



ARBITRATION AWARD

Panellist/s: Hilary Mofsowitz
Case No.: PSCBC 391-14/15
Date of Award: 28 May 2015

In the ARBITRATION between:

NUPSAW obo Fundiswa Pangwa
(Union / Applicant)

and

The Department of Justice and Constitutional Development
(Respondent)

Union/Applicant's representative: Orlando Moses/Omar Parker
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Details of hearing and representation

1. This is the award in the matter between National Union of Public Service and Allied Workers (“NUPSAW”) obo Fundiswa Panga (“the applicant”) and the Department of Justice and Constitutional Development (“the department”).
2. Arbitration was held at the offices of the department on 5 March 2015 and 6 May 2015. Both parties requested the opportunity to submit final argument in writing. Parties were granted the opportunity to provide their submissions on 15 May 2015.
3. Orlando Moses (“Moses”) an attorney with September and Associates represented the applicant. He was assisted by Omar Parker (“Parker”) an official of NUPSAW.
4. Happy Mzaza (“Mzaza”) represented the department.
5. The proceedings were digitally recorded. The documentary evidence and written submissions forms part of the record. No witnesses were called.

Issue to be decided

6. I have to decide whether the department correctly applied/interpreted the provisions of the Public Service Coordinating Bargaining Council (“PSCBC”) Resolution 7 of 2000. The particular provision in dispute relates to temporary incapacity leave. The applicant seeks that four periods of temporary incapacity leave be approved on full pay.

Background to the dispute

7. The issue in dispute is the interpretation/application of PSCBC Resolution 7 of 2000. The applicable provision (in dispute) relates to temporary incapacity leave. The applicant applied for temporary incapacity leave on a number of occasions from October 2012 to December 2013. The periods for which temporary incapacity leave was sought is recorded and agreed between the parties. There are four periods in dispute. The applications for temporary incapacity leave were not considered and declined. The quantum of the declined temporary incapacity leave is an amount of R 80 201.44. The

applicant seeks that the periods of temporary incapacity leave be converted to paid temporary incapacity leave. It is undisputed that the department has deducted the monies after the applicant was paid in full for the leave. The parties did not provide any evidence when the deductions commenced. It is undisputed that the applicant exhausted her normal sick leave cycle. It is undisputed that the department did not process or consider the applicant's applications for temporary incapacity leave. The applicant's medical illness that led to her leave applications was not placed in dispute. The applicant suffered with drug resistant tuberculosis. Apart from the periods in dispute, it is common cause that certain other periods of temporary incapacity were approved.

8. The department argued that it complied with the provisions of the applicable Resolution and all supporting regulations. The content of Resolution 7 of 2000 was not placed in dispute. The content of the Determination and Directive on Leave of Absence in the Public Service ("the Determination") was not placed in dispute. It was undisputed that Resolution 7 of 2000 must be read in conjunction with the Determination. The applicable Resolution and all supporting prescripts forms part of the record. Both parties referred me to PILIR. This is a policy formulated by the Minister for Public Service and Administration that deals specifically with leave of absence. This policy forms part of the record. In essence the department conceded that the applicant's four applications were not considered either on the basis that the applicant's applications were not received within the stipulated time frames or were incomplete/did not reflect the required information. The department communicated with the applicant on 6 June 2013 (first and third period), 22 June 2013 (second period) and 6 August 2013 (fourth period) that her applications would not be considered.
9. The applicant argued that the department did not apply the provisions of Resolution 7 of 2000 correctly in that her application for temporary incapacity leave ought to have been granted (the periods in which temporary incapacity leave was sought was not disputed). In particular the applicant referred to section 7. 5. 1 (b) of Resolution 7 of 2000. This section reads as follows: *"The employer shall, during 30 working days, investigate the extent of inability to perform normal official duties, the degree of inability and the cause thereof. Investigations shall be in accordance with item 10 (1) of Schedule 8 in the Labour Relations Act 66 of 1995 as amended ("the LRA")". "The employer shall specify the level of approval in respect of applications of disability leave".* The applicant also referred me to Circular 83 of 2010. This forms part of the record.
10. The applicant holds the position of senior administration clerk at the Stellenbosch magistrate's court. She commenced employment within the department in 2006. The applicant currently earns a salary of

R 123 000.00 per annum. The applicant exhausted the prescribed thirty six days of sick leave within a three year cycle.

11. The department referred to paragraph 15 of the Determination that states the following: *“An employee must submit an application form for temporary incapacity leave personally or through a relative, fellow employee or friend within five working days after the first day of absence”*.
12. It is common cause that in respect of the application for the period 1 October 2012 to 30 November 2012, the department received the applicant’s medical certificate on 2 November 2012 (a month later) and the actual application was received by the human resource office on 16 November 2012 (after the office received it on 13 November 2012). It is common cause that in respect to the application for the period 3 December 2012 to 31 December 2012, the department received the applicant’s medical certificate (the parties do not know the date it was received), but the actual application was signed by the area court manager on 11 December 2012 and received by the human resource office on 18 December 2012. It is common cause that that in respect of the application for the period 3 April 2013 to 28 June 2013, the department received a medical certificate (which was not accompanied by the temporary incapacity application) on 15 April 2013. The application was received by the department on 17/24 April 2013 (signed by the court manager and not by the applicant). In respect of the period 29 June 2013 to 31 December 2013, the applicant sent in her medical certificate on the first day of absence but is common cause that the actual application was signed by the applicant on 30 August 2013 and received by the human resources department on 5 October 2013 (the parties were not entirely certain of this date).

Survey of evidence and argument

The applicant’s submissions

13. The applicant argued that while an employee is required to submit an application within five working days after the first day of absence, the employee’s supervisor must (within two days) of receipt of the leave form submit the application to the relevant human resources division. This means that the employee should be granted conditional temporary incapacity leave subject to the outcome of an investigation. It was argued that the head of department must within five working days (from receipt of the application) grant conditional pay and refer the application to the health risk manager. In the

applicant's case, there was approval for the conditional payment in respect to the one period. The conditional payment means that the application must be referred to the health risk manager for assessment and advice. The department's failure to consider the applications for paid temporary incapacity leave (by not referring the applications to the health risk manager) was in contravention of its own policies and collective agreements and amounted to unfair administrative action by the department. Due to the fact that the decision was not taken by the head of department, the deductions from the applicant's salary was not lawful. Although the provisions of the collective agreement prescribe that the medical certificate must be submitted within five working days, the provisions make it clear that where an employee does not comply with this requirement, the supervisor must notify the employee that if the application was not received within two working days, then the sick leave will be considered as unpaid leave. This effectively grants the employee an additional two extra days from the date the supervisor informs him/her to submit the application. In essence, there is an extension granted for submission. The department's failure to inform the applicant of the consequences (in these circumstances) is grossly negligent and therefore the applicant's late referral should be condoned. The department had the option to discipline the applicant for failing to submit the application within the stipulated time frames. The effect of the late referral should not lead to the non consideration of the application.

14. In essence the applicant argued that the department's failure to consider the applicant's applications for temporary incapacity leave, the department failed to correctly interpret/apply Resolution 7 of 2000 read with the applicable prescripts. The provisions of Resolution 7 of 2000 specify that where an employee has exhausted her normal sick leave credit and is deemed by the relevant medical practitioner to be required to be absent from work due to disability that is not permanent, may be granted sick leave on full pay. On receipt of an application for temporary incapacity leave, the head of department (or his/her delegate) must grant conditional leave with full pay subject to the outcome of the investigation into the nature and extent of illness and the application must be referred to the health risk manager.

The department's submissions

15. The applicant applied for temporary incapacity leave by supplying the department with medical certificates. In order for temporary incapacity leave applications to be processed, the prescribed application forms must be properly completed and submitted. The submission of medical certificates is not sufficient and does not comply with the application requirements. The applicant was advised on all four occasions that due to noncompliance, her applications would not be considered. The applicant was advised of this within the prescribed time frames. The department's correspondence to the applicant

forms part of the record. The applicant was aware of all the required procedures as her previous temporary leave applications were compliant and therefore approved. While there was one previous application that was approved although it was not compliant, the applicant was not prejudiced by this. While it is undisputed that an official from the department assisted the applicant with her applications, the responsibility to submit the applications on time, remains with the applicant. The applicant cannot relinquish this responsibility.

16. In support of its case, the department relied on the provisions of the Determination. In particular the department referred to the following: *“An employee who has exhausted his/her normal sick leave, during the prescribed sick leave cycle and who according to the treating medical practitioner requires to be absent from work due to temporary incapacity, may apply for temporary incapacity leave with full pay on the applicable application form prescribed in terms of PILIR in respect of each occasion”*. *“An employee must submit an application for temporary incapacity leave personally or through a relative, fellow employee or friend within five working days after the first day of absence”*. The applicant did not comply with these requirements.
17. All the applicable prescripts place a burden on the employee to provide medical evidence in support of the temporary incapacity leave application. The employee is therefore required to hand in his or her application within five days of the first day of absence. There is no evidence to confirm that the applicant submitted a medical certificate that certified her illness as a temporary disability. There is insufficient evidence to show that the applicant’s illness incapacitated her in a manner that rendered her unable to perform her duties. The applications lacked evidence and were incomplete. The applicant failed to provide additional reports in circumstances where the submission of medical certificates is not sufficient. The application document makes it clear that additional medical reports must be submitted and therefore the applicant must have been aware of this requirement.

Analysis of evidence and argument

18. The dispute concerns the interpretation/application of a collective agreement. The dispute concerns PSCBC Resolution 7 of 2000. The contents of the collective agreement and supporting prescripts were not disputed. There was no dispute that Resolution 7 of 2000 is a collective agreement and both parties asked me to also consider the provisions regulated by the Determination as well as by PILIR. PILIR was specifically introduced to assist employers to properly manage applications for temporary incapacity leave in accordance with the provisions of Resolution 7 of 2000.

19. In essence the applicant's dispute relates to the department's failure to grant the applicant paid temporary incapacity leave for four periods that form part of the record. The parties agreed about the details of the disputed periods and it was established as common cause that the applicant's applications were either late or incomplete. The fact that the details of the late applications were not disputed does not preclude jurisdiction in a dispute of this nature.
20. The scope of an arbitrator in an interpretation/application dispute is to determine whether the department has failed to apply or interpret the provisions of a particular collective agreement. The scope of the arbitrator is narrowly confined to this particular task with due consideration of equity and fairness.
21. It was undisputed that the applicant's applications for temporary incapacity leave were declined. It was undisputed that the department did not process or consider the applicant's applications. It was undisputed that the department has discretion to approve or decline such applications. However the department must show that it has applied and interpreted the provisions of the collective agreement and that it has done so in a fair and reasonable manner. The granting of temporary incapacity leave is subject to the employer's approval but the exercise of discretion is open to scrutiny to ensure transparency and fairness.
22. The content and wording of the collective agreements were not placed in dispute. The department conceded that it did not comply with the 30 day requirement as per Resolution 7 of 2000. The discretion to grant or refuse temporary incapacity leave must be exercised properly, rationally and fairly. The terms of Resolution 7 of 2000 (in so far as temporary leave applications are concerned) (specifically clause 7.5.1) require that the department "shall" conduct investigations within thirty working days in accordance with item 10 (1) of the LRA. It is common cause that the applicant submitted a medical certificate on all four occasions. It is common cause that the applicant did not comply with the stipulated time frame in that she did not submit her application for temporary incapacity leave within five working days after the first day of absence. In terms of clause 15.7 of the Resolution, if the employee fails to submit an application within the prescribed time frame (as in the applicant's case), the employee's manager/supervisor must notify the employee that if such application is not received within two working days, the sick leave period will be regarded as unpaid leave or annual leave. The supervisor/manager must immediately inform the human resources division and the relevant authority shall approve such absence as unpaid leave or annual leave (if the employee consents). There was no evidence to show that the department complied with this provision of the Resolution in a timely manner. There is correspondence from the department's representative (dated 26 July 2013) that forms part of the record.

In this correspondence, Mzaca confirms that where an employee does not comply with the requirement to submit an application for temporary incapacity leave within five working days after the first day of absence, the department is “compelled” to inform the employee that the required application is needed within two working days. The evidence therefore supports the conclusion that the department failed to comply with the collective agreement in the form of Resolution 7 of 2000 to the extent that the applicant was materially disadvantaged by the noncompliance in respect to four applications for temporary incapacity leave. The department has confirmed this obligation. The department’s noncompliance warrants interference as the department did not provide compelling argument why it did not apply/interpret the provisions of a collective agreement that is binding on it. There was no evidence placed before me that the department communicated with the applicant within the required time frames. The correspondence that the department sought to rely on was dated June, April or August 2013 and does not appear to have been within the prescribed time frame with respect to periods one, two and four.

23. The applicant submitted applications for temporary incapacity leave for the periods recorded above. The application for leave for the period 1 October 2012 to 30 November 2012 was declined on 6 June 2013; the application for leave for the period 3 December 2012 to 31 December 2012 was declined on 22 June 2013; the application for the period 3 April 2013 to 28 June 2013 was declined on 6 June 2013; the application for the period 29 June 2013 to 31 December 2013 was declined on 6 August 2013. From the documentation on record (and according to the date stamps on the applications), the applications were declined after two months to six months in terms of the first three periods. It is therefore clear that the department did not comply with item 10 (1) of Schedule 8 of the LRA and did not comply with the 30 working day period as prescribed by the collective agreement. In respect to the first three periods the decision to decline temporary incapacity leave was made outside of the prescribed period and therefore not in compliance with Resolution 7 of 2000.
24. The recovery of salary paid for “conditional leave” initially granted, pending the outcome of an application for temporary incapacity leave, is done either by way of deductions from salary, vacation leave credits, capped leave or unpaid leave and is inextricably linked to the decision to decline temporary incapacity leave. It was undisputed that the department deducted the conditional leave granted for all four periods from the applicant’s salary. I find that employees cannot be subjected to leave without pay and monthly deductions from their salary unless the application is declined within thirty days, the employer having completed the necessary investigations and required the employee to return to work and the employee failed to do so. The employer may only recover salary paid if temporary incapacity leave was declined within thirty days or if it is declined at a later date, deductions may only be

made for the period the employee was required to return to work and did not. If the employer is not compliant with these provisions, then the refusal to grant temporary incapacity leave kicks in with retrospective effect and is therefore unfair. The decision to decline temporary incapacity leave with retrospective effect is an arbitrary exercise of discretion with unfair consequences on the employee.

25. I therefore find that the department has incorrectly applied/interpreted the provisions of Resolution 7 of 2000 read with the applicable Directive and PILIR. In exercising its discretion to decline the applicant's application for temporary incapacity leave, the department has not complied with its own prescripts as detailed in paragraph 22 above. The terms and the provisions of the collective agreement and supporting legislation are clear. The intentions are clear. The Resolution provides for extra paid and the department is obligated to comply with the provisions of the Resolution as described above. The relief the applicant seeks is therefore reasonable in the circumstances. The department's noncompliance warrants interference in circumstances where the department did not correctly apply/interpret clause 15.7 (periods one, two and four) and 15.8 (periods one, two and three) of Resolution 7 of 2000. The applicant indicated that the department deducted an amount of R 80 201.44 in respect of the four periods (detailed above) where the applicant applied for temporary incapacity leave and the applications were declined. There were no counter submissions in relation to the quantum of the deductions.

Award

26. I find in favour of the applicant.
27. The Department of Justice and Constitutional Development has incorrectly applied/interpreted the provisions of Resolution 7 of 2000 read with the applicable directives/prescripts in relation to the four applications for temporary incapacity leave with respect to the applicant Fundiswa Pangwa. The department must convert the four periods of temporary incapacity leave to paid temporary incapacity leave. The four periods are detailed as: 1 October 2012 to 30 November 2012, 3 December 2012 to 31 December 2012, 3 April 2013 to 28 June 2013, 29 June 2013 to 31 December 2013.
28. The Department of Justice and Constitutional Development must pay the applicant Fundiswa Pangwa an amount of R 80 201.44 by no later than 30 June 2015.

A handwritten signature in black ink, appearing to read "Hilary Mofsowitz", with a stylized flourish at the end.

HILARY MOFSOWITZ

For the PSCBC

28 May 2015

PSCB 391-14/15