



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

CASE NO: PSCB 687-15/16

PSA obo Hendricks

APPLICANT

and

Department of Home Affairs

RESPONDENT

AWARD

DATE OF ARBITRATION	:	20 June 2017
CLOSING ARGUMENTS	:	27 June 2017
DATE OF AWARD	:	5 July 2017
ARBITRATOR	:	I de Vlieger-Seynhaeve

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 Mr Johnson from the PSA, represented the Applicant. Mr Mkonto represented the Respondent.
- 1.2 The proceedings were recorded digitally.

2. ISSUE TO BE DECIDED

- 2.1 The issue to be determined is whether the respondent was in breach of Resolution 7 of 2000 when it denied the applicant temporary incapacity leave.

3. SURVEY OF ARGUMENT

- 3.1 The applicant made the following submissions:
 - 3.1.1 **Ms Hendricks** stated that she applied for TIL from 21/10/13 - 25/10/13; 27/11/14 - 11/12/14; 10/07/15 - 31/07/15; 20/08/15 - 18/09/15; 21/09/15 - 16/10/15. The applicant was not informed within 30 days of the outcome of these applications. Only towards the end of 2015, when deductions were being made, was she informed that the deductions were for the disapproved TIL. She received a letter dated 03/11/2015 from Mr Gumbi that 143 days of TIL were not approved. She did not know what the reason was for this. When she asked she was told that the Department needed more information when it comes down to TIL applications for psychiatric reasons. She was booked off for Depressive Disorder and Major Depressive Disorder during those times after she suffered panic attacks at work. It became worse when she was verbally attacked by her head of office on 07/07/15. Her condition did not change after that and she was on various medications that made her feel sedated. On 13/02/16 she went to see Dr Kaliski, a forensic psychiatrist, who wrote a report in which he concluded that the applicant should not be regarded as impaired on psychiatric grounds. The respondent is in breach with clause 7.5.2 of Resolution 7 of 2000. She has suffered prejudice because of this extreme delay. If she would have been informed timeously, she would have been able to address the reasons for disapproval. She could have gone back to her doctors to get an additional medical report. But she

was never informed before November 2015 and that is why she lost financially.

3.1.2 During cross examination it was put to her that she is only disputing the 30 day period although there are valid reasons why the TIL application was not approved. The applicant confirmed that she only contests the 30 day period. It was then put to her that besides these 5 TIL applications there was a tendency by the applicant to take sick leave over the years as described in the HRM report. The applicant said that she could not confirm all dates but if she was booked off she cannot contest the doctor's certificate booking her off. It was then stated that the respondent sent the applicant to Dr Kalinsky in order to get a second opinion.

3.2 The respondent did not call any witnesses but relied on argument only.

4. SUMMARY OF ARGUMENT

4.1 Mr Johnson submitted that the respondent failed to properly investigate, within 30 days, the extend of the inability of the applicant to perform normal office duties, the degree of the inability and the cause thereof. The HRM was not functioning from 01/01/2013 until 31/10/2013. A new HRM was appointed on 01/11/2013 and the applicant submitted her TIL application on 13/11/2013 so the delay could not have been attributed to that. He referred to the matter *PSA & Another v PSCBC & Others (D751/09) [2013] ZALCD 3* where it was held 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. He prays that all TIL applications will be approved.

4.2 Mr Mkhonto stated that they are aware that they did not reply within the 30 day period but that was due to several factors. One of these factors was that there was no HRM during a period of time (2013) and no applications could be processed. Furthermore, the psychiatric report indicated that the applicant is not impaired to work due to psychiatric reasons but that she needed to be transferred. He referred to *POPCRU v Department of Correctional Services*, where a similar application was brought to the court. That matter was dismissed on the basis that it

cannot be enough to only rely on the merits of the late response by the response, overlooking the merits of the matter. He further referred to award *PSCB 40-15/16 PSA obo Bakajana - Department of Home Affairs* where a similar decision was taken. He further stated that only deductions have been made for the period 21/10/2013 - 25/10/2013. Therefore the other cases were referred prematurely.

5. ANALYSIS OF EVIDENCE AND ARGUMENT

5.1 I first would like to deal with the jurisdiction to hear the matter. I hereby refer to the judgements in *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others (2010) 31 ILJ 1813 (LAC)* and *PSA obo De Bruyn v Minister of Safety and Security and Another (2012) 33 ILJ 1822 (LAC)* where it was decided that the BC has jurisdiction to entertain disputes about the application and interpretation of Resolution 7 of 2000 in terms of section 24 of the LRA. "Interpretation" refers to the situation where the parties differ over the meaning of a provision of the collective agreement. "Application" includes both the question whether an agreement applies to the facts in question and the manner in which the agreement is applied, which includes non-compliance.

5.2 Paragraph 7.4 and 7.5 of the PSCBC Resolution 7 of 2000 deals with normal sick leave and with incapacity management in excess of the 36 days normal sick leave. An employee, who has exhausted its 36 days sick leave, MAY be granted additional sick leave (TIL) on full pay where the provisions of paragraphs 7.5.1 (a) (i) & (ii) of Resolution 7 of 2000 are complied with and the employer, after investigations, including investigations in accordance with item 10(1) of Schedule 8 of the LRA, so decides. Resolution 7 of 2000 is amplified by the Policy and Procedure on Incapacity Leave and Ill-Health retirement (PILIR), determined in terms of section 3 (2) of the Public Service Act 1994, as amended by the Minister for Public Service and Administration. The employer has a discretion to grant the TIL, although it needs to exercise its discretion properly (must take into account relevant information, follow laid down procedures and act within the framework of the Collective Agreement). Not every failure on the part of the employer to comply with the Collective Agreement will necessarily result in a claim of right on the part of the employee. The employee still needs to show that he qualified for the relief

sought, that the employer failed to comply with the agreement and in doing so prejudiced him (see also PSCB601-11/12).

5.3 I will first deal with the 30 days' rule. The Resolution states clearly that the employer must investigate within 30 working days.

5.4 It is common cause in this case that the Respondent did not decide the applications within the 30-day timeframe. To my mind it does not necessarily mean that, because the investigation was not done within 30 days, the applicant will be entitled to the TIL. I have to concur with the argument raised by the respondent in this regard and the case law cited that the medical condition must be the determining factor to grant the TIL and not the timeframe to investigate. The applicant's reliance on the Gouvea judgment must be rejected and the more recent position held in *Popcru and Another v Department of Correctional Services and Another (D642/15) [2016] ZALCD 25 (23 November 2016)* must be accepted, wherein Whitcher J held as follows:

"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*. 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 retrospectively. 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 deductions from their salary (in order to recover salary paid, where an application for TIL/IHR is declined for a period they have been off work sick) or stoppage of salary unless the application is declined within 30 days or unless they have been given a date to return for work and have failed to do so." 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. 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 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.” (own emphasis)

5.5 In light of the above judgment by Witcher, J the applicant's reliance on Gouvea and the submissions in respect thereof must accordingly be rejected. It must be stressed that TIL is not ordinary sick leave and is leave that is granted after consideration of several factors. The applicant's representative stated that the relief sought is the approval of the TIL. It is not because the respondent is in breach with the resolution that therefore the application needs to be approved. The decision of the HRM, confirmed by a psychiatrist in January 2016, still stands in terms of the medical information and seeing that I am no medical doctor I cannot overrule that. Also, the decision of the HRM was not disputed and no extra medical information was submitted at the arbitration hearing.

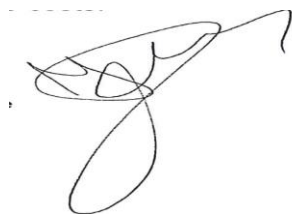
5.6 Has the applicant suffered prejudice because of the delay of the decision in terms of his TIL applications? The reason for the 30 days rule is that employees need to have certainty about their applications. If the application is denied they will have to forfeit their annual leave or part of their salary. This is a situation where there cannot be uncertainty that lasts for months. The delay was very long and cannot be attributed to the lack of HRM as a new HRM had been appointed at the time of the submission of the TIL applications. I accept that there might have been a delay in the processing of the new and

outstanding TIL applications. According to the documentation at hand it seems that all applications, except for the first one, were decided on 12/10/2015. The first application was decided on 12/03/2014 but the applicant only became aware of the outcome on 03/11/2015. She stated that if she had known at that time that her application was rejected she could have asked her doctor for additional information or reports. I agree with the applicant that she suffered prejudice because of the late reply on the first TIL application. The applicant would have handled the future applications differently. However, at the end of the day, a psychiatric report, done in February 2016 stated that the applicant should not be regarded as impaired on psychiatric grounds. This conformed the disapproval of the TIL applications. Seeing that the applicant was prejudiced because of this significant delay, especially in light of the first application, I will order compensation to address this prejudice.

5. AWARD

- 5.1 The respondent breached PSCB Resolution 7 of 2000;
- 5.2 The respondent is hereby ordered to pay the applicant compensation equivalent to 1 month's salary on or before 31/07/2017;
- 5.3 There is no order as to costs.

Signed at Cape Town on this 5th day of July 2017



I De Vlieger-Seynhaeve
PSCB Panelist