



Panellist/s: MR A S DORASAMY  
Case No.: PSCB 23-17-18  
Date of Ruling/Award: 13 DECEMBER 2017

**In the ARBITRATION between:**

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**POPCRU O B O KEKANE M S**

**APPLICANT**

**and**

**SAPS-GAUTENG**

**RESPONDENT**

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## **DETAILS OF HEARING AND REPRESENTATION**

1. Ms N Dlodlu of POPCRU represented the applicant and Mr M Machabaphala represented the respondent. The arbitration proceedings commenced at 12H30 on the 17 November 2017 at the POPCRU OFFICE Boardroom in Johannesburg. The dispute concerns the alleged incorrect application of Resolution 7 of 2000 in respect of temporary incapacity leave.

## **BACKGROUND**

2. The applicant contends that his application for temporary incapacity leave should be granted. After the matter could not be resolved the parties thereafter drafted a statement of case in respect of the issues in dispute. The submission dates were as follows:

APPLICANT'S FOUNDING SUBMISSION DUE 24:11:2017

RESPONDENT'S ANSWERING SUBMISSION DUE 01:12:2017

APPLICANT'S REPLYING SUBMISSION DUE 08:12:2017

THE AWARD WILL BE RENDERED THEREAFTER

The parties' submissions were taken into account in arriving at my decision.

## **ISSUE TO BE DECIDED**

3. I am to decide whether the respondent failed to apply clause 7.5.1 of Resolution 7 of 2000 correctly in respect of the applicant's claim to be granted temporary incapacity leave.

## **SUMMARY OF THE EVIDENCE**

### **APPLICANT'S SUBMISSION**

Background

4. The applicant was injured on duty whilst performing duties of the employer which form part of his KPA. The injury caused the member to be incapacitated to further perform his work duties and he had to consult with a doctor.
5. The doctor after examining him realized he had a muscle which was torn and needed to be operated on. Alternatively through medication the muscle would heal on its own but rest was needed. The doctor recommended he take some-time off work to allow the muscle tear to recuperate and heal. In the process the Applicant submitted sick notes to the HR management as per procedure. He further realized that his sick leave was exhausted and vacation and he applied for Temporary Incapacity Leave which the employer refused based on an analysis of his previous sick notes which diagnosed acute sinusitis.

6. When he questioned the respondent on his application he was told to lodge a grievance which he did and province after evaluating the evidence before it decided to deduct his monies for which as per the resolution below they were not supposed to deduct his remuneration.
7. PSCBC Resolution No 5 of 2001 section 7.5 deals with Disability Management Leave and the following applies to the applicant:  
"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 disability which is not permanent may be granted 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 dully 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."
8. From the above the employer never followed the process and the applicant was surprised that her salary was deducted without the results of the investigation been made known to him as he has complied with the agreement.

Schedule 8 Labour Relations Act of 1995

*10. Incapacity: Ill health and injury.—(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.*

*(2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.*

*(3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.*

*(4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.*

#### Prayer

9. We therefore pray that the Commissioner rule on behave of the applicant and issue an Award that orders the respondent to payback all monies deducted with interest and grant the Incapacity Leave that was applied as prove of the incapacity was provided.

#### **APPLICANT'S REPLY**

10. Paragraph 1-4 of the Respondent's submission acknowledges that temporary incapacity was not approved; but there is no reason as to why be the short-term incapacity leave was disapproved.
11. The applicant booked off by the doctor for 14 days, His sick leave cycle could not cover all the days he had to be absent. The applicant's sick leave cycle only covered part of the sick days which was 7days.
12. The applicant was advised by the respondent to apply for short-term incapacity leave for the 7 outstanding days.
13. We are in agreement with the respondent on paragraph 6/ 7/ 8 and 9 as stated. It is their report that we are disputing because the medical condition that was stated for the refusal of the incapacity leave was a different diagnosis to the one on the medical certificate submitted by the applicant.
14. Paragraph 10 is in dispute as when the temporary incapacity leave was disapproved reasons were not forthcoming to the refusal as the applicant indicated in the application the reasons given by the doctor for the incapacity leave.
15. Paragraph 12 which indicates the representation made by the applicant was intended to motivate for the approval for he indicated the sinusitis challenge which was shown on the leave history audit was not related to the medical certificate which he handed to the respondent.
16. The respondent's submissions are misleading in that they are referring to issues which were not raised by the applicant. The applicant's condition is as the results of an accident that happened in 2000 while on duty; the applicant has been declared disabled because his right hand is dysfunctional.
17. The respondent is not addressing the fact that they refused to grant the short-term incapacity leave based on the wrong information or an error on their side; the applicant tried on several occasion to

correct the respondent that he has sinuses but that was not the reason at the time for him to be booked off and the medical certificate was submitted again to that effect.

18. See medical certificate attached as **B1**. During the grievance process the applicant was not given hearing in that the respondent was directing him to obtain an ENT specialist report despite his explanation that the reason for his absence was not sinuses.
19. He further explained that he has an ENT specialist report in his file at work that was submitted in 2014 February see the attached **B2**.
20. The respondent acted in bad faith in ignoring all facts which were presented by the applicant trying to correct them in that they base their refusal on a diagnosis which was not reported to the medical certificate which was issued at the time referring shoulder injury.  
Because the applicant's one hand is dysfunctional and the one that he was using was injured it was impossible for him to function as a person or even go to work.
21. The respondent did not treat the applicant fairly and did not comply with PSCBC Resolution No 5 of 2001 section 7.5 that deals with Disability Management Leave.
22. The respondent never followed the processes in place and had failed the applicant by not assisting him; when they have all necessary structures in place (Employee Health and Wellness).

#### **Prayer**

23. We therefore pray that the Commissioner rule on behalf of the applicant and issue an Award that orders the respondent to payback all monies deducted with interest and grant the Incapacity Leave that was applied as prove of the incapacity was provided.

#### **RESPONDENT'S SUBMISSION**

##### **24. BACKGROUND.**

1. The applicant, MS Kekana who is an employee of the responded, South African Police Service applied for temporary incapacity leave for seven days and the respondent declined to approve.
2. The applicant made a representation to the respondent, but still the respondent declined to approve the temporary incapacity leave.
3. The applicant then lodged the grievance which could not be resolved and the mediation certificate in this regard was issued.
4. Then the applicant referred the matter to PSCBC for application of Resolution 7 of 2000.

#### **THE ISSUE AN ARBITRATOR IS REQUIRED TO DECIDE ON.**

5. Whether the refusal of the respondent to approve the temporary incapacity leave, the capturing of 7 days as unpaid leave which resulted into the deduction of his money is fair or not.

## **FACTS OF THE MATTER**

6. The applicant Kekana MS consulted with the Doctor (herein after referred to as DR) Carl Pretorius on 2014-10-14, where the doctor discovered that he has left shoulder rotator cuff tension/injury which needed time to heal (see medical certificate on page 56 of the bundle).
7. The doctor then recommended that the applicant be on sick leave from 2014-10-07 till 2014-10-24 (see medical certificate on page 56 of the bundle), which made a total of 14 working days for which the applicant had to be absent.
8. From a total of 14 working days where he was absent, 7 working days were covered by sick leave (code 510 which represent sick leave) and another 7 working days were supposed to be covered by incapacity leave (code 521 which represent incapacity leave) which the applicant applied for (see entry number 11 and 12 on page 70 of the common bundle).
9. The applicant then applied for temporary incapacity leave, documents which were forwarded to the Provincial Office HR on 2015-02-25 (see page 84 of the bundle as confirmation).
10. On the 2015-09-29 the Provincial Office wrote a response to Roodepoort Radio Technical where Kekana was working, indicating that the application for temporary incapacity leave was disapproved (see page 59 & 60 of the bundle).
11. The Provincial Office HR also advice Roodepoort Radio Technical to capture the 7 working days the applicant applied incapacity leave for, as vacation leave or capped leave and that if the applicant had no such leave, then be captured as unpaid leave.
12. The applicant then made a representation (page 63-65 of the bundle) to the Provincial Office HR explaining how his 36 sick leave days were utilised, which implied that the applicant had a challenge with sinusitis.
13. The respondent then responded to the applicant on 2015-11-17, indicating that the status quo remains which meant that the application for temporary incapacity leave still was declined (see paragraph 5 on page 61 of the bundle).
14. The respondent further advised that upon receipt of the specialist report from his treating doctor pertaining to the sinus condition, if indeed is a challenge, the decision may be revisited and considered (see paragraph 6 on page 61 of the bundle).
15. On 2015-12-02, the respondent wrote to Roodepoort Radio Technical, informing them that an unpaid leave must be processed on the applicant since he had no vacation leave left, since the applicant has failed to submit the requested medical report from the sinus specialist, giving an account of the condition of sinus, as the applicant has exhausted all his sick leave days on sinus.

## **SUBMISSION**

16. PSCBC Resolution 5 of 2001 Section 7.5.1 stipulates that
  - (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.
17. The applicant has informed the employer that he is sick from the 2014-10-07 to 2014-10-24. He completed all the relevant documents and have them forwarded to the Provincial Office for approval. The Provincial Office declined the application citing the lateness of the application, effective management of 36 sick days' credit and noting of the shoulder rotator (see page 59 of the bundle). The temporary incapacity.
18. It was also advised that the vacation leave days should be used for that purpose or leave be captured as unpaid leave on the system.
19. Subsequent to that, the applicant made a presentation, giving an account as to how his 36 sick days were utilized. From that representation the employer could realize that a sinusitis seems to be problematic for the applicant.
20. The employer declined the application for incapacity for the second time, however, indicated that the applicant should obtain a medical report from the specialist who treated him for sinusitis to give an account of the applicant's condition relating to sinusitis which seems to be acute so that the application could be reconsidered or revisited (see paragraph 6 on page 61 of the bundle). Further the employer advised that vacation leave be utilised or it be captured as unpaid leave if no vacation leave available.
21. The applicant failed to submit the report as requested by the Provincial Office/employer till the 2015-12-02 where the employer disapproved the application for temporary incapacity leave and again advised that the vacation leave be utilised or it be captured as unpaid leave where there are no vacation leave days left.
22. The seven days were then captured as unpaid leave and the money was deducted from his salary, subsequent to that.
23. PSCBC Resolution 5 of 2001 Section 7.5.1 (c) states that the employer shall specify the level of approval in respect of the application. The employer asked for the medical report from the applicant as a condition for reconsideration and approval and the applicant failed to comply with that request, therefore it is not the employer's fault but the applicant's fault.

24. PSCBC Resolution 5 of 2001 Section 7.5.1 (b) talks about the investigation that the employer needs to conduct into the degree and extent of inability to perform normal duties. The employer could not investigate the circumstances surrounding that since the applicant's application reached the Provincial Office about four to five months later and the applicant was already back at work. The applicant as well completed the application late when he came back from work.
25. The applicant claims that he fell while on duty and got injured. There are no documents from the applicant to support his version that he fell while on duty. In terms of the police procedure when an employee got injured while on duty, he/she must make an OB entry and complete WCL 2 for the employer to pay for the injured employee and the sick leave days of the injured employee won't be utilised. The employee will be granted occupational injury and disease leave for the period the employee cannot work (see paragraph 7.6 on page 27 of the bundle). Therefore, the applicant cannot claim injury on duty.
26. SAPS National instruction on management of sick leave and temporary incapacity dated 2006 June 6, paragraph 10.5 on page 37 of the bundle states that incapacity leave is not an unlimited number of additional sick leave days at an employee's disposal but is an additional sick leave granted conditionally at the employer's discretion.
27. The applicant has been given feedback about his application throughout the process; therefore, he cannot claim that he was surprised by the deduction of his salary without been informed prior to the deduction.
28. The applicant cannot claim that the employer was unfair in declining his application for temporary incapacity leave whereas he failed to comply with the employer's requirements, therefore the applicant's application should be dismissed.

#### **SURVEY OF EVIDENCE AND ARGUMENT**

25. The applicant had exhausted his normal leave and applied for temporary incapacity leave. His leave application for 7 days was not approved. He challenges the employer's decision not to grant him the leave.
26. The employer contends that the applicant cannot claim that the employer was unfair in declining his application for temporary incapacity leave whereas he failed to comply with the employer's requirements, therefore the applicant's application should be dismissed.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT**

27. The applicant had exhausted his normal leave and was absent for 14 days and only seven days was approved.
28. In order to remain within the scope of section 138 (1) of the Labour Relations Act the relevant provision of the applicable resolutions have been read with the applicable provisions relating to the

terms and conditions of employment of employee by the employer. Further the previous and current decisions in respect of temporary incapacity leave have been taken into account in arriving at my decision. The whole question of temporary incapacity leave and the application thereof was determined by Judge Whitcher and delivered on the 23 November 2016. This judgment and its implications will be elaborated below after some pertinent judgments are explored.

29. In terms of decision in *Public Servants Association O B O Liebenberg v Department of Defence and others* (2013) 22LC 4.2.1 the issue of the jurisdiction of councils to arbitrate disputes referred under section 24 of the LRA has been settled.
30. The *POPCRU and L E E Mbongwa v The Department of Correctional Services and other* delivered by Judge Whitcher on the 23 November 2016 has provided new direction in dealing with temporary incapacity leave. The following are recorded from the judgment and where necessary the applicant's submission are incorporated in the finding:

**"WHITCHER J**

- [1] Clause 3.1 of the respondent's Policy and Procedure on Incapacity Leave and Ill-Health Retirement Policy (PILIR) provides that if an employee has exhausted his or her normal sick leave of 36 working days in a sick leave cycle of 3 years, the respondent, may at its discretion, grant temporary incapacity leave (TIL). The PILIR policy of 2005 is additionally a ministerial determination determined in terms of section 3 (3) (c) of the Public Service Act of 1994. It amplifies a collective agreement, Resolution 7 of 2000, concluded in the Public Service Bargaining Council.
- [2] Clause 7.1.1 of PILIR provides that incapacity leave is granted conditionally at the employer's discretion.
- [3] Clause 7.3.3 provides that the employer must within 5 working days from receipt of the written application for incapacity leave conditionally grant a maximum of 30 consecutive working days temporary incapacity leave with full pay subject to the outcome of its investigation.
- [4] Clause 7.3.5 provides that the employer must within 30 working days after receipt of the application approve or refuse temporary incapacity leave granted conditionally on conditions that the employer may determine.
- [5] Clause 7.3.5 provides further that if the employer (i) approves the temporary incapacity leave granted conditionally, such leave must be converted into temporary incapacity leave; or if the employer (ii) refuses the temporary incapacity leave granted conditionally, the employer must notify the employee in writing of the refusal, the reasons thereof, that the employee has the right to lodge a grievance against such refusal.
- [6] The first page of the application forms contains a number of warning notes to the applicant.
- [7] Note 4 warns that the application for temporary incapacity leave is subjected to an investigation and in light hereof, the employer shall grant temporary incapacity leave conditionally for a maximum period of 30 working days with full pay subject to the outcome of the investigation.

- [8] Note 5 further cautions the applicant that if the application is declined based upon the outcome of the investigation the period of temporary incapacity leave shall be converted to either annual leave or unpaid leave.
- [9] Section 38 (1) of the Public Service Act, 1994 provides that if a state employee has, in respect of his salary, including any portion of any allowance or other remuneration or any other benefit calculated on his salary or awarded to him by reason of his salary, been overpaid or received any such other benefit not due to him, an amount equal to the amount of the overpayment shall be recovered from him by way of the deduction from his salary of such instalments as the head of department, with the approval of the Treasury, may determine.
- [10] The applicant is employed by the respondent and was booked off on sick leave and part of her leave was granted and the rest was declined. The employer commenced deductions from her salary.
- [11] The Applicant prays for an order in the following terms:  
The Respondent incorrectly applied the provisions of Resolution 7 of 2000 in relation to the Applicant's application for Temporary disability Leave (Clause 7.5.1 (b)) by failing to respond to the applicant within 30 days after receipt of the application. The respondent gave results for these applicants out of time frame as suggested by the collective agreement/ resolution;
- [12] The Applicant was not at work from the 10.06.2011 to 31.07.2015 and according to the employer she has still not returned to work despite being asked to do so.  
The applicant's submissions
- [13] The applicant contends that the deductions are unlawful because the respondent failed to make a decision and notify her thereof within the time periods prescribed in the PILIR (the 30 working day period referred to in clause 7.3.5) and because the respondent failed to afford her a hearing prior to taking the decision to effect the deductions.
- [14] At the hearing of this matter (not in his founding affidavit), it was contended on behalf of the applicant that when he did not hear from the respondent after the 30 working day period, and thus advised the applicant timeously that his leave had only been partially granted.
- [15] It was further contended at the hearing that if the respondent had complied within the 30 day period, and thus advised the applicant timeously that his leave had only been partially granted, he would have reconsidered his position, which may have included returning to work to avert financial prejudice. It was contended that the policy implicitly provides the applicant with this right and the respondent's failure to afford him same caused the financial loss.
- [16] Lastly, the applicant contended, section 38 of the Public Service Act, 1994 does not have application to his case because the payments made to him do not constitute "overpayments" of remuneration arising from "an error" in calculating his remuneration.  
The respondent's submissions

- [17] It is evident from the respondent's opposing affidavits that the processing of incapacity leave applications is cumbersome and time consuming. The application proceeds through various departments before it ends up at Proactive Health Solutions (PHS), the service provider tasked to assess all applications for temporary incapacity leave and to make recommendations thereon. The recommendation from the PHS also proceeds through various departments for approval before the employee is notified of the final outcome.
- [18] According to the respondent, it only received the recommendations from PHS in April 2013. Thereafter the recommendations were sent for approval to another department, the approval was granted in May 2013 and the applicant was informed of the outcome in April 2014
- [19] The respondent submitted that the policy and guidelines on temporary incapacity leave clearly warns applicants that temporary incapacity leave is only conditionally granted subject to the proviso that where leave is not approved and the employee has exhausted all sick and annual leave, then the sick leave taken will be regarded as leave without pay. The policy clearly indicated that the employee assumes a risk: a risk that temporary incapacity leave may not be granted, and, if so, any leave taken will be regarded as either annual leave or unpaid leave.
- [20] The respondent pointed out that nowhere in his founding affidavit did the applicant allege that he assumed the leave had been granted and that he would have reconsidered his position if he had been timeously advised of the final outcome. It is obviously an afterthought conceived by his counsel and is thus irrelevant and inadmissible.
- [21] The policy in clause 7.3 permitted the applicant to lodge a grievance against the outcome of his leave application, but he had failed to do so.
- [22] Section 38 of the PSA applies to the applicant's case in that he received remuneration not due to him- he was paid while on leave without pay.
- [23] Finally, to allow the applicant to retain the money will amount to irregular and wasteful expenditure, which is contrary to the provisions of the Public Finance Management Act, 1999 (PFMA) as the applicant did not render any services during the said period.

#### Analysis and findings

- [24] I am aware of the judgment of my learned brother, Cele, J in *Public Service Association of South Africa and Another v PSCBC, Gouvea and Others*<sup>1</sup> in [2013] ZALCD 3 (at para 20), unreported in this he finds that where an application for temporary incapacity leave is declined outside the 30 day investigation period, any deduction from an employee's salary for the period (outside the 30 day period) that he or she was awaiting a decision from the employer would offend the prohibition against retrospectivity. Cele, J states, "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". This has been taken to mean that "employees cannot be subjected to leave without pay/monthly deduction for TIL/IHR is declined for a

period they have been off work sick) or stoppage of salary unless the application is declined with 30 days or unless they have been given a date to return for work and have failed to do so<sup>2</sup> Bezuidenhout / Department of Health: Eastern Cape (2014) 23 PSCBS 4.2.2,

- [25] The decision in Gouvea flowed from an analysis of clause 7.5.1 (b) of PSCBC Resolution 7 of 2000, which is identical in operation to clause 7.3.5 in PILIR? PILIR, a ministerial determination, indeed amplifies the earlier PSCBC Resolution 7 of 2000.
- [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 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. However, 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 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 reasonable employee applying for additional leave assume that, 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 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.
- [27] I also agree with the respondent's submission that section 38 of the PSA applies to the applicant's case in that he received remuneration not due to him.
31. In the present case the applicant's applied for TIL for seven days and was advised that his leave was not recommended.
32. The applicant was advised of the respondent's decision and the action taken by the respondent in lieu of the leave not granted and the action to recover the leave not approved from other benefits accrued by the applicant.
33. This dispute deals with the application of the Resolution and the Council has jurisdiction to enquire whether the employer applied the terms and conditions of the Resolution fairly or correctly. The employer's decision sought to have retrospective effect. The previous decision of Judge Cele was overtaken by the recent judgment and as such the new guiding principles must apply.
34. The learned judge has pronounced that this interpretation and application of the policy of PILIR and determined that it 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 action by the employer, does not in terms of the Whitcher J judgment harden 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 reasonable employee applying for additional leave assume that, 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 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.

35. I have also considered the recent Constitutional Court decision under case number CCT/6/17 and 14/14 in the matter between PSA OBO Olufunmilayi Itunu Ubogu and HOD of Health Gauteng and Others heard on the 18 May 2017 and decided on 7 December 2017. This case concerns the validity of a statutory provision that permits the state, as an employer to recover monies wrongly paid to its employees directly from their salaries or wages in the absence of any due process or agreement between the parties. In this matter the Court ordered that:
  4. The matter is remitted to the Labour Court to determine the disputes between the parties regarding the recovery of the amounts allegedly overpaid to Ms Olufunmilayi Utunu Ubogu.
36. [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 a court order. The state can absent an agreement between it and the concerned employee, or a collective agreement or a court order, or an arbitration award, unilaterally decide on whether an overpayment has been made and if so, can decide on the method of recovery and the period over which such recoveries may be made.
37. Section 38 of the PSA applies to the applicant's case in that they received remuneration not due to them.
38. The period of absence are although not long and a reasonable employee ought to have considered the Implications of the leave not being granted and in the light of the foregoing judgment must bear the consequences of his actions.
39. The slavish reliance on the 30 days response time not to be penalized for not rendering a service has now been addressed. An employee must be aware that even if the response is delayed implications may follow that may have financial implications on the employee.
40. The employees applying for temporary incapacity leave cannot rely on his/her medical practitioner's assessment only because the employer also has the right to subject the employee to its medical practitioner of like specialty to verify the assessment. The sole reliance of one's own medical practitioner's assessment without consideration of the employer's rights in most cases leads to unfavorable consequences for the employee.

41. I have noted the above judgment by Judge Witcher that is reportable and the judgment of Judge Lallie (not reportable) and prefer the Witcher judgment over the Lallie judgment.
42. Therefore I determine and Order that:
- 42.1. The respondent correctly applied the provisions of Resolution 7 of 2000 in relation to the Applicants' application for Temporary Incapacity Leave;
- 42.2. As a result of the foregoing, the applicant must comply with the employer's finding in respect of their TIL application.
- 42.3. The recovery of the number of days not recommended by the Health Risk Management be determined by the employer.

A handwritten signature in cursive script, appearing to read 'a. S. Dorasamy'.

Commissioner: ANAND DORASAMY