



Commissioner : ANAND DORASAMY
Case No. : PSCB 293-16/17
Issued : 20:05: 2017

In the ARBITRATION between:

PSA O.B.O. ZONDI Z C

APPLICANT

and

DEPARTMENT OF HEALTH- KZN

RESPONDENT

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DETAILS OF HEARING AND REPRESENTATION

1. The arbitration proceedings commenced at 12h00 on the 20 April 2017 at the VIP Lounge Boardroom in Durban. Ms C Mbali of the PSA represented the applicant and Mr C Mdlalose represented the respondent.

After discussing the matter the parties agreed and drafted a stated case with submission dates as follows:

- No oral evidence would be led.
- The applicant /employee will serve its Heads of Arguments in the WORD FORMAT on commissioner and respondent on or before 03:05 2017.
- The respondents/ employer will serve its Answering Heads of Arguments IN THE WORD FORMAT on the commissioner and applicant on or before 10:05: 2017.
- The applicant /employee will serve its Replying Heads of Arguments IN THE WORD FORMAT on the on commissioner and respondent on or before 17:05: 2017.

BACKGROUND

2. The applicant has applied for temporary incapacity leave for the periods 19 February 2015 to 20 February 2015(2 days) and 11 May 2015 to 15 May 2015 (5days). The employer disapproved her leave and intends to deduct the monies paid to the applicant in instalments. She challenges the respondent /employer's decision to refuse her application for the periods in question. She seeks the setting aside of the decision to decline her leave.
3. The applicant was advised of the respondent's decision to refuse her leave.
4. The applicant prays for an order in the following terms:
The respondent must approved the number of days for the applicant because they did not manage the whole process/ procedures were not followed according to PILIR. The respondent prays for the case to be dismissed.

ISSUE TO BE DECIDED

5. I am to decide: whether
The respondent failed to apply the collective agreement in respect of the applicant's temporary incapacity leave for the periods in question. Further should I am to determine whether any monies are to be deducted by the respondent for the periods in question. Should my finding not favour the applicant what remedy may be appropriate in the circumstances.

6. SUMMARY OF THE EVIDENCE

7. APPLICANT'S SUBMISSION

Applicant is employed by the respondent as a Registered Nurse at King Dinizulu Hospital.

- She is suffered a serious problem related acute severe backache from 2014, which necessitated her seeking medical intervention.
- Diagnosis which is on records with her family doctor (Dr P.S Cele), he wrote a report about her condition as a proof to the respondent.
- She has exhausted her sick leave but applied for a short term temporary incapacity leave.
- Applicant submitted medical certificate as a proof from her doctor which respondent did not denied.
- Respondent failed to apply the collective agreement PSCBC Resolution 7 of 2000 in respect of the applicant temporary incapacity leave.

Clause 7.1.2 of (Pilir): Employee who exhausted her normal sick leave may apply for temporary incapacity leave with full pay on the applicable application forms prescribed In terms of Pilir in respect of each occasion.

Clause 7.1.8: An employee must submit application form for temporary incapacity leave personally or through a relative, fellow employee or friend within 5 working days after the first day of absence.

(applicant did comply with Pilir).

Clause 7.2.2: Employer must within 5 working days from receipt of the employee's application for temporary incapacity leave.

Clause 7.2.9 Employer must within 30 working days after the receipt of both the application form and medical certificate referred to Annexure A for short period of incapacity leave.

- The respondent forwarded the documents to Thandile Health Risk Management on the 29 July 2015.
- The respondent advised the applicant of it decision of the outcome 8 June 2016, this was too long from the date of submission and a decision from Thandile (employer did not follow the PSCBC Resolution 7 of 2000)
- The respondent told the applicant her short term temporary incapacity leave for the periods have not been approved by Thandile Health Risk Management
(19 .02.2015 to 20.02.2015 – 2days)
(11.05.2015 to 15.05.2015 – 5 days)
- Applicant was told to pay a certain amount of money verbal but was not provided with any proof document as a copy explaining how much she is owing to the department.

- The respondent was not transparency about the decision of Thandile Health Risk Management to the applicant
- The whole process bind both parties to managed, addressed and resolved the whole process within the time frame of the Resolution 7 of 2000.
- The respondent if the leave is not granted (TIL) must be communicated properly and fairly by following the right procedures and act within the time frame, respondent failed to comply with the collective agreement.
- Applicant is suffering and will further suffer severe financial prejudice for this unknown amount of money which was not submitted to the applicant but only communicated verbal.
- Respondent must approved the number of days for the applicant because they did not managed the whole process, procedures were not followed and Pilir.

8. REPLY

9. RESPONDENT'S SUBMISSION

1. The applicant (Zondi Z.C.) exhausted her normal sick leave (36 days) in a three year cycle i.e. 2013-2015.
2. PSCBC Resolution 5 of 2001-Amendments to Resolution 7 of 2000 clause 7.4 (a) states that an employee shall be granted 36 working days sick leave full pay in a three year cycle.
3. PILIR clause 7.1.1 (**page 30 of Annexure A3**) states that incapacity leave is not an unlimited amount of additional sick leave days at an employee's disposal. Incapacity leave is additional sick leave granted conditionally at the Employer's discretion.
4. PILIR clause 7.1.2 states that an employee who has exhausted his/her normal sick leave, during the prescribed leave cycle may apply for temporary incapacity leave with full pay on the applicable application form prescribed in terms of PILIR in respect of each occasion.
5. The applicant applied for short term temporary incapacity leave for the: 19/02/2015 to 20/02/2015 = 2 days and also for the 11/05/2015 to 15/05/2015 = 5 days. Both applications were received by the respondent's HR Registry office on the 23/07/2015 (refer to date stamp on Annexure A, page 16 &54) that is contrary to PILIR clause 7.1.8 which states that an employee must submit an application form for temporary incapacity leave personally or through a relative, fellow employee or friend within 5 working days after the first day of absence.
6. PILIR clause 7.2.2 states that the Employer must within 5 working days from receipt of the employee's application for temporary incapacity leave verify that part A and B of the application form is completed and signed. The date on which the employee re-submits his/her complete and signed application to the Employer will be deemed the date of receipt for purposes of PILIR and Leave Determination.

7. The respondent (Employer) did comply with clause 7.2.2 as the temporal incapacity leave application forms received on the 23/07/2015 were verified and sent to Health Risk Management on the 29/07/2015 **(see Annexure A, page 1).**
8. The respondent advised the applicant about the outcome on the 8/06/2016 and it should be noted that processing of incapacity leave applications is cumbersome and time consuming as Health Risk Management tasked to assess all applications has: to determine the validity of the application for temporary incapacity leave, determine the need for ongoing temporary incapacity leave, determine the appropriate duration of the leave, provide preliminary advice on the management of the condition and advise a full health assessment . This assessment also include analysis and scrutiny of the available medical information, sick leave certificate(s) by a medical practitioner and sick leave profile for current and previous sick leave cycles, in conjunction with the employee's annual leave profile for the corresponding periods, contact the treating medical practitioner to verify information where necessary, categorize the application for temporary incapacity leave into: (i) employees who applied for clearly invalid reasons and for whom temporary incapacity leave should be declined (ii) employees who applied for valid reasons and for whom temporary incapacity leave should be granted for certain period etc **(PILIR clause 7.2.4.1 to 7.2.4.5 & 7.2.5.1 to 7.2.6.4 Annexure A3, page 10 &11)**
9. The objectives of PILIR are to set up structures and processes, which will ensure intervention and management of incapacity leave in the workplace to accommodate temporary and permanently incapacitated employees and the mission is to adopt a holistic approach to health risk management, prevent abuse of sick leave by managing incapacity or ill health as far as possible, adopt a scientific approach to health risk management, involve the various stakeholders, implement health risk management that is consistent, fair and objective, support health risk management that is cost effective and financially sound and to afford opportunity for recuperation to deserving/ incapacitated employees.
10. The applications for temporary incapacity leave for the periods (19/02/2015 to 20/02/2015 = 2 days and 11/05/2015 to 15/05/2015 = 5 days were not approved.
11. Both periods were not advised due to the general practitioner's failure to provide a valid medical diagnosis and a history of mismanagement of leave i.e short periods of sick leave and temporary leave adjacent to weekends, public holidays and annual leave, sick leave utilized as midweek breaks and sick leave without medical certificates **(see Annexure A, page 23, 25 and 61 &63).**
12. Persal print out for sick leave and annual leave records (Annexure A1 for sick leave taken and A2 for vacation leave taken–scrutinized and compared against each other) clearly shows pattern of mismanagement of sick leave i.e. several times extending vacation leave with sick leave and vice versa e.g. vacation leave 11/02/2015 to 17/02/2015 extended by sick leave 18/02/2015 e
13. The Thandile Health Risk management decision would not have changed even if the outcome was advised within 30 days.

14. The respondent was transparent about the decision taken in that the applicant was notified and furthermore the employer explained to her that if she was not satisfied with the Employer's decision she may lodge a grievance as per PILIR clause 11.
15. The applicant did lodge a grievance on the 15/06/2016 (**see grievance form on Annexure A, page 75**).
16. The grievance was submitted to Health Risk Management with medical reports attached on the 20/06/2016 (**Annexure A, page 73-87**).
17. The information forwarded by the applicant with her grievance did not convince Health Risk Management to change the previous decision.
18. In PILIR – Application form temporary incapacity leave short periods, **note 4** warns that the application is subject to an investigation in terms of Determination on Leave of Absence, read together with PILIR. In the light hereof, the Employer grant temporary incapacity leave conditionally for a maximum period of 29 working days with full pay subject to the outcome of the said investigation. The section also warns 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 if annual leave is exhausted (**Annexure A, page 3**).
19. **Note 5** of the application form states that cognizance must also be taken of the fact that the employee is responsible to prove to the Employer's satisfaction that s/he is too ill/injured to be at work.
20. The conversion of declined incapacity leave to annual leave could not be applied because the applicant had already exhausted her annual leave and as a result the Employer had no option but to apply unpaid leave for 19/02/2015 to 20/02/2015 = 2 days and 11/05/2015 to 15/05/2015 = 5 days (i.e 7 days in total).
21. **It should also be noted that the applicant has already exhausted the current sick leave (36 days) for cycle 2016-2018 (Annexure A, page 101 and A1 page 1).**
22. The applicant was notified verbally about the amount owing due to unpaid leave (R6063.90 salary plus R505.32 bonus overpaid) and the intention to deduct in terms of Section 38 of the Public Service Act, 1994 as it was regarded as irregular granted remuneration. HR called Commercial City in order to advise the applicant to come and fetch the letter but Prof Nurse Govender responded that Zondi Z.C. did not come to work.
23. The amount is to be deducted in instalments for a period of six months starting in September 2016 and the applicant is given a grace period of 7 days to make arrangements with the Employer's HR if she could not afford to pay in 6 months and needed an extension of the period of payment(**Annexure A, page 97**).
24. The Employer's failure to respond to application for temporary incapacity leave within 30 working days does not translate into entitlement to such leave.

25. **The Judge of the Labour Court of South Africa, Whitcher J, in the matter between POPCRU (1st Applicant), LINDANI EARL EMMANUEL MBONGWA (2nd Applicant and the DEPARTMENT OF CORRECTIONAL SERVICES (1st Respondent), THE MINISTER OF CORRECTIONAL SERVICES (2nd Respondent)- Case No: D642/15** is quoted as follows :

*"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 payment to an employee, subject to 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 prompted an employee to seek additional sick leave, this fact must determine what happens to any payments they received while applying and not the employer's delay in attending the application."*

It is the respondent's prayer that the applicant's case be dismissed accordingly.

ANALYSIS OF EVIDENCE AND ARGUMENT

10. 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.
11. 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.
12. 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

submissions 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) © 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 timely 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*¹ 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"² *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.
13. In the present case the applicant's applied for TIL for two periods and on the 8 June 2016 she was advised that the leave were not recommended.
 14. The applicant was advised of the respondent's decision and its decision to deduct monies in instalments from the applicant's salary.
 15. 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.
 16. 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 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.

Section 38 of the PSA applies to the applicant's case in that she received remuneration not due to her.

17. The period of absence 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 her actions.
18. 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.
19. Therefore I determine and Order that:
 - 19.1. The respondent correctly applied the provisions of Resolution 7 of 2000 in relation to the applicant's application for Temporary Incapacity Leave;
 - 19.2. As a result of the foregoing, the applicant must comply with the employer's finding in respect of her TIL application.
 - 19.3. The number of days not recommended by the Health Risk Management be deducted from the applicant's salary.
 - 19.4. The deductions are to continue until the full amount due is recovered.



Commissioner: ANAND DORASAMY
(AWARD PSCB ZONDI TIL NEW MAY 2017)