



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

CASE NO: PSCB 78-17/18

PSA obo Luzipo

APPLICANT

and

Department of the Premier

RESPONDENT

AWARD

DATE OF ARBITRATION : 28 August 2017
CLOSING ARGUMENTS : 3 September 2016
DATE OF AWARD : 15 September 2017
ARBITRATOR : I de Vlieger-Seynhaeve

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 Ms Mosetic, from the PSA represented the applicant. The Respondent was represented by Ms Champion. The proceedings were recorded digitally. The parties handed in documents, which were common cause and which constitute part of the record. The parties decided to lead evidence at the hearing and argue the case in writing.
- 1.2 The proceedings were recorded digitally.

2. ISSUE TO BE DECIDED

- 2.1 The issue to be determined is whether the respondent was in breach with Resolution 7 of 2000 when it denied the applicant temporary incapacity leave.

3. SURVEY OF EVIDENCE

- 3.1 The following facts were common cause: The applicant had made an application for temporary incapacity leave for the following periods:
- * 05/01/15 - 20/02/15: declined
 - * 23/02/15 - 31/03/15: approved
 - * 01/04/15 - 15/05/15: declined: annual leave taken
 - * 18/05/15 - 05/06/15: declined: annual leave taken
 - * 08/06/15 - 30/06/15: declined: leave without pay
 - * 01/07/15 - 14/08/15: declined: leave without pay
 - * 17/08/15 - 16/10/15: declined: leave without pay
 - * 19/10/15 - 30/11/15: declined: leave without pay
 - * 01/12/15 - 31/12/15: declined: leave without pay
 - * 23/02/16 - 31/03/16: declined: leave without pay
 - * 01/04/16 - 31/05/16: declined: leave without pay
 - * 01/06/16 - 15/06/16: declined: leave without pay

The total amount of deductions amounted to R 169 915,43 and deductions of R 500 per month have been effected. This was not the first time he had applied for TIL; his TIL applications for 24/01/2014 till 02/01/2015 had been approved.

3.2 The applicant made the following statement:

3.2.1 **Mr Luzipo** stated under oath that he cannot remember the date when he received feedback on his TIL applications but the letter was dated 17/11/16. He was told during May or June 2016 to report back for work. He went back to work on 27/06/16. The respondent had requested a meeting with him around August or September 2015 and he had made arrangements to get back in time. However, he got sick on the bus on the way to Cape Town and was hospitalized in Knysna. He had phoned the respondent to inform them of this. He really tried to get a transfer but could not find anything on his level. He was asked to change the date of his last TIL application from 01/06/16 - 15/08/16 to 01/06/16 - 24/06/16 as he had returned to work on 27/06/16.

3.2.2 During cross examination it was put to him that he did not abide to the PILIR policy as he did not submit his TIL applications within five working days. The applicant explained that he was in Port Elizabeth so he faxed through the doctor's certificate. He then posted the original documents and TIL application to the respondent in Cape Town. It was then put to him that he only returned to work after his salary was frozen. The applicant agreed to this although he was still booked off sick by his psychiatrist.

3.3 The respondent made the following submissions:

3.3.1 **Ms Edwards**, the HR clerk, stated under oath that previously they would send a letter to the employee when the HRM has declined the application and asked the applicant to submit non-medical evidence in order for the HOD to make the final decision. The applicant never submitted any additional non-medical evidence. The number of TIL applications increases towards the end of the sick leave cycle. The applicant's applications happened during the last year of the sick leave cycle which is a hectic period. His first application for the period was received by their office on 06/07/2016. The delay for the feedback was due to a backlog in the processing of applications as there were staffing problems and the high influx of applications.

4. SURVEY OF ARGUMENT

4.1 **Ms Mosetic** submitted that when the respondent did not receive the TIL application after two days of absence, the employee's supervisor must notify the employee that his sick leave will be deemed to be leave without pay. Seeing that the respondent did not reply within the 30 days, they are in breach with the Resolution. She further

referred to the matter *PSA obo Gouvea v Department of Land Affairs (LC) - D 751-09* where the court found that only once the investigations pertaining to the TIL are finalized, the employee can be called back to work. The applicant was only called back to work on 26 June 2016. The court further held that the report had a retrospective effect and that the consequences of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of a discretion with unfair consequences to the employee. Implementing the declined TIL retrospectively therefore qualifies as arbitrary action and is unfair. This finding was upheld in the matter *Department of Roads and Transport v John Cheere Robertson (PR 40/14), 15/02/2017*. The applicant is seeking that the TIL applications will be approved, that all deductions must cease and all deducted monies should be reimbursed. Furthermore, all vacation leave that was deducted must be re-allocated to the applicant.

4.2 **Ms Champion** stated that it is common cause that the applicant's TIL applications were not finalized within the 30 days. However, the applicant did also not abide to the time frames. The granting of TIL is at the discretion of the employer. The applicant never submitted any non-medical information. The respondent tried to meet with the applicant to discuss the way forward, to no avail. The applicant was booked off from 1 June 2016 to 15 August 2016. The applicant did however return to work on 27 June 2016 which indicates that he was not so incapacitated. The applicant failed to prove that he qualified for the TIL, and he furthermore failed to prove that he suffered any prejudice because of the delay in feedback from the respondent.

5. ANALYSIS OF EVIDENCE AND ARGUMENT

5.1 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 his/her 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).

- 5.2 I will first deal with the 30 days' rule. The Resolution states clearly that the employer must investigate within 30 working days. It was unclear when the applications had reached the respondent as the applicant had posted the TIL applications from PE to Cape Town. The respondent stated that the applicant had also not abided by the 5 days rule within which the TIL application had to be submitted. Although that is true, it seemed that the applicant had an arrangement with his supervisor where he would fax through the medical certificate on the day that he went to the doctor and then would post the application to them.

The respondent was aware that the applicant was absent and had condoned the late submission by accepting it and making a decision about the application. The decision was not made within 30 days from when the TIL application was received in Cape Town. I took the date on which the supervisor signed the application as the date when the application was submitted, contrary to the date when the applicant signed. The first application was signed by the supervisor on 02/02/15 and the outcome was received on 05/12/16. The letter acknowledging receipt of the TIL application was however dated on 06/07/16.

The second to the sixth application were signed by the supervisor on 30/09/15 and the outcome was received on 20/04/2016. The seventh application was signed by the supervisor on 20/11/2015 and the outcome was received on 31/08/16. The eighth and the ninth application were signed by the supervisor and HOD on 17/03/16 and the outcome was received on 05/12/16. The tenth application was signed by the supervisor on 15/10/16 and the outcome was received on 24/07/17. The last application was signed by the HOD on 13/07/16 and the outcome was received on 24/07/17. It is clear from the time frames above that there was often a delay of 1 year to almost 2 years before the outcome was received by the applicant. The respondent explained that the delay was caused by an influx of applications and a shortage of staff. I would accept this explanation if the outcomes of the applications were maybe 1 to 3 months late. However, the delay was extremely long. The explanation does not condone the long delay. The respondent is therefore in breach with the Resolution.

- 5.3 It must be noted that TIL is not a right but is granted at the discretion of the employer. The applicant had already been booked off on paid TIL for 234 days during the previous year. The respondent asked the applicant to provide non-medical information to strengthen his case which he failed to do. No other medical information was provided and the HRM did not recommend the approval of the TIL application. The HRM noted that no change in medication had been suggested and that the applicant had not been hospitalized anymore. They believed that having regard to the objective information regarding the medical and psychological care, it did not indicate that the applicant was significantly incapacitated by his disease. This decision remains valid. It is not because the respondent did not abide by the 30 days rule that therefore this decision has to be overturned. Without any extra medical information and the consequent decision of the HRM, the fact remains that the applicant was not entitled to TIL during his absence.
- 5.4 The applicant's rep referred to the judgment in *PSA obo Gouvea v Department of Land Affairs (LC) - D 751-09* where the court found that only once the investigations pertaining to the TIL are finalized, the employee can be called back to work. It also held that the consequences of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of a discretion with unfair consequences to the employee. This was confirmed in the matter *Department of Roads and Transport v John Cheere Robertson (PR 40/14), 15/02/2017*.
- 5.5 With all due respect, I do not agree with the above judgments and hereby rely on the judgment in the matter *POPCRU boo Mbongwa & Department of Correctional Services & Others (Case D642/15) LC*. In that matter, Judge Witcher 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 day 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".


5.6 Has the applicant suffered prejudice because of the delay of the decision in terms of his TIL applications? The applicant stated that he believed that the applications would be approved and had immediately returned to work when he was ordered to do so. The reason for the 30 days rule is that employees need to have certainty about their applications. If the application is denied they will have to forfeit their annual leave or part of their salary. This is a situation where there cannot be uncertainty that lasts for months. The delay was very long and cannot be attributed to the lack of staff or the influx of applications. If the applicant's applications would have been handled within the recommended time frame, he surely would have handled the future applications differently and probably would have presented for work earlier. I therefore accept that the applicant was prejudiced because of the delay.

6. AWARD

6.1 The respondent did breach PSCB Resolution 7 of 2000 when it did not investigate the applications within 30 days;

6.2 The respondent is hereby ordered to pay the applicant an amount equivalent to one month's wages for the prejudice suffered. This money needs to be paid in on or before 30 September 2017.

Signed at Cape Town on this 17th day of September 2017



I De Vlioger-Seynhaeve
PSCB Panelist