



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

CASE NO: PSCBC324-20/21

PSA obo Gounden, R

APPLICANT

and

Department of Education

FIRST RESPONDENT

and

DPSA

SECOND RESPONDENT

ARBITRATION AWARD

DATE OF ARBITRATION : 17 October 2022
DATE OF AWARD : 08 December 2022
ARBITRATOR : I de Vlieger-Seynhaeve

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 The matter was set down for an arbitration hearing on 17 October 2022 at the Durban Education Centre. The Applicant was represented by Mr Naidoo from the PSA. The First Respondent was represented by Mr Makhoee. The Second Respondent was represented by Ms Tabane.
- 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 first respondent correctly interpreted and applied the provisions of Resolution 7 of 2000.

3. SURVEY OF EVIDENCE & ARGUMENT

- 3.1 The parties submitted a stated case: The applicant has been employed by the first respondent since 01 February 2007 at the Phoenix Technical Secondary School in Phoenix. The applicant sustained an injury on duty on 11 October 2013. He has been absent from work since February 2014 and also during January 2018 and January 2020. He had submitted TIL applications for the following periods:

- 1) 08/01/2018 to 08/01/2018: 1 day
- 2) 05/02/2018 to 07/02/2018: 3 days
- 3) 14/02/2018 to 16/02/2018: 3 days
- 4) 01/03/2018 to 01/03/2018: 1 day
- 5) 05/03/2018 to 20/03/2018: 12 days of which 3 days were recommended
- 6) 25/06/2018 to 06/07/2018: 10 days
- 7) 07/08/2018 to 07/08/2018: 1 day
- 8) 15/08/2018 to 16/08/2018: 2 days
- 9) 18/09/2018 to 18/09/2018: 1 day
- 10) 21/09/2018 to 21/09/2018: 1 day
- 11) 25/09/2018 to 28/09/2018: 4 days of which 2 recommended
- 12) 10/10/2018 to 16/10/2018: 5 days of which 2 recommended
- 13) 25/10/2018 to 16/11/2018: 17 days of which 3 recommended
- 14) 02/04/2019 to 02/04/2019: 1 day
- 15) 21/05/2019 to 21/05/2019: 1 day

- 16) 21/05/2019 to 21/05/2019: 1 day
- 17) 05/06/2019 to 05/07/2019: 9 days
- 18) 16/07/2019 to 16/07/2019: 1 day
- 19) 23/07/2019 to 23/07/2019: 1 day
- 20) 19/07/2019 to 19/07/2019: 1 day
- 21) 25/07/2019 to 26/07/2019: 2 days
- 22) 01/10/2019 to 01/10/2019: 1 day
- 23) 10/10/2019 to 18/10/2019: 7 days
- 24) 22/11/2019 to 22/11/2019: 1 day
- 25) 20/02/2020 to 20/02/2020: 1 day

Applicant's submissions:

- 3.2 Mr Naidoo, stated in his closing arguments that the applicant has been under continuous medical treatment since October 2013 to date. When the applicant was absent from work, he consulted with the relevant Medical Practitioners and Specialists. After those consultations, he was given a medical certificate for that period of absence. The medical certificates, therefore, record periods of absence. The medical certificates were all submitted to the applicant's supervisor. The reason for not approving the TIL was because the treatment was not optimal which is very vague. He then referred to PSCBC Resolution 7 of 2000, the PILIR document and the Determination and Directive on Leave of Absence in the Public Sector. These documents do not require the treatment to be optimal. The applicant was never offered the use of the Employee Assistance Program nor was he given any other form of counselling. The first respondent did not comply with the above documents nor did they comply with the prescribed timeframes and obligations. The unfair deductions, which happened as a consequence of the non-approval, should therefore be reimbursed.

First Respondent's submissions:

- 3.3 Mr Makhoee stated that the applicant argued all TIL applications together as if they were all the same. However, they are decided on their own and need to be dealt with separately. It is correct that one reason for declining the TIL applications was because treatment was not optimal which is a valid reason to decline. It is not so that a medical certificate is the only thing that is required to claim TIL. The application is subject to an assessment by the Health Risk Manager. The employer then has the discretion to approve or decline the application. The reasons for declining the TIL applications varied from an invalid application, vague and invalid diagnosis, insufficient information, no total incapacitation and mismanagement of leave. The applicant waited years before lodging a grievance. The

first respondent relied on the expert medical assessment when it declined the TIL applications. The matter should 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 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 Paragraphs 7.4 and 7.5 of the PSCBC Resolution 7 of 2000 deal with normal sick leave and with incapacity management over the 36 days of normal sick leave. An employee, who has exhausted their 36 days of 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 the 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 and 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 be noted that the applicant was injured on duty. When the second respondent questioned the applicant about this, the applicant’s representative did not want to deal with this. It must be noted that an injury on duty is dealt with in a completely different manner than an application for TIL. I can glean from the facts that the TIL applications that were made were more about doctor’s visits which occurred years after the injury, which might have been the result of the IOD in 2013.
- 4.8 The applicant stated that the TIL applications were submitted with a medical certificate and therefore those applications had to be approved. It must be stressed that the application for TIL is not as straightforward as that. The application needs to be assessed by the HRM (in line with PILIR) who will make recommendations. The employer has then the discretion to grant or decline the application. If an employee is unhappy with the outcome, he can lodge a grievance and attach more medical information, if that was lacking. However, the applicant did not do so. He stated that in general, all his applications

had to be approved as he had done what was required from him. It must further be noted that it is important that each application is decided on its own merits. There is no general approach possible regarding the 25 applications.

- 4.9 For example, the TIL application for 16/07/2019 states that the applicant suffered from lower back pain. The HRM recommended declining the application as the diagnosis was vague and invalid as it did not indicate the nature or severity of the impairment to justify absence from work. The HRM further detailed what kind of documents should be submitted in such a case. The applicant should then, upon receipt of the disapproved TIL, lodge a grievance together with the required medical evidence. Failing that submission, I have to abide by the decision of the HRM as I am not a medical practitioner myself.
- 4.10 Seeing that no additional medical information was submitted by the applicant, he did not prove that the respondent did not apply his mind when declining the TIL applications.
- 4.11 The applicant also stated that the first respondent did not abide by the timeframes laid down in the Resolution. Looking at the documents provided, it is correct that the first respondent did not always do so. The first respondent was therefore in breach of the Resolution when it did not deal with the TIL applications within 30 working days.
- 4.12 In terms of determining a remedy for this breach, 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"*.

4.13 I agree with the above judgment and confirm that the applicant's TIL applications cannot be approved because of the delay. I will therefore not order a remedy.

5. AWARD

5.1 The first respondent breached Resolution 7 of 2000 when it did not abide by the 30 calendar days within which it should do its investigations. However, no remedy is ordered.

5.2 There is no order as to costs.

Signed at Cape Town on 08 December 2022



I De Vlieger-Seynhaeve
PSCBC Arbitrator