.

5. AWARD

5.1 The respondent breached Resolution 7 of 2000 when it did not make a decision in terms of the applicant's application for TIL. The respondent is ordered to approve the TIL application for the period 18 July 2018 to 1 October 2018. The respondent must further refund the money deducted from the applicant. Payment must be made on or before 31 March 2021;

5.2 There is no order as to costs.

Signed at Cape Town on 5 February 2021

I De Vlieger-Seynhaeve
PSCBC Arbitrator