IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

HELD AT CAPE TOWN

CASE NO: PSCB 308-15/16

PSA obo Michaels **APPLICANT**

and

Department of Community Safety **RESPONDENT**

AWARD

DATE OF ARBITRATION	:	9 November 2015
CLOSING ARGUMENTS	:	16 November 2015
DATE OF AWARD	:	25 November 2015
ARBITRATOR	:	I de Vlieger-Seynhaeve

1. DETAILS OF HEARING AND REPRESENTATION

1.1 Ms Sirmonpong from the PSA, represented the Applicant. The Respondent was represented by Mr Conradie.

1.2 The proceedings were recorded digitally.

2. ISSUE TO BE DECIDED

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

3. SURVEY OF ARGUMENT

3.1 The applicant made the following submissions:

3.1.1. **Ms Michaels** stated under oath that she is the Deputy Director. In May 2014 she received a letter that she would be transferred to another unit. No consultation had taken place and she lodged several grievances. From August 2014, she was side-lined and removed from all official duties. She was victimised and bullied which took a huge strain on her. She was then referred to the Employee Assistance Program where she had several sessions with a psychologist. That psychologist provided a report about the applicant to the Respondent. The psychologist then found that she needed to see a psychiatrist as she was not making sufficient improvement. After two sessions with the psychiatrist, he asked her whether she had sick leave left because he wanted to book her off. She then informed her supervisor and applied for temporary incapacity leave. She attached a medical certificate for the period 13/10/2014 – 24/11/2014. She did not receive any response. Towards the end of December 2014, she was informed telephonically that her application was declined by the HRM as the medical information submitted did not give an indication about the severity of the symptoms that precluded her from performing her duties. The HRM acknowledged that she suffered from valid symptoms but without substantiating evidence they were unable to award the length of the leave as requested. The letter further stated that she has the right to appeal the recommendation and was given the opportunity to submit a comprehensive medical report from the treating psychiatrist. This was her first

TIL application and she has never abused her sick leave. The Respondent or HRM had the opportunity to contact her psychiatrist and they had access to the report written by the psychologist ito the EAP. The Respondent did not abide by the 30 days as stipulated in the Resolution. She was on holiday leave during December 2014 after which she went on maternity leave. The letter stating that the HOD had declined her TIL application was dated 05/03/2015. However she only received it on 07/04/2015 when she returned from maternity leave.

3.1.2 **Mr Conradie** stated during cross examination that the letter dated 15/12/2015 was sent to her work address (email) and that she must have been contacted. The applicant replied that indeed, shortly after 15/12/2015 she received a phone call where she was informed that her application was denied. It was then put to her that after the letter dated 15/12/2015 which requested more information, she submitted extra medical information. However, the letter stated that the applicant needed to submit non-medical information. The applicant stated that she submitted a comprehensive medical report from her psychiatrist dated 13/01/2015. But she does not think that it was considered.

3.2 The respondent made the following submissions:

3.2.1 **Ms Sampson**, the Chief HR Clerk, stated under oath that the TIL application was declined on 15/12/2014 after which the applicant was given additional time to submit documents. The decision to decline was taken after 38 working days which is not excessive. The applicant was given five additional days to write a submission to the HOD so he could make a final decision. She was required to submit non-medical information but she only included medical info. The HOD then made the final decision to decline the application.

4. ANALYSIS OF EVIDENCE AND ARGUMENT

4.1 I first would like to deal with the jurisdiction to hear the matter. I hereby refer to the judgements in *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others (2010) 31 ILJ 1813 (LAC)* and *PSA obo De Bruyn v Minister of Safety and Security and Another (2012) 33 ILJ 1822 (LAC)* where it was decided that the BC has jurisdiction to entertain disputes about the application and interpretation of Resolution 7 of 2000 in

terms of section 24 of the LRA. "Interpretation" refers to the situation where the parties differ over the meaning of a provision of the collective agreement. "Application" includes both the question whether an agreement applies to the facts in question and the manner in which the agreement is applied, which includes non-compliance.

4.2 Paragraph 7.4 and 7.5 of the PSCBC Resolution 7 of 2000 deal with normal sick leave and with incapacity management in excess of the 36 days normal sick leave. An employee, who has exhausted its 36 days sick leave, MAY be granted additional sick leave (TIL) on full pay where the provisions of paragraphs 7.5.1 (a) (i) & (ii) of Resolution 7 of 2000 are complied with and the employer, after investigations, including investigations in accordance with item 10(1) of Schedule 8 of the LRA, so decides. Resolution 7 of 2000 is amplified by the Policy and Procedure on Incapacity Leave and Ill-Health retirement (PILIR), determined in terms of section 3 (2) of the Public Service Act 1994, as amended by the Minister for Public Service and Administration. The employer has discretion to grant the TIL, although it needs to exercise its discretion properly (must take into account relevant information, follow laid down procedures and act within the framework of the Collective Agreement). Not every failure on the part of the employer to comply with the Collective Agreement will necessarily result in a claim of right on the part of the employee. The employee still needs to show that he qualified for the relief sought, that the employer failed to comply with the agreement and in doing so prejudiced him (see also PSCB601-11/12).

4.3 It is common cause that the applicant's application was submitted on 13/10/2014. She attached a medical certificate as required by the Resolution (section 7.5.1). The PILIR states in s 7.2.9 that the employer must within 30 working days after the receipt of the application form and the medical certificate approve or refuse TIL granted conditionally. In making the decision, the employer must apply his mind to the medical certificate, medical information / records, the HRM's advice, the additional information supplied by the employee and all other relevant information supplied by the employee.

4.4 It is common cause that the respondent wrote a letter to the applicant dated 15/12/2014, of which the applicant was informed telephonically, stating that the HRM had advised the respondent that her TIL application should be

declined based on certain reasons. The applicant was then given the opportunity to appeal the advice of the HRM. At that stage no final decision was taken by the respondent. That final decision was taken by the HOD on 05/03/2015. The resolution and PILIR both state that the decision is taken by the employer, after taking into account the HRM's advice and other factors. It is therefore clear that the respondent did not abide by the 30 days rule.

4.5 Furthermore, the process the respondent followed was flawed. After the HRM advised that, although there were valid symptoms, they lacked information to approve the claim, the applicant was given an opportunity to provide *non-medical information*. This is contradictory with the rest of the letter. The letter clearly states what is lacking in terms of medical information and gives the applicant an opportunity to submit a comprehensive *medical report*, which she did. However, the respondent stated that the applicant needed to provide non-medical information, which was mentioned at the end of the letter. This does not make sense at all. In my opinion, the HRM could only decline the application when it had all the information in front of him. That is why a comprehensive report was required. In order to get the report, the HRM could have contacted the treating psychiatrist, seeing that the applicant had given permission to do so, or could have requested the documents from the applicant. But that is not what happened. The applicant did send in a medical report dealing with all the issues requested by the HRM, but that report was never sent to the HRM but to the HOD. The HOD is not a medical doctor and cannot give medical advice on whether the application should be approved or not. The HOD then declined the application. This shows that the decision to decline the application was never based on the applicant's medical condition and comprehensive medical report.

4.6 Under the circumstances I find that the respondent has not exercised its discretion fairly. I accordingly find that the respondent was not entitled to take leave away from the applicant for the period in question to make up for the disapproved TIL application.

4.7 It must be stressed that TIL is not ordinary sick leave and is leave that is granted after consideration of several factors as mentioned in paragraph 4.3. The applicant's representative stated that the relief sought is the approval of the TIL, in line with the judgment in *PSA obo Liebenberg v Department of*

Defence (2013) 22 LC 4.2.1. First of all, that judgment confirms that the PSCBC has jurisdiction to hear disputes concerning TIL applications. It does not say that when an arbitrator finds non-compliance that the relief should be the approval of the TIL application. It is not because the respondent is in breach with the resolution that therefore the application needs to be approved. I am also no medical doctor and cannot make that decision. Seeing that the respondent did not follow the correct procedure, I order that the respondent re-considers the application by first of all sending all relevant documentation to the HRM. Based on the HRM's advice, medical records and any additional information, the HOD must then make a final decision.

5. AWARD

5.1 The respondent breached PSCB Resolution 7 of 2000;

5.2 The respondent's decision to disapprove the applicant's TIL for the period 13/10/2014 – 24/11/2014 is hereby set aside and the respondent must credit the applicant with the leave days that were deducted;

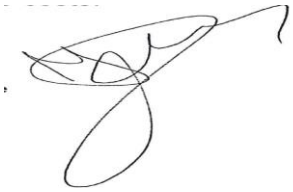
5.3 The respondent must within 60 days from date of receipt of this award re-consider and properly conduct an assessment of the applicant's TIL application together with the additional information submitted on 13 January 2015, in line with the Resolution and PILIR;

5.4 If the respondent does not make a decision within 60 days, the application for TIL will be considered approved due to the respondent's tardiness and the need to finalise this matter;

5.5 In the event that the respondent does make a decision within the 60 days' time frame and he decides not to approve the TIL after reconsidering and conducting an assessment, the applicant is at liberty to refer a new dispute to the PSCB in that the decision not to approve will then amount to a new decision;

5.6 There is no order as to costs.

SIGNED AT Cape Town on this 25th day of November 2015



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I De Vlieger-Seynhaeve

PSCB Panellist