



**IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL
HELD AT THE TEACHERS CENTRE, OVERPORT IN DURBAN**

CASE NO: PSCB 396-15/16

PSA obo N JODAPERSAD

APPLICANT

and

DEPARTMENT of EDUCATION - KZN

RESPONDENT

ARBITRATION AWARD

DATE OF AWARD : 14TH September 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 September 2016 in the boardroom of the Respondent at The Teachers Centre, 1 College Road, Asherville, Durban, KwaZulu-Natal. The Applicant (hereinafter referred to as 'the Applicant') was represented by Mr Isharat Mooloo. The Respondent, Department of Education-KwaZulu-Natal (hereinafter referred to as 'the Respondent') was represented by Amy Preethpaul. Both the applicants together with their representative and the Respondent's representative were present on the 1st September 2016.
2. On that day only the Applicant submitted her bundle of documents whilst the Respondent who allegedly had not received timeous notice of the set down undertook to submit its bundle of documents which purported to be evidence together with its heads of argument, which I have subsequently marked 'A' and 'B' respectively. 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). Notwithstanding the advice that such an approach was ill advised, the parties 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.
3. I ruled that both the Applicant and the Respondent were to submit heads of argument and a statement of their case by no later than the 9th September 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 Ms N Jodarpersad (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*”). The dispute was lodged by PSA on behalf of Ms Jodapersad, an employee of the Respondent.

[3] The dispute was lodged as a direct result of the Respondent having declined separate and consecutive applications for temporary incapacity leave which were submitted by the Applicant, Ms Jodapersad.

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

No.	PERIOD	TOTAL NUMBER OF DAYS
1.	12/06/2008 to 30/06/2008	19
2.	01/07/2008 to 30/09/2008	92
3.	1/10/2008 TO 5/10/2008	5
4.	06/10/2008 to 09/12/2008	65
5.	01/07/2009 to 31/12/2009	184
6.	01/10/2013 to 06/12/2013	67
7.	26/02/2014 to 28/03/2014	31
8.	17/04/2014 to 02/06/2014	47
	TOTAL	510

[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 Ms Jodapersad's applications for temporary incapacity leave are two policy documents.

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

[8] 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.

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

[10] Of 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.

[11] 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. 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] Quite pertinent to the matter, these clauses further prescribe a time limit within which the employer must approve or refuse the temporary incapacity leave 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 in the present matter that the 30 working days' time frame was never put in issue by Ms Jodapersad, the Applicant in the matter before me.

[15] After M's Jodapersad'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.

[16] The dispute lodged was classified as being about the interpretation or application of a collective agreement, the latter being Resolution 7 of 2000. In giving a summary of the facts in dispute in the referral form, PSA recorded thus:

‘Employer not complying with procedure of temporary incapacity leave. Member now having to pay for leave taken.’

[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 employer declining M's Jodapersad'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 Resolution 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 it is common cause that the primary issue in dispute is the interpretation/application of PSCBC Resolution 7 of 2000. The applicable provision (in dispute) relates to both short term and long 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 her applications for long and short term temporary incapacity leave for the following periods as a result of her suffering from depression.

No.	PERIOD	TOTAL NUMBER OF DAYS
1.	12/06/2008 to 30/06/2008	19
2.	01/07/2008 to 30/09/2008	92
3.	1/10/2008 TO 5/10/2008	5
4.	06/10/2008 to 09/12/2008	65
5.	01/07/2009 to 31/12/2009	184
6.	01/10/2013 to 06/12/2013	67
7.	26/02/2014 to 28/03/2014	31
8.	17/04/2014 to 02/06/2014	47
	TOTAL	510

- (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 an Educator at Ferndale Combined School.
- (i) She had applied for long and 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 specialist.
- (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 her applications for temporary incapacity leave for the periods in question were not recommended by the Health Risk Manager.
- (vi) The Respondent also advised the Applicant that as she 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 her default in that she had not complied with recommendations and request from the Respondent as well as the Health Risk Manager vis-a-vis that she follow the advice from the medical reports that she follows a certain regime in order to manage her condition. It is also argued that the Applicant had lodged her claim rather late making it necessary for it to apply for condonation.
- (viii) Two medical reports submitted by the Respondent indicate that, had she followed the advice regarding optimal treatment her condition would have been manageable and that she would be able to resume her duties.

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.
2. Applicant's case is as couched below

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

2.1 Resolution:

- 2.1.1 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.
- 2.1.2 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.
- 2.1.3 Such employee may be granted sick leave on full pay notwithstanding the exhaustion of his/her sick leave credits for that cycle provided that:

2.1.3.1 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).

2.2 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).

2.3 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).

2.4 PILIR

2.4.1 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:

2.4.2 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).

2.4.3 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.

2.5 PILIR: Clause 7.1.5.1 and 7.1.5.2

- 2.5.1 The employee must submit the application for temporary incapacity leave within five working days after the first day of absence.
- 2.5.2 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.
- 2.5.3 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.
- 2.5.4 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.

2.6 PILIR: Clause 7.1.8 and 7.1.9

- 2.6.1 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 she has a reasonable explanation for the delay***, he/she is not barred from doing so but the onus shifts to the employer (supervisor).
- 2.6.2 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.
- 2.6.3 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***.
- 2.6.4 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.
- 2.6.5 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.

2.7 PILIR: Clause 7.3.1

The Applicant goes on to argue that the employer is “obligated” (sic) to, within **five days** of receipt of the application to

- 2.7.1 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.
- 2.7.2 The resubmission date of the complete application will be recorded as the date of submission.
- 2.7.3 The provision acknowledges that there will be circumstances in which the employee submits an incomplete application (in respect of information, documents and or signatures).
- 2.7.4 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.

3. Determination

- 3.1 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. It is 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”.
- 3.2 The employer, so it is argued, 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.

- 3.3 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.

4. Determination: Clause 13

4.1 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.

4.2 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

5.1 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).

5.2 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)

6.1 The Applicant argues that the interpretation and application of the Resolution means, firstly that clause 7.5.1(b) "must be read with the relevant clauses in the Determination and the PILIR document" and, 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.

6.2 In essence, what the Applicant argues is that 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.'

6.3 The Applicant's complaint in chief in this referral is that the Respondent allegedly "failed to adhere to those procedures and\or time frames, and that in turn resulted

in severe prejudice to her”. ***For the purposes of this argument, she does not take me into her confidence in what way she will or has suffered “severe prejudice”. Nor did she explain the reasons for the delay on her part.***

6.4 In essence what she 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 resolution, read in conjunction with the applicable policies, required. ***I note that she does not argue that the Respondent is or was obliged to adhere to the procedures in the context of the current case, the facts which require an objective as well as critical assessment and evaluation.***

6.5 The Respondent, she 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, even by the Respondent’s own admissions, ***(it is not pointed out where these admissions are)*** 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:

8.1 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.

8.2 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 factual matrix that informs this case the issue is not a clear cut one as it is made out to be.***

9. In Clause 6 of PILIR, the employer's obligations and responsibilities are stated quite categorically:
- 9.1 The employer shall in terms of PILIR be responsible to process applications and complete reports within specified timeframes.
- 9.2 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. Applicant submits in 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. - In the circumstances where there was deviation, the Respondent was in breach of a collective agreement. ***In what way has the Respondent deviated is not in argument before me on the papers as they stand. Again one has to consider this argument in the context of the factual matrix that informs this case.***
11. 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 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.***
12. I was also referred to the case of ***Public Service Association of South Africa and Another v PSCBC and Others*** [2013] ZALCD 3 (26 February 2013), in which, the Applicant argued, the Labour Court resolved that employees cannot be

subjected to retrospective leave without pay when an application for incapacity leave is declined. Such leave without pay can only be implemented from a date given to the employee to return to work, if the employee fails to return to work on the day. ***Having the benefit of the documents in the Respondent's bundle (see page 28 for instance) the Respondent has complied with this requirement.***

13. The Applicant argues that previously, when the Respondent submitted its statement of case, a copy of which is attached hereto for ease of reference, it was submitted at paragraph 1.4 that the Applicant ought to have applied for condonation for the dispute to be addressed at this late stage. However, the Applicant argues that in this regard section 24 of the LRA in terms of which her dispute is being determined, "does not stipulate a time frame within which such disputes must be lodged." ***Does this mean that the Applicant can lodge her disputes at any time? In this case certain claims were lodged eight years later. I find this argument specious.***
14. I note that the Applicant argues that, the dispute is an "ongoing" one because the deductions in respect of leave without pay for the said periods are still continuing "at this very point in time". ***Does this mean that the Applicant is exempt from being proactive towards finalising her claim or dispute? This was not argued before me on the papers.***
15. 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 directives.

15. CONCLUSION

- a. Thus, it's argued 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 and long term temporary incapacity leave concluded by the Respondent is flawed.

16. 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 in relation to the Applicant's application for Temporary Incapacity Leave;
 - ii. As a result of the foregoing, the Applicant suffered severe financial 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

17. The arguments, which have not been refuted by the Applicant, presented by the Respondent are as follows:-
- 17.1 After exhausting her normal sick leave of 36 days, the applicant has taken 510 days sick leave during the period 12 June 2008 to 2 June 2014.
- 17.2 She was diagnosed by a Specialist Psychiatrist of suffering from, inter-alia, depression and permanent brain damage.
- 17.3. Her Neurologist however diagnosed her of having tension type of headaches and asymptomatic cerebellar atrophy.
- 17.4 He indicated that he could not find any form of brain damage and noted that the Applicant did not comply with the treatment prescribed by him.
18. On 2 October 2008, the respondent referred the Applicant for an independent secondary psychiatric evaluation to a Professor M G Nair.
19. Professor M.G.Nair S indicated that the South African Society of Psychiatrists and/or international guidelines "were not followed and her treatment was sub-optimal (sic)".
20. Professor M G Nair, so it is argued, concluded that Ms Ajodapersad was not disabled on psychiatric grounds and indicated in her report dated 13 October 2008 that the Applicant did not take the treatment as advised by the neurologist.

21. Presumably based on the “suboptimal treatment”, the Applicant was advised that her leave was not approved and that she had to report for duty.
22. Documentary evidence which were part of the bundle of documents accompanying the Respondent’s heads of argument show that subsequent applications were consistently denied allegedly on the basis of the suboptimal treatment.
23. There is, so it is argued no confirmation from the neurologists who treated her in June 2007, March 2009 and in April 2011, of the presence of any brain damage or “cognitive defects”.
24. The Applicant was advised (***and this was not refuted on the papers before me***) on numerous occasions to optimize her treatment but failed to do so.
25. She was also requested to furnish, together with her application, a medical report from a neurologist detailing outcome and significance of any investigations done, diagnosis, treatment plan, response and her compliance to treatment. She had also failed in this regard. Consequently, her applications for temporary incapacity leave were not granted on the basis of lack of evidence to substantiate the extent of her incapacity to perform her duties. ***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.***
26. Respondent went on to argue that the Applicant did not comply with the request from the Health Risk Manager to consult with a neurologist and psychologist for the treatment for her condition. She was also advised to submit additional motivation for her leave which she failed to do. ***This too was not refuted on the papers before me.***
27. The Applicant, it is argued failed, “in certain instances, to submit her application for leave timeously as required in the relevant Resolution”.
28. Specifically, the period 1 October 2013 to 06 December 2013 **was only signed by Ms Ajodapersad on the last day of her leave, i.e. 6 December 2013 (see Annexure A of the Respondent’s bundle of documents).** Her application for the period 14 April 2008 to 30 June 2008 was signed on 29 April 2008 which is 10 days beyond the stipulated 5 days (paragraph 7.1.8 – page 88 of applicant’s bundle) for the submission of such applications. (see Annexure B of the Respondent’s bundle of documents)

29. Procedurally the Applicant, so it is argued, was advised of respondent's decision regarding her application for incapacity leave. The first period of her leave was in 2008. Her application is eight years late and she ought to have applied for condonation for the dispute to be addressed at this late stage. ***There is merit in this argument, besides although the Applicant briefly alluded to this, there is the issue of prescription also which the Applicant need to address me on and this has not been done.***
30. The Respondent argues that therefore to look at the issue of non-adherence to time frames as contained in Resolution 7 of 2000 isolation "would be a travesty of justice", as with all rights there are corresponding obligations.
31. It argues that in this instance the Applicant failed to "adhere to recommendations made by the Health Risk Manager" and it was for this reason that, in most instances, her applications for incapacity leave were not approved. As the Respondent seems to argue that on certain occasions she had not submitted her application for leave on time for the respondent to comply with the thirty day time period allocated for the processing of such application.
32. It was argued further that the granting of incapacity leave is at the discretion of the respondent and in exercising such discretion it is incumbent upon the respondent that any decision taken must be on a fair and equitable basis.
33. It was for this reason optimal treatment was requested and additional information was required which would have enabled the respondent in making an informed decision in this matter.
34. For an application for temporary incapacity leave to be considered, the employee was obliged to furnish sufficient proof that he/she was too ill to work. It is argued that she has failed on every occasion to comply with the requests from the health risk manager. Taking this into account, and in the absence of argument contradicting the foregoing, all subsequent applications should be regarded as invalid or incomplete applications which did not warrant consideration. ***The argument seems to be premised on the point is that the Applicant is not expected to sit back and do nothing once she has lodged her application.***

35. It also argued that given the sheer volume of 70,000 educators as ranged against 5000-7000 administration staff the delays in responding to the applications for incapacity are at times inevitable.
36. The Respondent argued that the Applicant is well educated and has been consistently been applying for leave that whilst that it was incumbent upon the respondent to advise the applicant with regard to the submission of applications for incapacity leave. ***Inferentially, ignorance of the law and procedure is not an excuse in such circumstances.***
37. It was further argued that whilst there may be procedural delays in the processing of the application forms, ***substantive reasons exist for the non-approval of the leave.*** The applicant could not have suffered any prejudice because the applicant could not come back to work any earlier if she claimed that she was indisposed. ***It was up to her to mitigate the prejudice she allegedly suffered and she has not put up any convincing argument on paper what efforts she made to mitigate the prejudice she allegedly suffered.***
38. The applicant had been aware that in the event that the leave is declined based on the outcome of the investigation, the period of temporary incapacity leave shall be converted to either annual leave or be unpaid leave (Refer to paragraph 4 Annexure D – cover page of application).
39. Given the foregoing, the respondent prayed that the dispute be dismissed on the basis that substantive reasons existed for the granting of leave without pay to the applicants for her periods of absence.

ANALYSIS OF EVIDENCE AND ARGUMENT

40. 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.
41. 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).

42. 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.***
43. The courts states that we must prefer a “sensible meaning” to one that leads to insensible or “unbusinesslike 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.***
44. 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.
45. The relief that Applicant seeks is in the following terms:
- i. The Respondent incorrectly interpreted and applied the provisions of Resolution 7 of 2000 in relation to the Applicant’s application for Temporary Incapacity Leave;
 - ii. As a result of the foregoing, the Applicant suffered severe financial 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.
46. I am not persuaded that the Applicant has made out a case to grant her 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.
47. 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 "failed to adhere to those procedures and/or time frames, and that in turn resulted in severe prejudice to her". ***For the purposes of this argument, she does not take me into her confidence in what way she will or has suffered "severe prejudice". She has an obligation to mitigate the perceived prejudice.***
 - 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 she 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 herself has been tardy , alternatively negligent in pursuing her rights and fulfilling her obligations under the collective agreement with due diligence.***
 - c. Applicant submitted in 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. In the circumstances where there was deviation, it argued that the Respondent was in breach of a collective agreement. 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 herself is partially at fault in that she did not diligently as well as timeously pursue her rights (she was eight years late) I'm inclined to lean in favour of the Respondent.***
 - d. The Applicant argued that previously, when the Respondent submitted its statement of case, it was submitted at paragraph 1.4 that the Applicant ought to

have applied for condonation for the dispute to be addressed at this late stage. However, the Applicant argues that in this regard section 24 of the LRA in terms of which her dispute is being determined, “does not stipulate a time frame within which such disputes must be lodged.” ***Does this mean that the Applicant can lodge her disputes at any time? I find this argument specious. There is no compelling reason or argument why she did not lodge her disputes in time and therefore I am not persuaded by this specious argument.***

- e. The Respondent argued that the Applicant was advised on numerous occasions to optimize her treatment but failed to do so. ***She did not refute this argument before me on the papers and there is no evidence on the papers directing me towards her version.***
- f. Procedurally the Applicant, so it was argued by the Respondent, was advised of respondent’s decision regarding her application for incapacity leave. The first period of her leave was in 2008. Her application is **eight years late** and she ought to have applied for condonation for the dispute to be addressed at this late stage. ***There is merit in this argument, besides although the Applicant briefly alluded to this, there is the issue of prescription also which the Applicant did not address me on. Even if, as the Applicant argues that this was an ongoing dispute prescription is not halted and it requires the Applicant to do something like lodging her dispute.***
- g. The Respondent argued that the Applicant was well educated and had been consistently been applying for leave that whilst that it was incumbent upon the respondent to advise the applicant with regard to the submission of applications for incapacity leave. She is a senior educator and ought to have familiarised herself. ***Inferentially, it is trite that ignorance of the law and procedure is not an excuse in such circumstances.***
- h. 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 had consistently did not follow the advice and directions given to her about, for instance to optimise her treatment. ***It was up to her to mitigate the prejudice she allegedly suffered by, for instances complying with the advise and recommendations by the medical practitioners as well as the Respondent’s Health Risk Manager and she has***

not put up any convincing argument on paper what efforts she made to mitigate the prejudice she allegedly suffered.

- i. 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 she was obliged to and she did not reasonably comply.
48. Based on the conspectus of evidence before me I am inclined to agree with the Respondent.
49. In summary I conclude that the respondent has correctly applied/interpreted the provisions of Resolution 7 of 2000 read with the applicable Directive and PILIR. It is undisputed that the applicant handed in her application late (eight years on one occasion) at times.
50. 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 read with the applicable directives/prescripts in relation to the applicant's application for temporary incapacity leave with respect to the applicant N JODAPERSADH.
3. The applicant is therefore not entitled to any relief.

SIGNED AT DURBAN ON THIS 14th September 2016



Saber Ahmed Jazbhay
PSCBC Arbitrator