ARBITRATION AWARD

Case Number: ***PSCB 707-13/14***
Commissioner: ***Kelvin Kayster***
Date of Award: ***10 November 2014***

In the **ARBITRATION** between

PSA obo Mentz MMA
(Union/Applicant)

And

South African Police Service
(Respondent)

Union/Applicant's representative:	***Mr. A. Killian (PSA)***
Union/Applicant's address:	***P.O. Box 63660***
	Greenacres
	Port Elizabeth
	6057
Telephone:	***041 501 6800***
Telefax:	***041 501 6812***
E-mail:	
Respondent's representative:	***Ms. N. Mavango***
Respondent's address:	***Private Bag X91***
	Pretoria
	0001
Telephone:	***012 393 1774***
Telefax:	***041 393 7159***
E-mail:	

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing in this dispute was scheduled for 23 October 2014 at the offices of Respondent in Fort Beaufort.

2. The Applicant is Ms. Magriet Mentz, an employee in the service of the Respondent. The Applicant was represented by Mr. Killian of the PSA.

3. The Respondent is the South African Police Service and was represented by Ms. Mavango.

4. At the arbitration proceedings the parties agreed to submit a stated case. The parties further agreed that they would then submit written closing arguments by not later than 01 November 2014.

ISSUE TO BE DECIDED:

5. The matter was referred to the PSCBC as a dispute relating to the interpretation/application of PSCBC Resolution 7/2000, as amended. The Applicant referred this dispute to the PSCBC after the Respondent declined two of her applications for temporary incapacity leave (TIL) for specified periods, resulting in deductions being made from her salary for the said periods. I am called upon to determine whether or not the Respondent correctly applied the said Resolution 7/2000.

BACKGROUND TO THE ISSUE:

6. The background to this dispute is contained in the agreed statement of case. Briefly, the Applicant applied for TIL for the periods 7 March 2011 to 13 April 2011, as well as for the period 14 April 20111 to 4 July 2011. She submitted her applications within the prescribed time limit. On 15 January 2013 and 13 February 2013 respectively she was informed that her applications have been declined. The Respondent opened a debt account of R65175-00 against her salary and has to date already deducted R29793-46 from her income. She was not afforded the opportunity to make representations regarding the refusals to grant TIL, nor did she give her approval for any of the deductions.

SURVEY OF SUBMISSIONS:

Applicant's submissions:

7. With reference to the relevant provisions of Resolution 7/2000, the "policy and procedure on incapacity leave and for ill-health retirement" (PILIR), and Item 10(1) of Schedule 8 of the LRA, the Applicant submitted that she had a legitimate right to have her applications for TIL fairly investigated and to be informed in writing within the stipulated timeframe of the outcome of the applications and the reasons therefore. The outcomes of her applications, which were received almost 2 years later, merely states that it was declined due to "mismanagement of leave" and " excessive period." The Applicant contended that

these reasons are unclear and that the Respondent did not investigate the extent of the Applicant's inability to perform normal office duties, the degree of inability and the cause thereof, as required by Item 10(1) of Schedule 8 of the LRA. The Applicant argued that she was prejudiced in the extreme by the Respondent's long delay to provide feedback, because had she been advised earlier she would have made alternative arrangements, like using her vacation leave of 2011 instead. The retrospective effect of the Respondent's unreasonable and arbitrary exercise of discretion resulted in unfair consequences for the Applicant. With reference to the judgment in *PSA obo Gouvea v PSCBC & Others* (case D751/09) the Applicant argued that she cannot be subjected to leave without pay (LWP) or monthly deductions from remuneration unless their application was declined within the 30 working day timeframe.

8. The Applicant further argued that the Respondent may also not apportion blame for the delay to the Health Risk Manager (HRM), because the HRM is contracted to perform certain duties on behalf of the Respondent and is accordingly merely an extension of the Respondent. The Respondent is also obliged to confirm with the HRM that applications have been received in time. The HRM merely make recommendations, but the final decision on TIL applications rests with the Respondent. In conclusion the Applicant prayed for an order that her applications for TIL be approved, and that the deductions made from her remuneration be reimbursed.

Respondent's submissions:

9. The Respondent submitted that the dispute does not entail an interpretation of Resolution 7/2000, but rather a claim by the Applicant for reimbursement of the deductions made from her salary. The Respondent further argued that the time limit of 30 working days is very short, and that emphasis should rather be placed on the nature of the sickness in relation to the period, and also the extent of prejudice to the parties. She argued that the Respondent suffered more prejudice in that it had to remunerate the Applicant whilst she was not performing any duties, and was accordingly unduly enriched.

10. The Respondent further argued that the applications for TIL were declined because the periods were unreasonably long. In conclusion the Respondent argued that an arbitrator does not have jurisdiction/authority to review the Respondent's decision. The Respondent accordingly asked for an order to dismiss the Applicant's claim for reimbursement and a finding that the refusal of TIL was fair.

ANALYSIS:

11. This dispute relates to the application of PSCBC Resolution 7 of 2000, as amended (The Collective Agreement on the improvement in the conditions of service of public service employees). The Applicant referred the dispute to the PSCBC after the Respondent made deductions from her salary after declining

her applications for TIL. The relevant provision to this dispute can be found in clause 7.5.1 of Resolution 7 of 2000. It reads as follows:

<u>*Temporary disability leave:*</u>

(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 disability 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 registered medical and/or dental practitioner has duly certified such a condition in advance as temporary incapacity leave except where conditions do not allow.

(b) 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 of 1995.

(c) The employer shall specify the level of approval in respect of applications for disability leave".

12. By accepting the form and content of the Applicant's documents it is indeed common cause that the Applicant submitted her applications for TIL correctly and within the stipulated timeframes. It is also common cause that the Applicant's applications for TIL were only responded to approximately 22 months later. She argued that it constitutes non-compliance with the requirement of 30 working days, and that she suffered prejudice as a result thereof. She submitted that she could have used annual leave instead had she known earlier that her applications for TIL would be declined. She further argued that the Respondent exercised its discretion improperly and unfairly. It is rather obvious that the Respondent was indeed in breach of clause 7.5.1 of Resolution 7 of 2000.

13. The reasons given by the Respondent for declining the TIL applications are "excessive period" and "mismanagement of leave." I agree with the Applicant that these reasons are flimsy and does not elaborate on whether the Respondent conducted an investigation on the extent of the incapacity, the seriousness of the illness and whether alternatives were considered, as required by Item 10(1) of Schedule 8 of the LRA. This failure on the part of the Respondent contributes to the unfair manner in which the applications were considered.

14. The Respondent argued that the dispute is in essence a claim for the reimbursement of the deductions, and that an arbitrator would not have the jurisdiction/authority to review the Respondent's decision. PSCBC Resolution 7/2000 is a collective agreement and its provisions are mandatory. In terms of section 24 of the LRA an affected party may refer a dispute about the interpretation or application of a collective agreement to the relevant dispute resolution forum. An arbitrator is enjoined to determine whether the provisions of a collective agreement were correctly applied, and to order competent or appropriate relief in instances of non-compliance. The Applicant contends that the Respondent failed to comply with the provisions of Resolution 7/2000, and she seeks an order for competent relief. The Respondent's argument that the dispute is solely for reimbursement of deductions is therefore not sustainable.

15. Due to the mandatory nature of the Resolution's provisions, I can also not agree with the Respondent that this exercise should rather place emphasis on the weighing of the extent of prejudice to the respective parties. The provisions are mandatory.

16. The Applicant correctly submitted that the principles in the judgment *PSA obo Gouvea v PSCBC & Others* (case D751/09) can be made applicable to the dispute at hand. The Court held that the retrospective effect of a decision to decline TIL would amount to an unreasonable and arbitrary exercise of a discretion with unfair consequences to an employee. The Court therefore held that the Respondent should have given further TIL while the respondent was acting within the clear terms of item 10 (1) of Schedule 8 of the Act. Once all investigations pertaining to the temporary disability leave are finalised and a decision is taken by the respondent and communicated to the employee, then and only is the moment reached when she could be called back to work, should the decision go against her. It would be unfair to penalise the Applicant retrospectively in this instance, especially since it took in excess of 21 months to process the applications.

17. The Applicant seeks an order that the refusal of the TIL be set aside, and that the Respondent be ordered to reimburse the deductions made from her income. I am called upon to consider whether or not the collective agreement was complied with, and to grant competent relief to remedy any non-compliance with the collective agreement. The question that arises is whether or not the Respondent's non-compliance with prescripts (that resulted in the deductions being made) was fair. The yardstick in labour issues is based on the principle of fairness. Fairness dictates that the employer's discretion should be exercised fairly and in compliance with legal prescripts. The failure to comply with the prescripts prejudiced the Applicant and is accordingly sufficient ground for the Respondent's decision to be set aside. The Respondent's conduct flies in the face of what the collective agreement has intended and is in direct conflict with the principles of fairness.

18. Therefore, the setting aside of the decisions to decline the application and an order to reimburse the deductions would in my view constitute competent relief in the circumstances. In setting aside the deductions I am in no way crediting the Applicant with leave, but I am rather restoring the situation that would have prevailed had it not been for the Respondent's unfair conduct. I am similarly also not approving the application for TIL, but I am simply reversing the situation to the stage before the Respondent's unfair conduct occurred.

19. The agreed stated case states that a debt account of R56 175-00 had been opened against her salary, and that R29 732-46 had been deducted thus far. I consider it fair and just to set aside the refusal of TIL, to order the Respondent to nullify the debt account, and to also order the Respondent to reimburse the deductions made from the Applicant's salary. In the premise I make the following award:

AWARD:

20. The Respondent failed to comply with clause 7.5.1(b) of Resolution 7 of 2000.

21. The Respondent's act of making deductions from the Applicant's remuneration for the stated periods is hereby set aside.

22. The Respondent is directed to nullify the Applicant's debt account of R56 175-00 with immediate effect.

23. The Respondent is directed to reimburse the deductions made from the Applicant salary in the amount of R29 732-46, being the deductions made from her remuneration relating to the stated periods. Such reimbursement is to be made on or before 31 December 2014.

Signature: ______________________________

PSCBC Panelist: **Kelvin Kayster**