



ARBITRATION AWARD

Case Number: PSCB 143 -16/17
Commissioner: Minette van der Merwe
Date of Award: 03 August 2017

In the **ARBITRATION** between

PSA obo WH Theunissen

(Union/Applicant)

And

Department of Correctional Services – Free State

(Respondent)

Union/Applicant's representative: Mr Jaco Greeff (PSA Official)

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DETAILS OF HEARING AND REPRESENTATION:

1. The matter was scheduled for arbitration on 17 July 2017 in Bloemfontein. The matter was referred to the PSCBC as a dispute relating to the interpretation or application of PSCBC Resolution 7 of 2000.
2. Parties were represented as per the cover page of this award.
3. Parties agreed to argue the merits of this dispute by way of the submission of heads of arguments as follows:
 - PSA to submit by no later than 24 July 2017
 - The Respondent to submit by no later than 31 July 2017
 - PSA to supplement its arguments by no later than 03 August 2017, if it needed to.

ISSUE TO BE DECIDED:

4. The matter was referred to the PSCBC as a dispute relating to the interpretation or application of PSCBC Resolution 7 of 2000, as amended. The Applicant referred this dispute to the PSCBC after the Respondent failed to finalize an application for temporary capacity leave ("TIL") within 30 days as required.
5. I am called upon to determine whether or not the Respondent correctly applied the said collective agreement.

BACKGROUND TO THE ISSUE:

6. The Applicant applied for TIL for the period 23 June 2015 – 28 June 2015 (6 days) on 29 June 2015.
7. The Respondent responded to the application for TIL during August 2015.
8. There is no statutory timeframe in which a dispute related interpretation and application of a Collective Agreement has to be referred to a specific dispute resolution forum.
9. The Applicant seeks an order that the period in question be converted to TIL with full pay on account that Resolution 7 of 2000 was not applied fairly, and reimbursement of deductions made for leave without pay.

SURVEY OF ARGUMENTS AND EVIDENCE:

Applicant's heads of arguments (*verbatim*):

10. *"The Applicant applied for temporary incapacity leave from 23 June 2015 to 28 June 2015 (6 days) on 29 June 2015.*
11. *The Respondent only responded to the application from the period from 23 June 2015 to 28 June 2015 in August 2015. It is clear out of the dates which are common cause that the Respondent failed to finalize the two applications for temporary incapacity leave within 30 days as required by section PSCBC Resolution 07 of 2000 section 7.5.1. (b).*
12. *The relevant section from PSCBC Resolution 07 of 2000 as follows: (Attached find PSCBC Resolution 07 of 2000):*

7.5 Disability management leave:

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 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.*
- 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."*

Respondent's heads of arguments (verbatim):

13. *"The above mentioned clause (7.5.1) of resolution 7 of 2000 is not peremptory to the employer to approve any TIL application including the applicant's application. The wording of the clause empowers the employer with discretion to grant or not to grant TIL. Clause 3.1 of the PILIR Policy also confirms the same discretion. In exercising this discretion the employer must not be reckless, but must be informed by the recommendations made by the HRM.*
14. ***The reasons for the employer to decline the application of the applicant were as follows:***
- *There was insufficient objective medical evidence submitted to support this application.*
 - *There was lack of information pertaining to the extent and severity of the employee's present symptoms, whether he suffered with any complications and his response to treatment.*
 - *Due to this lack of information the HRM was unable to justify and to recommend the granting of TIL for the applicant.*
 - *The HRM further indicated that the period applied for was excessive, especially as there was no evidence of escalation of the treatment to a specialist.*
 - *The other critical reason presented by the HRM was that the sick leave profile of the applicant was very poor and it was dominated by weekend's related absence of 1-2 days.*
 - *It is therefore our argument that the responsibility to convince and persuade the employer to approve the TIL application was solely on the shoulders of the applicant.*
 - *It is further our argument that incapacity leave is an employee privilege and unlike sick leave, it is not a right or a basic condition of employment in terms of Basic Conditions of Employment Act (BCEA).It is specifically intended for conditions of an incapacitating nature that renders temporary disability.*
 - *The nature of the diagnosis of the applicant was not that renders him disable to could perform his normal duties. Commissioner the purpose and the intention of clause 7.5.1 is not meant to force the employer to approve any TIL application including the applicant application. The clause merely says the employer has to conduct an investigation into the nature and the degree of inability, which will hamper the employee to perform his normal duties. This clause Commissioner has no bearing or suggests to influence the employer to make a decision within a period of 30 days.*
15. *It is further our submission that it is common cause that the applicant was paid for the duration of his absence and as such upon the decline of his application it is only fair that the employer will invoke the provision of the PSA section 38 to recover the monies paid to the applicant.*

16. Commissioner in the recent case of **POPCRU obo Lindani Earl Emmanuel Mbongwa V/S Department of Correctional Services case no.D642/15 handed down on 23 November 2016 by the Labour Court**, it was held that an Employers failure to respond to an application for temporary incapacity leave within 30 working days, that does not translate into an entitlement to such leave.
17. It is therefore our considered view that this judgement confirms our position in this matter as alluded above. It is further our argument that DCS was not in contravention of Resolution 7 of 2000. “

ANALYSIS OF EVIDENCE AND ARGUMENTS:

18. This dispute relates to the application of PSCBC Resolution 7 of 2000, read with the Policy for Incapacity Leave and Ill-Health Retirement (PILIR).
19. Clause 7.5.1 of Resolution 7 of 2000. It reads as follows:

"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 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.
- (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”.

20. The Applicant must establish a *prima facie* case. Only once the Applicant has established a *prima facie* case, does the onus shift to the Respondent to present a defense.
21. The Respondent argued that it had a discretion to grant TIL, which discretion was confirmed by clause 3.1 of the Respondent's PILIR Policy. Clause 7.5.1 of Resolution 7 of 2000 infers that the Respondent has a discretion to grant TIL, under specific circumstances once an investigation into the alleged inability to perform normal duty has been concluded.
22. It is common cause that the Respondent was in breach of the time limits in clause 7.5.1 of Resolution 7 of 2000.
23. In the recent case of **POPCRU obo LEE Mbongwa vs the Department of Correctional Services and another** (D642/2015) handed down on 23 November 2016 by the Labour Court, it was held that an Employer's failure to respond to an application for temporary incapacity leave within 30 working days does not translate into an entitlement to such leave. The facts of this particular judgment was that the Employee filed an application for TIL during May 2010 and only received feedback from the Employer during April 2014, during which he was informed that his TIL application for 7 months, has only been partially approved.
24. An arbitrator is tasked with determining whether the provisions of a Collective Agreement were correctly applied, and to order appropriate relief in instances of non-compliance. The Applicant argued that the Respondent failed to comply with the provisions of Resolution 7 of 2000, and sought an order for competent relief.
25. It is my finding that the Applicant's case stands to be dismissed. It is, in my view, supported by the Labour Court judgment above that it is not sufficient to only argue that TIL should be approved merely because the Respondent failed to comply with the 30-day time limit.

AWARD:

26. The Respondent was not in contravention of Resolution 7 of 2000.
27. The Applicant's claim is hereby dismissed.



Signature: _____

PSCBC Panelist: **Minette van der Merwe**