



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

CASE NO: PSCB 306-15/16

PSA obo Mashiyi

APPLICANT

and

Department of Justice

RESPONDENT

AWARD

DATE OF ARBITRATION : 23 November 2015
DATE OF AWARD : 3 December 2015
ARBITRATOR : I de Vlieger-Seynhaeve

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 Mr Theunissen from the PSA, represented the Applicant. The Respondent was represented by Mr Mzaca.
- 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 sick leave.

3. SURVEY OF ARGUMENT

- 3.1 The applicant made the following submissions:
 - 3.1.1. **Ms Mashiyi** stated under oath that, on 20/04/2015, she submitted an application for sick leave for 24/04/2015. She attached a copy of the email confirming her appointment (the email reads as follows: *This serves to confirm that Ms Mashiyi has an appointment with Dr Muller on 24/04/2015 at 11h*). She was 19 weeks pregnant and had visited her doctor on 17/04/2015. At that appointment she was referred to the pre-natal clinic for a test that needs to be performed before 20 weeks of pregnancy. On 21/04/2015, Mr Arendse said that she should talk to Mr Roux and try to change the appointment. She could not find him on 21/04/2015 and neither on 22/04/2015. After a meeting which happened on 22/04/2015 she did speak to him and told him that she could not change the appointment. He then told her that he needed it in writing. On 24/04/2015 she went for an amniocentesis which is a clinical procedure. On 28/04/2015, she received a letter from Mr Roux stating that the following: *On 20 April 2015, you applied for sick leave. You were requested on 22/04/2015 to inform the Regional Head whether or not you will be able to shift the appointment to the afternoon or move it to an alternative date. You indicated that you will consider and respond to the Regional Head to confirm the appointment by the next day, 23 April 2015. As you never came back to the Regional Head with an alternative date / time, he made unsuccessful himself made enquiries on that same day and the next day. The applicant did not give feedback to the Regional Head as requested*

and further stayed away from work on 24/04/2015 without approval. The following now needs to be considered: - leave without pay for 24/04/2015 and; - misconduct as you failed to come back to the Regional Head. You are hereby afforded an opportunity to make representations in that regard. She responded to that letter on 30/04/2015. In that letter she explained that attempts were made to secure a meeting but she was unsuccessful. On 22/04/2015, she had reminded the Regional Head about her appointment. She then informed him of the impossibility to move the appointment. She was then asked to come back to the office after her appointment and that the Doctor write a report confirming what the applicant was stating. She forwarded that request to Dr Gaertner. She followed the prescribed procedure. She had a note from Dr Muller confirming her appointment but Mr Roux did not want to accept it. Later on 30/04/2015, she was called into a meeting and informed that she will receive a warning for being absent without permission, valid for 6 months. The Regional Head also denied that the applicant spoke to him about her appointment and that he requested a doctor's note. She then requested a copy of her leave form which was denied. The respondent did not adhere to their own policy seeing that they did not follow clause 14.5 of PILIR where it is stated that *the employee's manager must within two working days from receipt of the leave application form recommend / not recommend and/or approve / disapprove the application.* The respondent had only declined on 30/04/2015 which was after two working days. Furthermore, clause 14.6.2 of PILIR states that *failure by the manager to properly manage it (that the employee submits the application in time) must be viewed in a serious light and disciplinary steps against the manager should be taken.* Finally, she submitted a doctor's note dated 04/11/2015 signed by Dr Gaertner in which he writes that the applicant is his patient. He confirmed that he referred her for genetic counselling to Dr Muller on 24/04/2015 at 20 weeks due to her increased risk of Downs Syndrome. She wishes to be reimbursed with the amount that was deducted from her. She claims the R 1807.20 plus interest.

3.1.2 **Mr Mzaca** stated during cross examination that the respondent was not in breach with PILIR as the applicant was informed on 28/04/2015 that her leave was declined. She was off on 24/04/2015 which was a Friday. The applicant disagreed and stated that she applied for leave on 20/04/2015.

3.2 The respondent made the following submissions:

- 3.2.1 **Mr Mohammed**, the Regional Head, stated under oath that the policy at work is that doctor appointments should be done in the afternoon in order to cause the least amount of disruption. If it is impossible to move the appointment then they will grant the leave. The applicant said she would come back to him but never did. He had asked his secretary to follow up as well but she could not get hold of the applicant either. He then wrote a letter to her as there had been previous incidents. The applicant had made a promise and she did not keep it. He denied that the applicant had given him feedback; otherwise he would not have written her the letter.
- 3.2.2 During cross examination, it was put to him that the leave application was declined on 30/04/2015 and is therefore in breach with the collective agreement. The witness disagreed as he had told the applicant to come back to him which she failed to do.
- 3.2.2 **Mr Roux**, the HR Director at the time, was the last witness and testified under oath that the applicant had informed him on 20/04/2015 about an appointment. He had responded with an email dated 22/04/2015 which stated that a doctor's appointment cannot be sick leave and that if her appointment cannot be outside working hours, she must put in a request for vacation leave with a motivation. When he heard that she had not reported for duty on 24/04/2015 he had written her a letter dated 28/04/2015. He had informed the Regional Head. There was never any proof that the applicant went for an operation or procedure. She only went in for an appointment which does not qualify for sick leave. That is why the clause 7.4 of the Resolution is not applicable. The applicant never lodged an appeal against her warning.

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 of the PSCBC Resolution 7 of 2000 deals with normal sick leave. 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, which deals with sick leave in section 14.
- 4.3 It is common cause that the applicant took pre-natal leave on 17/04/2015. She then submitted an application for sick leave for 24/04/2015 however the email to proof her absence only refers to a doctor's appointment and does not mention any clinical procedure that needs to be undertaken. Mr Roux' reaction, through his email, was correct to inform the applicant that this would not constitute sick leave and that she needed to submit an application for vacation leave. After this, the applicant did not provide proof that she was going for a clinical procedure. She was also asked to move the appointment. It is in dispute whether she did inform the Regional Head that she could not move her appointment. The applicant stated that she could not get hold of him and referred to a conversation she had with him after attending a meeting, which was denied by the Regional Head. However, this evidence is relevant in regard to the misconduct and is not relevant in regard to my decision whether the respondent breached the Resolution or not.
- 4.4 After the applicant was off on 24/04/2015 she brought a sick note from Dr Muller which stated the following: *This is to certify that Ms Mashiyi attended an appointment today and should be fit for work on 25/04/2015.* However, the wording: *had a genetic procedure and is unfit for work* was scratched out. This again, does not give us a clear indication of whether the applicant underwent a clinical procedure or if she only had an appointment. I therefore agree that the respondent was entitled to disapprove the sick leave for 24/04/2015 as there was no proof that the applicant had more than an appointment with a doctor. The applicant then submitted another doctor's note, dated 04/11/2015, issued by Dr Gaertner that confirmed that he had referred the applicant to Dr Muller for a scan and counselling. First of all, this doctor's certificate was never given to the respondent when the decision was made to disapprove the sick leave. Secondly, this doctor's certificate is not from the doctor who treated the applicant on 24/04/2015 and still does not

confirm that a clinical procedure was undertaken. The certificate only referred to a scan and counselling. There is therefore no sufficient proof that the applicant was booked off for a clinical procedure in line with section 14.3 of PILIR.

- 4.5 As a consequence, the respondent did not breach the Resolution when it disapproved the sick leave. The applicant made the submission that the respondent was in breach with section 14.5 of PILIR as it did not disapprove the sick leave application within two working days. I did not agree with that submission as Mr Roux replied in his email dated 22/04/2015, that a doctor's appointment did not amount to sick leave and that an application for vacation leave should be submitted instead. The applicant knew already on 22/04/2015 that her application would not be approved. I do not find that the respondent breached the Resolution.
- 4.6 It must be stated that the doctor's certificate of Dr Muller is quite confusing. She indicated that the applicant only went for an appointment but did book her off for the day. This is contradictory. If the applicant had indeed a clinical procedure that day then it would be acceptable that she was booked off. Based on that, I will afford the applicant the opportunity to submit a doctor's certificate by Dr Muller which must confirm whether the applicant went for an appointment on 24/04/2015, which involved counselling and a scan or whether the applicant went in for a clinical procedure (an amniocentesis) and was booked off for that day accordingly.
- 4.7 The applicant has time until 31/12/2015 to submit that doctor's certificate. The respondent has then until 20/01/2016 to make a decision about the approval / disapproval of the sick leave for 24/04/2015.
- 4.8 If the respondent would decide that the applicant did indeed have a valid reason to apply for sick leave, he should reimburse the deduction of R 1807.20. No interest will be added as the respondent was not in breach with the resolution when it originally disapproved the application for sick leave.
- 4.9 If the respondent disapproves the sick leave and the applicant disputes this, then the applicant will be 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. AWARD

- 5.1 The respondent was not in breach with PSCB Resolution 7 of 2000;
- 5.2 The applicant is afforded an opportunity to submit an additional sick certificate, in line with the requirements in paragraph 4.6, on or before 31/12/2015;
- 5.3 The respondent must make a final decision in terms of approving / disapproving sick leave for 24/04/2015 on or before 20/01/2016;
- 5.4 If the respondent approves the application for sick leave, the amount of R 1807.20 must be reimbursed by 31/01/2016;
- 5.5 In the event that the respondent disapproves the application for sick leave, 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 3rd day of December 2015



I De Vlieger-Seynhaeve
PSCB Panellist