



**IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL
HELD LADYSMITH, KWAZULU-NATAL**

CASE NO: PSCB 111-16/17

PSA obo M LUSWAZI

APPLICANT

and

Department of HEALTH -KwaZulu-Natal(UTHUKELA DISTRICT)

RESPONDENT

ARBITRATION AWARD

Date of Award : 18TH November 2016

Arbitrator : Saber Ahmed Jazbhay

DETAILS OF HEARING AND REPRESENTATION

1. The dispute relating to this matter was set down for arbitration on the 1st NOVEMBER 2016 in the boardroom of the Respondent at 32 Leyl Street, Ladysmith in Kwa-Zulu Natal.
2. The Applicant (hereinafter referred to as ‘the Applicant’) was represented by Mr ZAMANI MHLANGULELA. The Respondent, Department of Health-KwaZulu-Natal (hereinafter referred to as ‘the Respondent’) was represented by CLEMENT QWABE. Both the Applicant together with his representative and the Respondent’s representative were present on the 1st NOVEMBER 2016.
3. On the said day the parties agreed to file written arguments and advised that they would not be leading any oral evidence given that there were no disputes of fact (a common and generally ill-advised approach in arbitrations of this nature).
4. Notwithstanding my telling the, that such an approach was ill advised, the parties persisted and submitted to me that there was no need for any evidence to be led as it was a matter of interpretation and application of Resolution 7 of 2000. A statement of case was drafted and signed by them and presented to me.
5. I ruled that both the Applicant and the Respondent were to submit heads of argument and a statement of their case (and no extension of time would be granted)
 - a. The Applicant by no later than the 7th November 2016.
 - b. The Respondent by no later than the 10th November 2016
 - c. The Applicant’s reply by the 14th November 2016.

Introduction

- [1] The Applicant in this matter is the Public Servants Association of South Africa (hereinafter “PSA”). Acting on behalf of its member, namely Mr Madoda Luswazi (hereinafter referred to as “the Applicant”).

Background in general

- [2] Its common cause that PSA referred a dispute to the PSCBC concerning the interpretation or application of a collective agreement, it being PSCBC Resolution 7 of 2000 as amended (hereinafter “*Resolution 7 of 2000*”) and PSCB Resolution 5 of 2001

(hereinafter “Resolution 5 of 2001”). The dispute was lodged by PSA on behalf of Mr M Luswazi, an employee of the Respondent.

[3] The dispute was lodged as a direct result of the Respondent having declined an application for temporary incapacity leave which were submitted by the Applicant.

[4] The Application for temporary incapacity leave was submitted in respect of the following periods.

No.	PERIOD	TOTAL NUMBER OF DAYS
1.	01/09/2015 to 01/09/06/2015	1
2.	26/09/2015 to 29/09/2015	4
3.	07/10/2015 to 09/10/2015	3
	TOTAL	8

[5] The applications for temporary incapacity leave were based, *inter alia*, on the provisions of clause 7.5.1 of Resolution 7 of 2000, which read as follows:

- 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 incapacity which is not permanent, may be granted sick leave on full pay provided that:
 - i) her or his supervisor is informed that the employee is ill; and
 - ii) a relevant 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 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 respect of applications for disability leave.’*

[6] A careful perusal of the documents used in support of submissions and arguments show that key and relevant to Mr Luswazi’s applications for temporary incapacity leave are two policy documents.

- (a) The first is the Determination on Leave of Absence in the Public Service (July 2009), made by the Minister of Public Service and Administration (hereinafter “*the Determination on Leave of Absence*”).

(b) The second is the Policy and Procedure on Incapacity Leave and ill-Health Retirement of April 2009 (herein after "*PILIR*").

[7] Both the Determination on Leave of Absence and the *PILIR* give effect to, *inter alia*, the provisions of clause 7.5.1 of Resolution 7 of 2000.

[8] These two policy documents clearly and methodically set out, *inter alia*, the procedural steps to be followed by both the employer and the employee respecting an application for temporary incapacity leave.

[9] Of critical importance, and common cause to the present matter, is that there are timelines that are prescribed for both the employee and the employer. As far as this matter is concerned, the relevant timelines are those under clause 15 of the Determination on Leave of Absence as well as those under clauses 7.1 and 7.3 of the *PILIR*.

[10] Amongst other things, these clauses require of an employer to conditionally grant an applicant employee a maximum of 30 consecutive working days as temporary incapacity leave with full pay.

[11] This has to be done within five (5) working days from the date of receipt of an employee's application for temporary incapacity leave.

[12] Also critical and quite pertinent to the matter, is that these clauses further prescribe a time limit within which the employer must approve or refuse the temporary incapacity leave¹ which has been granted conditionally.

[13] Under both the Determination on Leave of Absence and the *PILIR*, the employer has a period of 30 working days within which to approve or refuse the temporary incapacity leave which has been granted conditionally.

[14] It is common cause that the Applicant submitted his applications for temporary incapacity timeously.

[15] After Mr Luswazi's applications were declined, long after they had been submitted, a grievance was lodged and same culminated in a dispute being lodged by PSA with the PSCBC as mentioned hereinbefore.

¹ Underlined for importance

[16] The dispute lodged was classified as being about the interpretation or application of a collective agreement, the latter being PSCB Resolution 7 of 2000 as PSCB Resolution 5 of 2001 (the “Resolution’s”).

[17] The outcome required as per the dispute referral was for the temporary incapacity leave to be approved and leave without pay be revoked. As a consequence of the Respondent declining Mr Luswazi’s applications, the conditionally granted temporary incapacity leave was converted into unpaid leave.

[18] In dealing with the dispute, the parties agreed to exchange a statement of case and a response thereto. In the statement of case, the issues to be determined are as couched in paragraph 4 herein below.

ISSUES TO BE DECIDED

It is trite that each matter has to be decided on its own merits and that there’s no one size fits all outcome favourable to either party. The facts in this case are in their own sense different as will appear.

4. ISSUES

- a. Whether, given the facts and circumstances of this case, the Respondent correctly interpreted the Resolutions in relation to the Applicant’s application for short and long term temporary incapacity leave? It is axiomatic that there are positive rights and obligations that both parties are obliged to adhere to.
- b. 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
- c. The particular provision in dispute relates to temporary incapacity leave as well as permanent incapacity leave.

5. BACKGROUND TO THIS MATTER

- (a) I reiterate that its common cause that the primary issue in dispute is the interpretation/application of PSCBC Resolution 7 of 2000 and PSCB Resolution 5 of 2001. The applicable provision (in dispute) relates to short term temporary incapacity leave.
- (b) It is also common cause that the Applicant referred a dispute to the above Council relating to the interpretation and application (in terms of Clause 24(2) and 24(5) of the Labour Relations Act, 1995, as amended) of Resolution 7 of 2000 (the “Resolution”) to

his applications for short term temporary incapacity leave for the following periods as a result of his being sick:

No.	PERIOD	TOTAL NUMBER OF DAYS
1.	01/09/2015 to 01/09/06/2015	1
2.	26/09/2015 to 29/09/2015	4
3.	07/10/2015 to 09/10/2015	3
	TOTAL	8

- (c) The period for which temporary incapacity leave was sought is recorded and agreed between the parties. It is undisputed that the applicant exhausted her normal sick leave cycle.
- (d) Save for what will follow, it's also common case that the Applicant is employed by the Respondent as a Forensic Pathology Officer and has ten years of uninterrupted service.
- (i) He had applied for short term temporary incapacity leave for the periods outlined above.
 - (ii) Each application was supported by a medical certificate/reports issued by a registered medical practitioner/ specialists.
 - (iii) The Respondent also supported its case with medical reports by a registered medical doctor.
 - (iv) However, the Respondent had submitted the applications to a Health Risk Manager for further assessment, examination and recommendation.
 - (v) The assessments by the Health Risk Manager were only done many months later. Moreover, it was only many months later that the Respondent advised the Applicant in writing that his applications for temporary incapacity leave for the periods in question were partially approved and 5 days were not recommended by the Health Risk Manager.
 - (vi) The Respondent also advised the Applicant that as he had no leave credits available, these days will be converted to leave without pay.
 - (vii) The Respondent alleges in its heads of argument that the Applicant is the architect of his own default in that he had not complied with recommendations and request from the Respondent as well as the Health Risk Manager vis-a-vis that the medical certificate be supplemented as it was vague and not clear².
 - (viii) As a result, the applications were partially approved.

² See paragraph 4 of the Respondent's heads of argument

SURVEY OF EVIDENCE, SUBMISSIONS AND ARGUMENTS

1. I only set out here under the evidence, submissions and arguments of the parties that which is necessary to enable me to determine this dispute. Even though the parties made oblique reference to Resolutions and Policy Documents, they did not specifically refer me to specific provisions. This shows poor preparation and presentation.

2. Applicant's case is as couched below

PSCBC RESOLUTION 7 OF 2000 READ WITH PILIR AND DETERMINATION ON LEAVE IN THE PUBLIC SERVICE:

a. Resolution:

- i. Clause 7.5.1 (Disability Management Leave) of PSCBC Resolution 7 of 2000 provides for the general guidelines and process to be considered and applied by the Respondent when determining an application for temporary disability leave.
- ii. 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.
- iii. Such employee may be granted sick leave on full pay notwithstanding the exhaustion of his/her sick leave credits for that cycle provided that:

His(or her) supervisor is informed of the employee's illness; and the relevant registered medical practitioner has duly certified such condition in advance as temporary disability, except where conditions do not allow (Clause 7.5.1(a)(i) and (ii) of the Resolution).

- b. The employer is "obligated"(sic) during the thirty working days from notice of the disability to investigate the extent of the employee's inability to perform his/her normal 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 (Clause 7.5.1(b) of the Resolution).*
- c. Part 2, Clause 1.2 in the Determination on Leave of Absence in the Public Service (the Determination) states that the Determination gives effect to clause 7 of the Resolution, as amended. Clause 13.1 under the heading Temporary Incapacity Leave, states that incapacity leave is additional leave granted conditionally at the employer's discretion, read with the policy and Procedure on Incapacity Leave for Ill-health Retirement determined by

the Minister for Public Service and Administration in terms of sec. 3(3)(c) of the Public Service Act, 1994, (PILIR).

d. PILIR

- i. Clause 7 (the Management of Temporary and Permanent Incapacity Leave) of PILIR expounds the Resolution and details the timeframes and obligations on both the employee and employer:
- ii. The employee may apply for temporary incapacity leave with full pay on the prescribed forms in terms of PILIR for each period of absence (Clause 7.1.2 of PILIR).
- iii. For an application for temporary incapacity leave to be considered, the employee must provide sufficient proof that he/she is too ill to work satisfactorily and attach a medical certificate from a registered medical practitioner certifying the condition as temporary with his/her application. **This medical certificate as to be clear to enable the Respondent to make an informed decision. In this respect the Applicant did not comply.**

e. PILIR: Clause 7.1.5.1 and 7.1.5.2

- i. The employee must submit the application for temporary incapacity leave within five working days after the first day of absence. **Its not disputed that the Applicant did so.**
- ii. 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.
- iii. 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.
- iv. Should the employee fail to submit the application within the timeframes and/or failure by supervisor to properly manage the process should be viewed in a serious light.

f. PILIR: Clause 7.1.8 and 7.1.9

- i. It is apparent that the initial obligation is on the employee to submit an application for temporary incapacity leave supported by all the relevant evidence and reports requisite to enable the Respondent to respond timeously. However, should the employee fail to do so within the prescribed time frame, ***provided that he has a reasonable explanation for the delay***, he/she is not barred from doing so but the onus shifts to the employer (supervisor).
- ii. 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.
- iii. The clause acknowledges that there will be circumstances in which the employee does not comply with the timeframes, which could be for reasons of negligence, impossibility and or ignorance, ***thereby placing the ultimate onus on the employer to inform the employee.***

- iv. 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.
- v. The employee **may** be subjected to a full health assessment by the appointed Health Risk Manager. This allows for a comprehensive assessment and evaluation which assists the employer to determine how the employee's duties may be adapted to accommodate his/her disability.

g. PILIR: Clause 7.3.1

It is critical to state that the Applicant does not argue that the employer is obliged to, within **five days of** receipt of the application to

- i. Verify that the application is complete and signed correctly (which includes attachment of relevant documentation) and if the application is incomplete and or unsigned, the employer must immediately return the application to the employee for resubmission within a further five days.
- ii. The resubmission date of the complete application will be recorded as the date of submission.
- iii. The provision acknowledges that there will be circumstances in which the employee submits an incomplete application (in respect of information, documents and or signatures).
- iv. 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; it is still relevant for the purposes of this award.

3. Determination

a. 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 the provisions contained in the PILIR. Its argued that the employee "must further notify his/her supervisor of his/her Illness immediately and submit an application within five working days of the day of the absence".

b. The employer is again obliged to inform the employee of the consequences of not making an application and the time frame in which to do so should the employee not submit an application within the initial five day period of absence. The employer is further 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.

c. The employer is obliged to, consistent with PILIR, approve and/or refuse the application **within thirty days** of the date of receipt of the complete application. **The Applicant refers to this in his arguments**³

4. **Determination: Clause 13**

a. Medical practitioners are those persons that are certified to diagnose and treat patients and who are registered with professional councils established by an Act of Parliament.

b. For the purposes of temporary incapacity leave the employer only accepts medical certificates issued and signed by practitioners registered with the Health Professions Council of South Africa.

5. **Determination: Clause 15.1 and 15.5**

a. The employer must notify the employee in the event that the medical certificate submitted by the employee is not in compliance with the required form and or detail (validity).

b. The employer must further notify the employee that a corrected medical certificate is required within two days of notification of non- compliance.

6. **INTERPRETATION/APPLICATION (APPLICANT'S SUBMISSIONS)**

a. Even though the Applicant is silent on this, the interpretation and application of the Resolutions means,

- i. firstly that clause 7.5.1(b) "must be read with the relevant clauses in the Determination and the PILIR document" and,
- ii. secondly, that the interpretation and application of the Resolution requires one to interpret and apply clause 7.5.1(b) "in the context of said policies rather than in a vacuum".

b. In essence, the Resolution, and more particularly Clause 7.5.1(b) and the other applicable clauses in the policies referred to, supra, 'determine the procedures and\or time frames in terms of which the Respondent is required to respond to an application for temporary incapacity leave.'

c. The Applicant's complaint in chief in this referral is that by the Respondent allegedly failure to adhere to those procedures and\or time frames, this resulted in him being prejudiced by "robbing him of his annual leave benefit as he was coerced into signing it away."⁴

d. In essence what he has done is to refer the matter so that it could be determined at arbitration, ***as a stated case and without oral arguments***, whether the Respondent was obliged to have adhered to and to have given effect to what the Resolutions, read in conjunction with the applicable policies, required.

³ See paragraph 7 of the Applicant's heads of arguments.

⁴ See paragraph 11 of Applicant's heads of argument.

e. The Respondent, he rightly points out, was obliged to approve or refuse the application for temporary incapacity leave within thirty days of receipt of the application and medical certificates.

7. The Applicant goes on to submit that the facts show that the Respondent failed to investigate the application within 30 days. In addition, the Respondent failed to give effect to provisions of the Determination and PILIR policy, for the employee was only formally informed after many months that the periods applied for was not approved. ***Given the facts in this case, I'm required to carefully consider this submission.***

8. The PILIR policy, it is argued, clearly states that:

a. 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, as provided for in the Determination and PILIR.

b. However, before the point is reached where this additional sick leave may be granted at the employer's discretion, both the employee and employer have to follow the procedures and timeframes set out in the two policies. Moreover, the discretion afforded to the Respondent was to be exercised judiciously after compliance with agreed guidelines and established process. ***It is the failure of the Respondent to interpret, apply and comply with process and respective policies that is in issue. Given the albeit vague factual matrix that informs this case the issue is not a clear cut one as it is made out to be. For instance no argument was put before me what was the cause of the Applicant's illness and mindful of the Respondent's allegation as supported by the Health Risk Manager, it would have been preferable that the Applicant led oral evidence of the medical practitioner. Regard must be had reference made by the Respondent that "the doctor clearly stated on the report that he was informed by the applicant that he(was) sick."⁵*** Contrary to what the parties stated, there was a dispute of facts and this is critical to my determination.

9. In Clause 6 of PILIR, the employer's obligations and responsibilities are stated quite categorically :

a. The employer shall in terms of PILIR be responsible to process applications and complete reports within specified timeframes.

b. While there are clear timeframes that the employer has to take once it receives the applicable documentation from the employee, there are also timeframes that the employee has to meet. It is submitted that as the initial obligation rests on the employer, unless the employer fulfils that obligation, it has to follow that there can't be a resultant obligation on the employee. However, in the event that the employer fulfilled that obligation and the employee did not meet the said prescribed timeframes and/or other requirements, the policies start afresh or further obligation rests on the employer to ensure that the employee meets those obligations.

10. I was referred to the case of ***Public Servants Association (PSA) obo Liebenberg v Department of Defence and Others***-(2013) 22 LC 4.2.1., where the Court found that where the employee and her union were dissatisfied with the

⁵ See Para 4 of the Respondent's heads of argument

employer's refusal to grant temporary incapacity leave and the procedure for granting or refusing such leave was governed by the collective agreement, her remedy lay in the referral of a dispute over the application of the agreement to the bargaining council in terms of Section 24 of the LRA. ***How relevant this case is towards supporting the Applicant's case was not argued on the papers.***

11. I'm referred to and I note the point that the Respondent raise in support of its version that it does not have the capacity to strictly adhere to time frames to justify its non-compliance with the time frames stipulated in the Resolution, policies and directives⁶.

12. CONCLUSION

a. Thus, it's argued⁷ that the Respondent incorrectly interpreted and applied the provisions of the Resolution in accordance with the plain meaning especially in circumstances where its supplementary policies (PILIR and the Determination) provide both procedures and time frames.

b. Further, the Respondent has failed to implement and apply the provisions of the Resolution and in so doing, has failed to comply with its obligations.

c. Consequently, the entire process of considering the Applicant's applications for short term incapacity leave concluded by the Respondent is flawed.

13. RELIEF SOUGHT

a. The Applicant prays for an order in the following terms:

- i. The Respondent incorrectly interpreted and applied the provisions of Resolution 7 of 2000 and Resolution 5 of 2001 in relation to the Applicant's application for Temporary Incapacity Leave;
- ii. As a result of the foregoing, the Applicant suffered severe prejudice;
- iii. The Applicant's applications for the leave for the periods in question be approved with full pay;
- iv. The Respondent be ordered to repay any monies deducted from the Applicant's salary and immediately stop any further deductions from the Applicant's salary.

Respondent's Case

14. The arguments, which have not be refuted by the Applicant, presented by the Respondent are as follows

⁶ See paragraph 6 of the Respondent's heads of arguments

⁷ Albeit vaguely I must note

14.1 After exhausting her normal sick leave of 36 days, the applicant has taken 8 days sick leave during the period referred to in the Applicant's submissions.

14.2 The reasons why his application was partially approved was that the diagnosis was vague and not clear and that despite being required to obtain a valid medical report from the treating doctor, the Applicant failed to comply.⁸

14.3. His doctor never seemed to have diagnosed him⁹.

14.4 He indicated¹⁰ that he was 'informed by the Applicant that he (was) sick'.

15. The Applicant was advised (***and this was not refuted on the papers before me***) to obtain a valid medical report but failed to do so.

16. ***I must point out that none of the foregoing has been refuted or challenged before me in argument and that therefore the issue has to be decided as couched on papers. No reasons to the contrary have been provided.***

17. For an application for temporary incapacity leave to be considered, the employee was obliged to furnish sufficient proof that he was too ill to work. It is argued that he has failed when required to do so, to comply with the requests from the health risk manager. Hence only a partial approval. ***The argument seems to be premised on the point is that the Applicant is not expected to sit back and do nothing once he has lodged his application.***

18. It is also argued that given the sheer volume of claims delays in responding to the applications for incapacity are at times inevitable¹¹.

19. Given the foregoing, the Respondent prayed that the dispute be dismissed on the basis, I infer, that substantive reasons existed for the partial approval of the applications and for granting of leave without pay to the applicants for his periods of absence.

ANALYSIS OF EVIDENCE AND ARGUMENT

⁸ See paragraph 4 of the Respondent's Heads of Argument.

⁹ See paragraph 4 of the Respondent's Heads of Argument

¹⁰ And the Applicant has failed to respond to this

¹¹ See paragraph 6 of the Respondent's Heads of Arguments

20. I have the power to give effect to collective agreements in terms of Section 138(9). It is then open to me to set aside the decision of Respondent to reject Applicants' application if, based on the conspectus of evidence and argument before me, I am persuaded that this is appropriate.

21. The seminal case of **Public Service Association of South Africa and Another v PSCBC and Others** [2013] ZALCD 3 (26 February 2013), is of great assistance in this matter before me. Specifically, in this case, the court held that interpretation entails a process of attributing meaning to the words used in a document, "be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole **and the circumstances attendant upon its coming into existence** (at para 17).

22. In that case referred to in para 42 supra, the court went on to hold that whatever the nature of the document was, consideration had to be given "to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those who are responsible for its production." (ibid) And where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process, it held is "objective and not subjective". **In other words based according to the factual matrix and circumstances informing each case.**

23. The courts states that we must prefer a "sensible meaning" to one that leads to insensible or "unbusiness like results or undermines the apparent purpose of the document" (ibid). Like judges, I must be alert to, and guard against, the temptation to substitute what I regard as reasonable, sensible or businesslike for the words actually used. If I did that I would be guilty of exceeding my authority as I would "cross the divide between interpretation and legislation." **In a contractual context such as in this case, it is to make a contract for the parties other than the one that they in fact made.**

24. The recent case of **Public Servants Association of South Africa obo Potgieter v Department of Trade and Industry and Others** [2016] ZALCJHB 52 (12 February 2016) is also helpful. Like the present matter there were multiple applications for temporary incapacity leave. Like the **Public Service Association of South Africa and Another v PSCBC and Others**, supra, there were no factual disputes.

25. The relief that Applicant seeks is in the following terms:

- i. The Respondent incorrectly interpreted and applied the provisions of Resolution 7 of 2000 and Resolution 5 of 2001 in relation to the Applicant's application for Temporary Incapacity Leave;
- ii. As a result of the foregoing, the Applicant suffered prejudice;
- iii. The Applicant's applications for the leave for the periods in question be approved with full pay;
- iv. The Respondent be ordered to repay any monies deducted from the Applicant's salary and immediately stop any further deductions from the Applicant's salary.

26. I am not persuaded that the Applicant has made out a case to grant him the relief she seeks. Unlike **Public Service Association of South Africa and Another v PSCBC and Others(supra)** there are factual disputes that are put in issue and have to be considered.

27. My reasons, though not exhaustive, are set out as follows:

a. The Applicant's complaint in chief in this referral was that the Respondent allegedly failure to adhere to those procedures and/or time frames, resulted in him being prejudiced.

b. In essence what she has done is to refer the matter so that it could be determined at arbitration, as a stated case without oral argument and evidence whether the Respondent was obliged to have adhered to and to have given effect to what the resolution, read in conjunction with the applicable policies, required. *I note that he does not argue that the Respondent is or was obliged to adhere to the procedures in the context of the current case and how fatal it is to its argument that the Applicant himself has been tardy , alternatively negligent in pursuing his rights and fulfilling his obligations under the collective agreement with due diligence as he was required to do so.*

c. Applicant has not submitted argument that the Respondent did not have the discretion to deviate from the procedures set out in the Resolution and/or those set out in the Determination and PILIR policies, but was compelled to adhere to the procedures and timeframes.

d. However, I discern that there was a deviation, and therefore the Applicant seemed to argue that the Respondent was in breach of a collective agreement. If this is what the Applicant argues, I don't agree. *In what way has the Respondent deviated is not in argument before me on the papers as they stand and if the referring party himself is partially at fault, I'm inclined to lean in favour of the Respondent.*

e. It was further argued that whilst there may be procedural delays in the processing of the application forms, substantive reasons existed for the non-approval of the leave. I agree because the Applicant did not follow the advice and directions given to him *by the Respondent's Health Risk Manager and he has not put up any convincing argument on paper what efforts she made to mitigate the prejudice he allegedly suffered.*

f. Furthermore unlike in **Public Servants Association of South Africa obo Potgieter v Department of Trade and Industry and Others (supra)** the applicant

was required to comply by the Respondent's Health Risk Manager as he was obliged to and he did not reasonably comply.No cogent explanation was presented or submitted in argument or in reply as the Applicant was obliged to.

47. Based on the conspectus of evidence before me I am inclined to agree with the Respondent.

48. In summary I conclude that the respondent has correctly applied/interpreted the provisions of Resolution 7 of 2000 as well as Resolution 5 of 2001 read with the applicable Directive and PILIR.

49 I therefore conclude that it was reasonable for the Respondent act as it did and I have not found that this was in contravention of the Resolution or any of the applicable supporting prescripts.

AWARD

1. I find in favour of the respondent.
2. The Respondent has correctly applied/interpreted the provisions of Resolution 7 of 2000 and Resolution 5 of 2001 read with the applicable directives/prescripts in relation to the applicant's application for temporary incapacity leave with respect to the applicant M Luswazi .
3. The applicant is therefore not entitled to any relief.

SIGNED AT DURBAN ON THIS 18th November 2016



Saber Ahmed Jazbhay

PSCBC Arbitrator