



AWARD

YOUR REFERENCE NUMBER FOR THIS CASE:

Please quote this reference number when communicating. It will assist us in providing information more quickly and efficiently.

PSCB337-12/13

FOR ATT:	LJ Jensen	FOR ATT:	R Tshabalala / J Olivier / M Ntshikila
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Referring party details PSA obo Olivier, JJ PO BOX 11027 Hatfield Tel: 012 432 4838 Fax: 012 432 4848/9	Responding party details Department of Correctional Services - National Private Bag X393 Pretoria 0001 Tel: 012 420 0100 Fax: 012 430 4539 / 323 3476 / 011 814 3343 / 086 599 4475
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13 February 2017

Dear Sir/Madam,

Matter Between: **PSA obo Olivier, JJ**
and: **Department of Correctional Services - National**
Issue: **24(2), [24(5)] - Collective agreement - interpretation or application (Res 7 of 2000)**

Please find attached award for this matter.

Yours sincerely,

Tracey Mokoena
Case Management Officer
Case Number: PSCB337-12/13

AWARD

Panellist/s: WILLEM KOEKEMOER

Case No.: PSCB337 – 12/13

Date of Ruling: 11 March 2013

In the matter between:

PSA obo OLIVIER, JJ

(Union / Applicant)

and

DEPARTMENT OF CORRECTIONAL SERVICES - NATIONAL

(Respondent)

Union / Applicant's Representative:	Mr Jensen (PSA representative)
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Respondent's Representative:	Mr Kalp (Respondent representative)
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DETAILS OF HEARING AND REPRESENTATION

1. This matter was heard on 12 February 2013 at the Correctional Services conference facilities at Modderbee, Springs
2. The respondent was represented by Mr L Kalp of the respondent.
3. The applicant was represented by Mr L Jensen of PSA.
4. The parties handed up bundles of documents (Annexure "A" "R").
5. The arbitration hearing was digitally recorded.
6. The parties agreed not to call any witnesses and to submit oral argument.
7. This award was due on 26 February 2013. Subsequent to the arbitration date, I requested extension to submit the award on 11 March 2013, which extension was granted.

BACKGROUND TO THE DISPUTE

8. The applicant referred a dispute relating to the interpretation and application of the PSCBC Resolution No.7 of 2000 to this council. The matter in dispute relates specifically to paragraph 7.5.1 of the aforementioned Resolution. Paragraphs 7.2.3 and 7.2.9 of the '*Policy and Procedure on Incapacity Leave*, ill health and retirement, hereinafter referred to as PILIR were referred to in clarification. The applicant applied for 3 days temporary incapacity leave on 9 May 2011, which application was declined. The respondent declined the application only on 10 July 2012, 14 months later. The applicant then lodged a grievance with the respondent on 30 July 2012 relating to temporary incapacity leave and the grievance was finalized on 2 August 2012. As the applicant was not satisfied with the outcome, he lodged a grievance to the 2nd level on 8 August 2012. The grievance was finalized on 15 August 2012, and it was once again not in favour of the applicant
9. On 21 August 2012, the applicant served and filed an Application for condonation at this council. In his application, the applicant claimed that *the employer did not comply with Resolution 7 of 2000 in that the member was only informed of the outcome of his application for temporary incapacity leave, more than a year after having submitted such application. Furthermore, the applicant claimed that he was presented with an invalid and irrelevant reason for declining his temporary incapacity leave application.*
10. The applicant requested that the declined temporary incapacity leave be rectified by granting him the three days leave.
11. The matter was then set down for Conciliation on 3 October 2012. As the matter could not be resolved, a certificate of non-resolution was issued.
12. The matter was then set down before me for Arbitration on 12 February 2013.

ISSUES TO BE DECIDED UPON

13. The dispute referred and scheduled before this Council was in terms of Sections 24(2), [24(5)] - Collective agreement - interpretation or application (Res 7 of 2000).

14. The particular issue in this dispute concerns paragraph 7.5.1 which reads as follows:

"Temporary Disability Leave

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 disability except where conditions do not allow.*

b) *The employer shall, during 30 working days, investigate the extent of inability to perform normal office 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.*

15. And in clarification, paragraph 7.2.3 of PILIR which reads as follows:

*"The Health Risk Manager must acknowledge receipt of the above-mentioned report within **2 working days** and confirm in writing that the Employer shall receive feedback on the application within **12 working days**. It is incumbent on the Employer to confirm that the Health Risk Manager receives the report and required attachments.*

And paragraph 7.2.9 which reads as follows:

"The Employer must within 30 working days after the receipt of both the application form and medical certificate referred to in paragraphs 7.1.4 and 7.1.5, approve or refuse temporary incapacity leave granted conditionally. In making a decision, the employer must apply his/her mind to the medical certificate (with or without describing the nature and extent of the incapacity) contemplated in par 7.1.5.2, medical information / records contemplated in paragraph 7.1.5.4 (if the employee consented to disclosure), the Health Risk Manager's advice, the additional information supplied by the employee in paragraph 7.1.5.3 (if any) and all other relevant information available to the Employer and based thereon approve or refuse the temporary incapacity leave granted conditionally, on conditions that the Employer may determine, e.g. to return to work, etc.

16. The policy document “*Determination on leave of absence in the public service*” was also referred to in clarification. Said policy document emphasises the discretion to be exercised judicially, which lies with the employer to grant temporary incapacity leave.

ARGUMENT

Herewith below is a summary of the arguments submitted by the respective representatives of the parties.

The Applicant’s Argument

17. The applicant’s representative argued as follows:
- The applicant applied for three days temporary incapacity leave during May 2011 and only received an outcome during October 2012, declining his application.
 - This is contrary to what is provided for in paragraph 7.5.1 of resolution 7 of 2000.
 - Paragraphs 7.2.3 and 7.2.9 of PILIR clarify time boundaries to be adhered to.
 - Paragraph 7.2.9 of PILIR provides that the employer should conclude the application within 30 days.
 - Furthermore, the reason for declining the applicant’s application for temporary incapacity leave, being unsatisfactory sick leave profile, amounted to no valid reason for declining the application and it was also unfair.
 - In the event that the applicant was timely informed that his application for temporary incapacity leave was not granted, he could have acted precautionary by utilising other available leave. Instead, the 3 days temporary incapacity leave were categorised as unpaid leave.
 - In considering the sick leave of the applicant, the poor profile of the sick leave record of the applicant does not make out a fair / sound reason for rejecting his application.
 - The respondent did not comply with resolution 7 of 2000 and the applicant is requesting that the said three days should be converted to temporary incapacity leave.
 - There was nothing presented on abuse of sick leave that the Health Risk Manager had to consider.
 - In the event that the application was dealt with within 30 days, there would not have been any prejudice to the applicant, as he could then have addressed the problem meaningfully.
 - The Health Risk Manager has no powers to make decisions.
 - The case of *Dhanraj & Another v Department of Correctional Services infra* refers to an occupational injury, which is not the facts in this case and is therefore irrelevant.
 - No compensation is requested but the overturn of the leave allocation is applied for.
 - The collective agreement does not refer to the Health Risk Manager at all.
 - It remains that the employer had to exercise its discretion judicially, which did not happen.
 - All the relevant factors in the application were not considered.
 - It remains that the respondent did not comply with the provisions of the collective agreement.

- The representative of the applicant requested that the Commissioner should rule that the three days in May, categorised as unpaid leave, be re categorized as temporary incapacity leave.

The Respondent's Argument

18. The respondent's representative argued as follows:

- The turnaround time of this application was not due to the fault of the respondent.
- Fact is that when temporary incapacity leave is granted, it is merely a conditional approval pending feedback from the Health Risk Manager.
- One of the factors to be considered when temporary incapacity leave is granted or not, is trends of sick leave abuse.
- He referred to p32, 33, 34 and p57 of the respondent's bundle, emphasising a poor sick leave profile.
- The applicant's sick leave cycles since 2007 until the date of this dispute reflects negatively.
- The information provided on p33, bundle 'R', and constitutes a true reflection of sick leave trends.
- As from June until August 2010, temporary incapacity leave for a shoulder operation was already granted.
- The illness reflected for the 3 days in May 2011 claimed by the applicant, did not relate to the shoulder operation he had during 2010.
- Mr Baloyi, the area manager, had to rely on the report of the Health Risk Manager, as he has no medical background.
- Paragraph 7.5.1 of resolution 7 of 2000 reflects that temporary incapacity leave may be granted. The provision is not imperative.
- Paragraph 15.1 reflects that temporary incapacity leave is additional sick leave granted conditionally at the discretion of the employer.
- The cycle starting on 1 January 2010, was mainly taken up by the shoulder operation of the applicant plus temporary incapacity leave added to the 26 sick leave days.
- The applicant had no other leave to his credit that could have been utilised for the additional sick leave days.
- He referred to *Dhanraj & Another v Department of Correctional Services [2010]*.
- He submitted that the arbitrator in the aforementioned case emphasised the existence of discretion to grant or not to grant temporary incapacity leave. The arbitrator also emphasised that he had no jurisdiction to overturn the decision of the Health Risk Manager.
- The said case also indicates that compensation is not to be granted as is envisaged in sections 193 and 194. The relief available remains a moot point.
- The applicant could, however, lodge a civil claim in a civil court based on what is reflected in their contract of employment.

- The representative of the respondent requested that the unpaid leave allocation for the three days in May 2011 should remain unchanged.

ANALYSIS

24. In the Labour Appeal Court case of *SA Municipal Workers Union v SA Local Government Bargaining Council & Others* (2012) 33 ILJ 353 (LAC), it was stated:

"[8] The third respondent (the commissioner), who was appointed to arbitrate the dispute, approached the matter on the basis that in the absence of a statutory provision and guidelines as well as other documents regarding the issue of annual leave for shift workers, he could only resolve same on considerations of fairness between the parties. He reasoned that such treatment was fair and in keeping with the equality principle.....His view was that equality of treatment was a guiding principle in the workplace and further that the Employment Equity Act 8 allows no unfair discrimination between similarly placed employees.

[15] In North East Cape Forests v SA Agricultural Plantation & Allied Workers Union & others, Froneman DJP (as he then was) stated that a collective agreement is unlike other ordinary contracts and that the primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements. This, it was stated, was better suited to promote the 'effective, fair and speedy resolution of labour disputes'. In Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBWU (2), this court remarked, inter alia, that:

'Where constitutional validity is not an issue it seems that an interpretation that accords best with the general purpose of the Act (as set out in s 1) and the more specific purpose of a particular section, should be followed.'

In National Education Health & Allied Workers Union v University of Cape Town & others, the Constitutional Court stated:

'The declared purpose of the LRA "is to advance economic development, social justice, labour peace and the democratization of the workplace". This is to be achieved by fulfilling its primary objects, which include giving effect to s 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution.'

[16] That is the approach adopted by the commissioner in this case. Perusal of the award shows that the commissioner clearly understood the issues before him and the task he was expected to perform. He understood that there was a lacuna in the collective agreement insofar as the annual leave situation of shift employees was concerned and that his task was to interpret and apply the collective agreement in a manner that encompassed these employees. He identified the purpose of the collective agreement, ie the provision of an annual leave benefit to eThekweni's employees, in particular those working according to a shift system. He then proceeded to interpret the agreement in a practical manner that he deemed was fair and equitable in those circumstances and which would cater for shift employees as well.....Based on considerations of fairness and equality of treatment, he reasoned that it was proper to interpret the collective agreement as if the shift employees worked a normal five-day cycle as was done by eThekweni.

[19] I am satisfied therefore that the commissioner properly applied his mind to the issues before him, that he considered all the material before him and adopted an approach that gave effect to the purpose of the collective agreement in a manner that achieved equity and fairness amongst eThekweni's employees. If one interprets the collective agreement within the context of the shift workers, considering one of the purposes of the LRA which is to promote fair labour practices, then without doubt the commissioner's approach of fairness cannot be said to be unreasonable. The award of the commissioner is clearly one that a reasonable decision maker would have made. The court a quo was correct in refusing to interfere with the award. In the circumstances, the appeal must fail."

25. As emphasised in the above mentioned Labour Appeal Court judgement, where a collective agreement is to be interpreted, or the proper application thereof in particular circumstances is to be determined, amongst other, the purpose of the collective agreement is to be regarded. In *casu*, resolution no. 7 of 2000 intends to regulate the absence of employees from their place of work. Stated differently or more to the point, the said collective agreement has provisions in place to assist employees with poor health, but on the other hand it also has measures in place to limit frivolous applications for sick leave.
26. It goes without saying that temporary incapacity leave only comes into play where an employee has no more sick leave days to his/her credit in a particular cycle. Temporary incapacity leave is a measure to assist employees with poor health, but to grant or not to grant temporary incapacity leave is based on discretion to be exercised by the employer judicially.
27. Paragraph 7.5.1 provides that an employer is required to deal with such application within 30 days. This time limitation is further echoed in paragraph 7.2.9 of PILIR.
28. The respondent did not convince me that the provisions of resolution 7 of 2000 were properly applied in the circumstances of the applicant. For the respondent to present the applicant with the outcome of his temporary incapacity leave application almost 14 months subsequent to his application was far beyond what is provided for in the said resolution. Even in the event of no time limitation, the time spent to conclude this temporary incapacity leave application was unreasonable, unfair and contrary to the principle of equity. The respondent could not present any plausible reason for its unreasonable delay.
29. I could also not deduce from the documentation presented by the respondent that the discretion exercised by the respondent not to allow temporary incapacity leave was exercised judicially.
30. A poor or unsatisfactory sick leave profile could be one of the factors to be considered by the respondent, but it does not on its own demonstrate that the discretion was exercised judicially.
31. See:
- *Dhanraj & Another v Department of Correctional Services* [2010] 9 BALR 909 (PSCBC)
 - *SA Municipal Workers Union v SA Local Government Bargaining Council & Others* (2012) 33 ILJ 353 (LAC)

AWARD

32. I find that the respondent failed to properly apply the terms of Resolution 7 of 2000 in refusing the applicant's temporary incapacity leave application for the period 4, 5 and 6 May 2011.
33. I order that:
- (i) The three days on which the Applicant was on unpaid sick leave on 4, 5 and 6 May 2011, be rescheduled as temporary incapacity leave with full pay;
 - (ii) The applicant should be reimbursed for the monies deducted from his remuneration as a result of the refusal of his temporary incapacity leave.

(iii) The rescheduling and reimbursement must be effected no later than 15 April 2013.

Signed and dated at PRETORIA on this 11th day of March 2013.

Signature:



WILLEM KOEKEMOER

Panellist/s: