



Commissioner : ANAND DORASAMY
Case No. : PSCB 367-16/17
Issued : 21:05: 2017

In the ARBITRATION between:

PSA O.B.O. MAJOZI P N

APPLICANT

and

DEPARTMENT OF PUBLIC WORKS (ULUNDI) - KZN

RESPONDENT

Applicant's representative : MR R NAIDOO
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Respondent's representative : Ms L KHUMALO
Applicant's address

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DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration proceedings commenced at 10h00 on the 21 April 2017 at the Department of Public Works Boardroom in Ulundi. Mr R Naidoo of the PSA represented the applicant and Ms L Khumalo 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 05:05 2017.
- The respondents/ employer will serve its Answering Heads of Arguments IN THE WORD FORMAT on the commissioner and applicant on or before 12:05: 2017.
- The applicant /employee will serve its Replying Heads of Arguments IN THE WORD FORMAT on the on commissioner and respondent on or before 19:05: 2017.

BACKGROUND

2. The applicant has applied for temporary incapacity leave for various periods (see clause 4 of respondent's submission). The employer and disapproved her leave started deductions. She challenges the respondent /employer's decision to refuse her application for the period in question. She seeks the setting aside of the decision to decline her leave and to be reimbursed the monies deducted by the employer.
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:
 - 4.1. The Applicant prays for an order in the following terms:
 - 4.1.1 The Respondent had failed to comply with the provisions of resolution 7 of 2000 in relation to the Applicant's applications for temporary incapacity leave for the periods in question.
 - 4.1.2 As a result of the foregoing the Applicant suffered severe financial prejudice.
 - 4.1.3 The Applicant's application for leave for the periods in question be approved with full pay.
 - 4.1.4. The Respondent to pay the monies deducted from the Applicant prior to her instituting a grievance against the decision not to approve her applications for temporary incapacity leave for the periods in question.

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 the monies deducted by the respondent for the period should be reversed and further and should my finding not favour the applicant what remedy may be appropriate in the circumstances.

6. SUMMARY OF THE EVIDENCE

7. APPLICANT'S SUBMISSION

The Applicant referred a dispute to the above Council relating to interpretation application of a collective agreement PSCBC Resolution 7 of 2000. The dispute relates to her applications for temporary incapacity leave for various periods which is normally granted in terms of PSCBC Resolution 7 of 2000. Previously, prior to the Liebenberg and Gouvea decisions, disputes which related to the non-granting of temporary incapacity leave were referred as a dispute that related to the interpretation and application of a collective agreement in terms of Section 24 of the Act. It is respectfully submitted that Council does have jurisdiction to deal with the matter because the issue in dispute is regulated by PSCBC Resolution 7 of 2000 (The Agreement on Improvements in the Conditions of Service of Public Service Employees for 2000/2001 Financial year) which is an agreement on, inter alia, the granting of temporary incapacity leave in instances where the normal leave entitlement has been exhausted. The provisions of the Resolution are further explained and developed by the provisions of the Policy and Procedure on Incapacity Leave and Ill Health retirement ("PILIR") and the Determination on Leave of Absence in the Public Service Sector (the "Determination") which documents are cross referenced as must be read conjunctively.

1. It is the Applicant's case that the Respondent incorrectly interpreted as well as failed to comply with the substantive and procedural obligations and provisions of the resolution read with PILIR and the Determination. The improper conduct of the Respondent will cause the Applicant substantial financial prejudice which will be canvassed hereunder.

2. ISSUES

- 2.1. Whether the Respondent correctly interpreted the Resolution in relation to the Applicant's applications for short and long term incapacity leave?
- 2.2. Whether the Respondent complied with the provisions of the Resolution and or correctly applied the Resolution in relation to the Applicant's applications for short and long term temporary incapacity leave?

3. **BACKGROUND**

- 3.1. The Applicant has been employed by the Respondent since 2 December 1993 at its Ulundi offices in the capacity of Senior Administration Clerk. She was transferred to its Durban Offices during 2004. In 2007 she was transferred to Pietermaritzburg where she was required to commute between Durban and Pietermaritzburg on a daily basis. With effect from April 2011 she was once again transferred to Ulundi on promotion in the capacity of Senior Administration Officer where she is currently based.
- 3.2. The Applicant was absent from employment for most of the time during August 2007 and to 27 August 2010. The Applicant was diagnosed as suffering from severe depression for which she received treatment and was prescribed medication. The Applicant had undergone continuous medical treatment for her depression.
- 3.3. As the Applicant was during the period August 2007 to August 2010 undergoing continuous treatment, she had recurrent appointments with Dr A Valjee (Specialist Psychiatrist) and other medical practitioners such as Dr PL Patel (Specialist Physician), Dr M Naidoo (Radiologist), Dr Sonia Roopnarain (Psychologist).
- 3.4. Accordingly, where the Applicant was absent from employment, she consulted with the relevant medical practitioner on the next scheduled date. After consultation, the medical practitioner (if satisfied as to the illness of the Applicant) issued the Applicant with a medical certificate for the period of absence that he deemed appropriate.
- 3.5. Consequently, the date of issue of the medical certificate regularly occurred during the period of absence consistent with the scheduled date for the applicant to consult the medical practitioner. The medical certificate, therefore, record a period of absence prior to and after the consultation dates.
- 3.6. All medical certificates were submitted to the Applicant's immediate supervisor at Pietermaritzburg where the Applicant was based during her absence from duty.
- 3.7. The periods reflects in the bundle for which the Applicant had applied for temporary incapacity leave, the number of days applied for, the reasons for the absence, the dates on which the medical certificates were submitted, the dates on which the applications for temporary incapacity leave was applied for the dates on which such applications were not approved and the reasons for it not being approved.
- 3.8. It will be noted that initially the Applicant was not aware that she was required to make an application for temporary incapacity leave on the prescribed forms. Hence, her first application for temporary incapacity leave for the period 31 August 2007 to 28 September 2007 was only submitted on 31 January 2008. However, the Respondent advised the Applicant only on 15 May 2008 that her application was not approved, i.e. almost three and a half months later. For the

period 1 October to 31 December 2007 she applied on 23 September 2007 and the Respondent only advised the Applicant on 15 May 2008 that her application was not approved, i.e. almost seven and a half months later. The table above clearly reflects the long periods in which the respondent failed to advise the Applicant of the outcome of her applications for temporary incapacity leave. It will be noted that there was a delay of more than three months.

4. In most instances the reasons recorded for not approving the Applicant's application for temporary incapacity leave was because the treatment was not optimal.
5. The outcome does not inform the Applicant of nor set out the recourse available to appeal and or challenge the decision nor the time frames in which to file such appeal.
6. Nevertheless, the Applicant lodged a formal grievance timeously and it was not resolved. The Applicant invoked the dispute procedures and at conciliation the matter was not resolved and the Applicant referred the dispute to Council.

7. **RESOLUTION 7 OF 2000 READ WITH PILIR AND DETERMINATION ON LEAVE IN THE PUBLIC SERVICE**

Resolution:

7.1. Clause 7.5.1. (Disability Management Leave) of the Resolution provides for the general guidelines and process to be considered and applied by the Respondent when determining an application for temporary disability leave.

10.1.1. The provision is applicable to an employee that has exhausted his/her normal sick leave credits in a cycle and who according to the relevant practitioner, requires to be absent from work due to disability which is not permanent. Such employee may be granted sick leave on full pay notwithstanding the exhaustion of his/her sick leave credits for that cycle provided that:

7.1.1.1. his/her supervisor is informed of the employee's illness; and

7.1.1.2. a relevant registered medical practitioner has duly certified such condition in advance as temporary disability except where conditions do not allow.

Resolution: Clause 7.5.1(a)(i) and (ii)

7.1.2. It is apparent that the employer only needs to be informed of the illness of the employee. Secondly, that a medical practitioner must certify the disability of the employee prior to the period of absence due to the disability. However, the exception referred to indicates that the employer acknowledges that there are circumstances in which a medical practitioner will only be able to certify the disability after the commencement of the period of absence due to such disability.

7.2. The employer is obligated during the thirty days from notice of the disability to investigate the extent of the employee's inability to perform his/her duties, the degree of inability and the cause of

such inability. The employer is further obligated to perform such investigation in accordance with item 10(1) of Schedule 8 of the LRA. The provision not only places an obligation on the employer but also provides a guideline and creates a timeframe in which the employer must comply with that obligation.

Resolution: Clause 7.5.1(b)

- 7.3. The employer is obliged to specify the level of approval (if any) in respect of an application for disability leave. It is submitted that this approval can only be decided after compliance with the obligation set out in paragraph 10.2. above

PILIR

- 7.4. Clause 7(The management of temporary and Permanent Incapacity Leave) of PILR expounds the Resolution and details the timeframes and obligations on both the employee and employer.

7.4.1. The employee may apply for temporary incapacity leave with full pay on the prescribed forms in PILR for each period of absence.

PILIR: Clause 7.1.2

- 7.4.2. For an application for temporary incapacity leave to be considered, the employee must provide sufficient proof that he/she is too ill/injured to work satisfactorily, attach a medical certificate from a registered medical practitioner certifying the condition as temporary together with his/her application.

PILIR: Clause 7.1.5.1 and 7.1.5.2

- 7.5. The employee must submit the application for temporary incapacity leave within five working days after the first day of absence. Should the employee not submit an application, the employee's supervisor must immediately notify the employee that if an application is not received within a further period of two days, the period of absence will be regarded as leave without pay. Should the employee fail to submit the application(within the further two days) or fails to submit compelling reasons why the application cannot be submitted, the supervisor must immediately inform the relevant department that the absence must be covered by annual leave or as unpaid leave. Should the employee fail to submit the application within the timeframes and or failure by the supervisor to properly manage the process should be viewed in a serious light.

PILIR: Clause 7.1.8 and 7.1.9

- 7.6. It is apparent that the initial obligation is on the employee to submit an application for temporary incapacity leave. However, should the employee fail to do so within the prescribed timeframe, he/she is not barred from doing so but the onus shifts to the employer (supervisor). The employer must follow up with the employee and notify him/her of the need to submit an application together

with the consequences should he/she fail to do so. The clause acknowledges that there will be circumstances in which the employee does not comply with the time frames, which could be for reasons of negligence, impossibility and or ignorance, thereby placing the ultimate onus on the employer to inform the employee. The employee cannot be held responsible for the consequences of any late submission of an application where the employer has failed to comply with its obligation to inform the employee of the need and timeframe in which to submit an application.

7.7. The employee may be subjected to a full health assessment by the Health Risk Manager. The appointed Health Risk Manager appointed in the Public Service is Thandile Health Risk Management ("Thandile"). This allows for a comprehensive assessment and the valuation which assists the employer to determine how the employee's duties may be adapted to accommodate his/her disability. The employer is obliged to immediately register a date of receipt of the application for temporary incapacity leave in the designated office and central register.

PILIR: Clause 7.3.1. and 7.3.2

7.8. The employer is obligated to, within five days of receipt of the application :

7.8.1. verify that the application is complete and signed correctly (which includes attachment of relevant documentation) and if the application is incomplete and unsigned, the employer must immediately return the application to the employee for submission within a further five days. The resubmission date of the complete application will be recorded as the date of submission. The provision acknowledges that there will be circumstances in which the employee submits an incomplete application (in respect of information, documents and signatures). It further places an onus on the employer to draw any defect in the application to the employee's attention and request that the application be corrected and resubmitted. Accordingly, no application should be declined for incompleteness or non-compliance as the employer is obliged to bring such error to the attention of the employee prior to the employer considering the application.

PILIR: Clause 7.3.3.1(a)

7.8.2. The employer must conditionally grant a period of thirty consecutive working days temporary incapacity leave with full pay subject to the outcome of its investigation set out in paragraph 10.2.above. The employee must be informed in writing of the conditional grant as well as final outcome.

PILIR: Clause 7.3.3.2.

7.9. The purpose of the thirty day grant is to afford the employer an opportunity to perform the investigation into the employee's health and make an informed decision within that period. This

limits any prejudice to both the employer and employee in that an employee is not paid unnecessarily by the employer and there is no expectation (which may arise through continued payment) that the application will be granted as the period of payment is only thirty days. Accordingly, should the application be declined, the amount repayable by the employee is limited.

- 7.10. The employer is obliged to approve or refuse the application for temporary incapacity leave within thirty days of receipt of the application form and medical certificate. It is apparent from the obligation of the employer set out in paragraph 10.8.1, where an application does not include a medical certificate, such application would be returned to the employee and the resubmission date would be the date from which the thirty day period set out herein would commence.

PILIR: Clause 7.3.5(e)

Determination:

- 7.11. Clause 13(Temporary Incapacity Leave) of the Determination outlines the requirements and process to be complied with when considering an application for incapacity leave. Many of the obligations relating to proof of illness, attachment of medical certificates and consent to disclosure of medical records by the medical practitioner are consistent with those contained in PILIR. The employee must further notify his/her supervisor of his/her illness immediately and submit an application within five working days of the first day of absence.
- 7.12. The employer is again obliged to inform the employee of the consequences of not making an application and the timeframe in which to do so should the employee not submit an application within the initial five day period of absence. The employer is again obliged to conditionally grant temporary incapacity leave with full pay for a period of thirty days subject to the outcome of an investigation into the health of the employee.
- 7.13. The employer is obliged to, consistent with PILIR, approve and or refuse the application within thirty working days of the date of receipt of the complete application.

Determination: Clause 13

- 7.14. Medical practitioners are those persons that are certified to diagnose and treat patients and whom are registered with either the Health Professional Council of South Africa. Only a medical certificate from such a practitioner will be accepted by the employer and must contain the name, qualifications and registration number of the practitioner, the name of the patient, the date and time of the consultation to name a few details.

Determination: Clause 15.1 and 15.2.

- 7.15. The employer must notify the employee in the event that the medical certificate submitted by

the employee is not in compliance with required form and detail. The employer must further notify the employee that a corrected medical certificate is required within two days of notification of non-compliance.

8. INTERPRETATION & APPLICATION

- 8.1. The reasons for the disapproval (Page 127 to 137 of the bundle) of the Applicant's application are in most instances reflected as being that the treatment for depression was sub-optimal.
- 8.2. Clause 7.5.1(a) of the Resolution only requires that the relevant practitioner (being a medical practitioner) certify the illness of the employee and that he requires a period of absence due to such illness. The Applicant obtained medical certificates for the entire period of absence from August 2007 to November 2010 mostly from Dr A. Valjee (Psychiatrist.). Neither the provisions of the Resolution, PILIR nor the Determination require that treatment be optimized by the medical practitioner to support the extended temporary incapacity leave. The Respondent has incorrectly interpreted the provisions of the Resolution read with PILIR and the Determination by making optimal treatment almost a precondition.
- 8.3. The further concern is that the medical certificates reflect the details of the medical practitioners who treated the Applicant during his period of absence. Had the first application been dealt with timeously and mere enquiry with the respective medical practitioner/specialist (during the investigation phase) could have led to the medical practitioner optimizing treatment if indeed he deemed it appropriate and necessary.
- 8.4. The Applicant was never offered the use of the Employee Assistance Programme nor any other form of counseling from the Respondent despite this forming part of the duty of care owed by the Respondent to the Applicant in light of its own policies.

9. NON COMPLIANCE

- 9.1. It is respectfully submitted that the Respondent had failed to implement and apply the Resolution, PILIR and the Determination in its non-compliance with prescribed timeframes and obligations.
- 9.2. The Respondent has shown gross disregard for the provisions of the Resolution and has not complied with any of the provisions set out therein.

10. PREJUDICE

- 10.1.** Had the Applicant been advised timeously that her incapacity had not been approved and the reasons why her incapacity was not approved, the Applicant would have had an opportunity to request her medical practitioner to optimize her treatment or she could have endeavoured to return to work.

- 10.2. The Applicant would not be in her current position where the Respondent implemented deductions from her salary. The deductions are now required by the Respondent as a result of their own fault and negligence.
- 10.3. The thirty day time frame which the respondent flouted is designed to prevent the same prejudice that is suffered by the Applicant now where she owes the respondent large amounts of funds as a result of their non-compliance of the Resolution.
- 10.4. The Applicant had suffered financial prejudice, anguish and uncertainty over the extended periods in which the Respondent took to make decisions regarding her applications and the deductions.

11. CONCLUSION

- 11.1. The Respondent has failed to implement and apply the provisions of the resolution and in so doing has failed to comply with its obligations. Consequently, the entire process of considering the Applicant's applications for temporary incapacity leave concluded by the Respondent is flawed.
- 11.2. In the matter of Public Service Association of South Africa and HC Gouvea v PSCBC which dealt with the retrospective effect of leave without pay it was stated that "***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***".

12. RELIEF SOUGHT

- 12.1. The Applicant prays for an order in the following terms:
 - 12.1.1. The Respondent had failed to comply with the provisions of resolution 7 of 2000 in relation to the Applicant's applications for temporary incapacity leave for the periods in question.
 - 12.1.2. As a result of the foregoing the Applicant suffered severe financial prejudice.
 - 12.1.3. The Applicant's application for leave for the periods in question be approved with full pay.
 - 12.1.4. The Respondent to pay the monies deducted from the Applicant prior to her instituting a grievance against the decision not to approve her applications for temporary incapacity leave for the periods in question.

8. **REPLY**

9. **RESPONDENT'S SUBMISSION**

1. Commissioner the Respondent is grateful for the opportunity to submit its replying heads of arguments in respect of this matter and I wish to state that according to the dispute referral forms lodged by the Applicant with the Public Service Sectoral Bargaining Council (PSCBC) the nature

of the dispute relates to Collective Agreement- Interpretation or Application of Resolution 7 of 2000.

2. The Respondent in proving her case will rely on the applicable prescripts and case laws, at the end will pray that you dismiss the matter.
3. Commissioner, the issue to be decided is whether the Respondent applied the Public Service Coordinating Bargaining Council (PSCBC) Resolution 7 of 2000, correctly when the Temporary Incapacity Leave was disapproved.
4. **BACKGROUND**

The Applicant had previously lodged a grievance with Labour Relations at North Coast Region on the 5th of July 2010 for the non-approval of temporary incapacity leave for the following periods:

FROM	TO	NUMBER OF DAYS
31 st of August 2007	28 th of September 2007	20
01 st of October 2007	31 st of December 2007	63
05 th of May 2008	16 th of May 2008	10
19 th of May 2008	19 th of June 2008	23
20 th of June 2008	18 th of July 2008	21
21 st of July 2008	22 nd of August 2008	25
25 th of August 2008	26 th of September 2008	24
29 th of September 2008	31 st of October 2008	25
03 rd of November 2008	28 th of November 2008	20
02 nd of January 2009	30 th of January 2009	21
02 nd of February 2009	27 th of February 2009	20
02 nd of March 2009	31 st of March 2009	22
04 th of May 2009	29 th of May 2009	20
01 st of June 2009	30 th of September 2009	85
01 st of October 2009	30 th of October 2009	22
02 nd of November 2009	30 th of November 2009	21
01 st of December 2009	31 st of December 2009	21

And her grievance was submitted to Thandile Health Risk Manager with additional motivation but her application was partially approved and the Applicant was advised about the outcome of her application. Subsequently, PSA on behalf of Ms Majozi lodged a dispute on the 3rd of August 2011 with the PSCBC in respect of Interpretation/Application of Collective Agreement PSCBC Resolution 7 of 2000.

5. A Conciliation hearing was held on the 2nd of December 2011, where a settlement agreement was issued stating that the Applicant be given an opportunity to resubmit further motivation/new evidence that was required by the Department for onwards transmission to Health Risk Manager, in the event the Applicant was unhappy with the outcome she reserved her right to invoke the dispute procedure by referring the matter for arbitration process.
6. The Department did not prejudice the Applicant as she was sent to an independent medical assessment by the Department on the 29th of January 2010 to Dr A.T. Barret and Prof. Nair from the Health Risk Manager on the 30th of April 2010, Dr Barret and Prof. Nair found that the employee's (Ms P.N. Majozi) depression was in remission with no cognitive dysfunction. The employee absence from work seemed to be related to her unwillingness to work at the Pietermaritzburg office while she resided in Durban at the time.
7. Commissioner it must be noted that the Applicant did not comply with the settlement agreement in submitting the additional/new evidence as stated on the settlement agreement and a reminder was sent on the 12th of October 2012 to her union representative requesting her to submit the additional motivation/new evidence. The date agreed upon with regards to resubmission of further motivation/new evidence to the Department for reconsidering was 29th of February 2012.

After the reminder that was sent to Ms Majozi on the 12th of October 2012, she then submitted the additional motivation/new evidence to Head Office PILIR section and was forwarded to Health Risk Manager, and the Department received the outcome on the 10th April 2013 that her applications were not approved based on fact that the purported new information was not different from the previous information submitted to the Health Risk Manager.

It was stated that the period of incapacity leave conditionally granted for the period shall be cancelled and be covered by either annual leave and/or unpaid leave. The Applicant was advised to express her consent within five (05) working days from the date of receipt of the letter or by not later than the 22nd of April 2013, authorising the Department to cover the period by annual leave.
8. Thereafter, PSA on behalf of Ms Majozi declared a dispute for Unfair Labour Practice-Benefits Section 186 (2)(a) with General Public Service Sectoral Bargaining Council (GPSSBC) and the Conciliation was held on the 02nd of October 2013 and the matter remained unresolved.
9. The arbitration hearing was held on the 13th March 2014 at North Coast Region: KZN Department of Public Works, case reference number GPBC176/2013. The Commissioner ruled on the 09th of June 2014 that the Council lacked jurisdiction to arbitrate the dispute lodged by the Applicant and the matter was finalised.
10. The advice from Thandile Health Risk Manager included amongst other things that the medical reports providing dates of consultations and treatment, issued by Dr Valjee, the treating Psychiatrist, provided no new clinical information not already known to the Health Risk Manager. Treatment as indicated in the

original advice of the applications was confirmed. Although the employee was hospitalised on three occasions it did not fall within the period in question.

The medical report issued by Dr Singh specialist did not fall within the period applied for as Temporary Incapacity Leave.

11. **INTERPRETATION AND/APPLICATION**

Commissioner it should be noted that the process an employee of the state follow to apply for temporary incapacity leave should be in line with the Public Service Coordinating Bargaining Council (PSCBC) Resolution 7 of 2000, regulates the process that has to be followed when an employee of the state wishes to apply for Temporary Incapacity Leave,

- (a) paragraph 7.5.1.(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:
 - (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. **(Refer to Respondent bundle page 105)**

12. The employees of the state therefore have the privilege to apply for Temporary Incapacity Leave if their annual sick leave has been exhausted and a medical certificate has been issued by a registered medical practitioner or dental practitioner. If such an application is conditionally approved, the employee will continue to receive his/her salary during his/her extended sick leave, even though his/her annual sick leave has been exhausted.

13. Commissioner, the Applicant had stated that the Respondent had failed to comply with PSCBC Resolution 7 of 2000, it must be noted that the Applicant did not comply with clause 7.1.8 of PILIR by not submitting the temporary incapacity leave forms on time. The Applicant only submitted applications on the 29th of November 2009 while she was booked off sick from 2007 which was two (02) years late.

It must also be noted that in order to ensure that an application for Temporary Incapacity Leave is successful, an employee must provide a copy of the medical certificate to his/her Supervisor or Line Manager as soon as possible.

Moreover, clause 7.5.1 of PSCBC Resolution 7 of 2000 must be read in conjunction with paragraph 7 of the Policy and Procedure on Incapacity Leave and Ill-Health (PILIR) that explains the process in more detail. The most crucial aspects for the employee to remember are set out in paragraph 7.1.8 of the

PILIR 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”.**(Refer to page 78 and 79 of Respondent Bundle)**

14. It must be noted that an employees of the state are not automatically entitled to Temporary Incapacity Leave, it is merely a privilege as the Department is guided by the policy and procedure on Incapacity Leave and Ill Health Retirement clause 7.1.1 clearly stipulate that “Temporary Incapacity Leave is not an unlimited number of additional sick leave at an employee’s disposal. Incapacity Leave is an additional sick leave granted conditionally at Employer’s discretion as provided for in the Leave Determination and PILIR”.
15. The latest judgment issued by Judge J. Whitcher on the 23rd of November 2016 , matter between POPCRU o.b.o. L.E.E. Mbongwa and the Department of Correctional Services case no. D642/15, the Judge had cited that “A late determination of an employee’s application for additional leave, as lamentable as this, 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 the 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 thirty (30) days set out in the PILIR policy.
However, if the period the employer takes to decide the application exceeds the 30 days set out in the policy, he does not see how the conditionality of payments to an employee, subject to a medical assessment, hardens into entitlement after the 30 day investigation period lapses. Nor, in light of clause 7.2.2.2, 7.3.3.2 of PILIR Policy, should 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 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” The matter was dismissed by the Labour Court. *In summary, PILIR- employer’s failure to respond to application for temporary incapacity leave within thirty (30) working days does not translate into entitlement to such leave.* **(Refer to Respondent Bundle page 112-118)**
16. The parity rule should apply, why the employee who had failed to submit the required information timeously should not be held liable and when the employer delayed in finalising the investigation the conditionally granted leave becomes an automatic entitlement as argued by the Applicant.
17. Therefore, the granting of Temporary Incapacity leave is merely a privilege and lies in the employers discretion, an employee is only entitled to a fair process when the application for temporary incapacity leave is being considered.

18. Commissioner the Applicant was afforded an opportunity to apply for Temporary Incapacity Leave and some of the applications were recommended by Health Risk Manager. The reasons for the non approval of temporary incapacity leave were communicated to the Applicant.

Commissioner it should be noted that in some of the applications, the Applicant did not complete the temporary incapacity leave forms. The Respondent gave the Applicant a chance to make necessary applications instead of instituting leave without pay.

19. The Respondent was more than willing to assist the Applicant whereby during the Conciliation hearing held on the 02nd of December 2011 the Respondent agreed to afford the Applicant an opportunity to re-submit the non approved applications, with additional motivation, since Health Risk Manager had indicated what was required from the Applicant in order for applications to be re-considered.

20. The Applicant had stated in clause 7.6 in its heads of arguments that “the initial obligation is on the employee to submit an application for temporary incapacity leave, however, should the employee fail to do so within the prescribed timeframe, he/she is not barred from doing so but onus shifts to the employer (supervisor)”

Commissioner, in response to the above, the Respondent reminded the Applicant to file the temporary incapacity leave applications; furthermore the Applicant was afforded to submit additional/new motivation to Health Risk Manager at the cost of state.

The Applicant apologised to the Respondent for failure to submit the required documents as agreed, and she claimed that the delay was due to the fact that the doctors delayed in finalising the reports.

21. The Respondent accepted the apology in the spirit of good working relations, subsequent to the apology; again, all required documents were not received up to a stage when the Respondent wrote a letter to the Applicant informing that the applications for temporary incapacity leave have not been received.

22. Thereafter, the applications for temporary incapacity leave for the Applicant were received in November 2009, and were forwarded to the Health Risk Manager, however the applications were not recommended by Health Risk Manager and the reason was that there was no further motivation/new evidence to substantiate the temporary incapacity leave.

23. The Respondent could have not attended the Applicant’s applications when they were not submitted timeously and completed incorrectly, however the Applicant was advised to reapply using the correct forms.

Given the abovementioned, the Respondent could have implemented leave without pay. In an arbitration matter between *PSA o.b.o. Piliso (Applicant) and the Department of Education- Western Cape (Respondent)* case Ref No. *PSCBC348-11/12* and the Panelists was Advocate J.P. Hanekom. The Applicant is employed as a Cleaner at Khanyalwethu Secondary School since 01 April 2008. During October 2009 the Applicant exhausted her sick leave credits and applied for 04 days sick leave on the

27 October 2009. The Applicant did not formally apply for temporary incapacity leave. The first correspondence by the Respondent to the Applicant was a letter dated 19 February 2010 in which the Applicant was informed that to date she did not apply for temporary incapacity leave and her period of absence would therefore be considered as unpaid leave.

The Applicant challenged the Respondent's decision as a dispute about the incorrect interpretation and application of the Resolution. The arbitration award stated that there was no incorrect interpretation and or application of the Resolution by the Respondent. The Application was dismissed.

24. **CONCLUSION**

It is therefore the Respondent's submission that it did not prejudice the Applicant as she was afforded opportunity to provide new evidence/additional motivation, unfortunately the applications were not approved again by Health Risk Manager and she was also sent to an independent medical assessment by the Department on the 29th of January 2010 to Dr A.T. Barret and Prof. Nair from the Health Risk Manager at the cost of the state.

25. The Respondent also submit to the Commissioner to consider that in terms of Policy and Procedure on Incapacity Leave and Ill-Health Retirement, Temporary Incapacity Leave is not an unlimited number of additional sick leave at an employee's disposal. Incapacity leave is an additional sick leave granted conditionally at the Employer's discretion.

26. The Applicant has referred to an outdated judgment, matter of PSA o.b.o. HC Gouvea v PSCBC which dealt with the retrospective effect of leave without pay, however the latest judgment by Judge Whitcher had ruled that "*if the period the employer takes to decide the application exceeds the 30 days set out in the policy, he does not see how the conditionality of payments to an employee, subject to a medical assessment, hardens into entitlement after the 30 day investigation period lapses*".

The Respondent applied the provision in the resolution in conjunction with Policy and Procedure on Incapacity Leave and Ill Health Retirement correctly. Section 38 (1) of the Public Service Act, 1994 states that "if a state employee has, in respect of his/her salary, including any portion of any allowance or other remuneration or any other benefit calculated on his salary or awarded to him/her by reason of his/her 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/her by way of the deduction from his/her salary of such instalments as the Head of Department, with the approval of the Treasury, may determine".

27. Based on the provided information, the Respondent prays to the Commissioner to dismiss the Applicant's case.

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 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*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 so² 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 various periods as recorded in clause 4 of the respondent's submission and was advised that the leave applications were not recommended.
14. She was advised of the respondent's decision and it deducted 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 is fairly 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 MAZOJI TIL NEW MAY 2017)