



IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION AWARD

Case Number:	<u>PSCB 562/11/12</u>
Commissioner:	<u>Anthony Maré</u>
Date of Award:	<u>11 July 2013</u>

In the **matter** between

SOCOSWU obo Mr Kunelisi
(Applicant)

and

Department of Correctional Services
(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration in the above matter was first held on 17 September 2012 and concluded on 30 May 2013 at the Department of Correctional Services in East London.
2. The Applicant, Mr Kunelisi was represented by Mr Plaatjies, an official of SACOSWU. The Respondent was originally represented by Mr Qaba, and later by Mr S Viviers.
3. A point *in limine* was raised by the Respondent to the effect that the Council lacked jurisdiction to deal with the matter and on 19 December 2012 a ruling confirming jurisdiction was issued by the writer.
4. Closing arguments were received by 15 June 2013 and an extension was granted due to prior leave arrangements to submit the award by 12 July 2013.

ISSUE IN DISPUTE

5. I must determine whether the Respondent complied with the parties Collective Agreement concluded under PSCBC Resolution 7 of 2000 as amended by Resolution 5 of 2001 and PSCBC Resolution 15 of 2002. In particular, whether they complied with the policy and procedures on incapacity leave, hereinafter referred to as the PILIR policy.
6. The crisp issue in dispute is whether the Respondent had approved all the Applicant's Temporary Incapacity Leave from 2005 to 2008 which includes 44 days for the following dates :-

2009.12.01 – 2009.12.02
2008.10.16 – 2008.10.17
2008.10.10 – 2008.10.14
2008.10.02 – 2008.10.07
2008.04.10 – 2008.04.18
2008.03.17 only
2008.03.07 – 2008.03.11
2007.10.16 – 2007.10.19
2005.03.10 – 2005.03.14
2005.02.25 – 2005.02.28
2005.02.11 only
2005.02.15 – 2005.02.16

BACKGROUND TO THE ISSUE

7. It is common cause or not disputed that Mr Makgaila, the Regional Head Corporate Services and delegated authority declined all the above applications for T.I.L on 26 August 2010 and this was communicated to the Applicant on 09 September 2010.
8. On 19 November 2010 Mr Makgaila wrote the following on a memorandum in freehand: *"Approved. It cannot be correct to want to deduct money from officials if they applied for T.I.L in 2001 and this feedback only comes back today / 2010. The fault lies with the system within the Department and not necessarily with the officials involved"*.
9. It is further common cause that the Respondent only reverted back to the Applicant with the outcome of his applications for T.I.L long after the mandatory 30 day period as prescribed by the Collective Agreement.
10. It is now the Applicant's contention that Mr Makgaila reversed his earlier decisions not to approve T.I.L after considering the extensive delay it took the Department to furnish the Applicant (and others) with the outcome of their Applications for T.I.L which went as far back as 2001.
11. The Respondent's contention is that Mr Makgaila did not carry out a lawful instruction by way of a hand written note and in any event never condoned the Applicant's T.I.L applications for the periods in question.

APPLICANT'S SUBMISSION

12. Mr Plaatjies argued that it was understandable that the delegated authority would approve T.I.L applications as it was unreasonable to wait 7 years for approval which was meant to be finalized within 30 days in terms of the PILIR Policy.
13. There had been no circular to revoke Mr Makgaila's decision to approve the T.I.L applications. If Ms Enver, an Administrative Supervisor, had not followed protocol by directly furnishing the Regional

Head, Mr Makgaila, with a letter suggesting he reconsider approving T.I.L due to a prolonged time lapse, then it was Mr Makgaila's duty to inform her that she needed to follow the correct procedures.

14. It was not uncommon for a delegated authority, as was Mr Makgaila in this instance, to approve a T.I.L application where the Health Risk Manager had recommended that T.I.L not be approved.
15. Joeann Enver (Enver) testified that she had explained the reason to Makgaila for presenting the letter in question to him. The letter was intended to be used by the Duty Clerks when motivating T.I.L for officials at some later stage. The purpose of drafting the letter was to jog Makgaila's memory when considering to grant/decline the T.I.L of all future Applications received. He had yet to make his final decision whether or not to reverse the Applicant's applications.
16. She conceded that she had not followed the required communication channels before presenting the letter to Makgaila. She was new in the office. She was supposed to have done that.
17. She further agreed that she had not received the authority from the Area Commissioners Office before writing the letter. She had also not been authorized to photocopy Makgaila's handwritten letter and distribute it to the Duty Clerks.

RESPONDENT'S SUBMISSION

18. The Respondent led the evidence of three witnesses : Mr Nweba, who was the Area Co-Ordinator of Corporate Services, and Ms Dumbela, the Deputy Regional Commissioner, *inter alia* responsible for the Compliance and Implementation of Policies.
19. Nweba's evidence is that as the Area Manager, he had not given Enver the instruction to write the letter to Makgaila on behalf of the Area Commissioners Office requesting that he re-consider the disapproval of the Applicant's T.I.L. Before writing such a letter prior permission would need to be sought from Enver's supervisor who would need the Approval of the Area Manager for Corporate Services who in turn would need the approval of the Area Commissioner.
20. He denied the Department was at fault in any way thereby having to reverse earlier decisions not to approve T.I.L due to time delays. He laid the blame at the foot of the Health Risk Manager, a Third Party, responsible for delaying the process. In terms of PILIR Policy the Department was not compelled to automatically approve T.I.L applications based on time frames.
21. He asserted that the designated authority, Mr Makgaila, lacked authority to approve T.I.L based on a delayed response from the Health Risk Manager.
22. In cross-examination, however, Ndweba conceded that Makgaila could override the Health Risk Manager's decision but qualified his statement by adding that he had to offer an explanation why he had not considered the HRM's decision.
23. He further testified that Makgaila lacked the authority to override the Area Commissioners decision in declining the Applicant's T.I.L. He was not aware of any circular revoking Makgaila's earlier decision not to approve the T.I.L.
24. In order for a Delegated Authority to convey a decision to reverse an earlier decision, it would need to be formally issued by way of a typed memorandum and not by a hand written note.
25. Nosipiwo Dumbela's (Dumbela) evidence is as follows : As Makgaila's superior and responsible for the compliance with Policy, it was mandatory for the Area Commissioner to sign the letter drafted by Enver before it was presented to the Regional Head, Mr Makgaila.

26. She also testified that the PILIR Policy made no provision for the automatic approval of T.I.L due to time frame irregularities.
27. Only the Bargaining Chambers' had the authority to amend policies. Makgaila did not have the power to approve T.I.L based on the reasons he had given on his handwritten letter.
28. The correct procedure was for Makgaila to refer Enver back to her supervisor in order to follow the correct procedures. The Area Commissioner was not aware of the letter being disseminated to the Duty Clerks.

SURVEY OF EVIDENCE AND ARGUMENT

29. The thrust of the Applicant's claim relies on the premise that the Applicant's T.I.L for periods 2005 to 2008 was automatically approved, as this approval had been granted by the designated authority empowered to make the final decision on T.I.L applications.
30. They further argue that the reasons proffered by the Regional Commissioner, Mr Makgaila, were justifiable given the extensive delay in granting or declining the T.I.L applications.
31. The Respondent on the other hand led corroborative evidence to the effect that Makgaila, despite his powers to deviate from the Health Risk Managers decision, went too far when he used his discretion to reverse previous decisions to decline the Applicant's (and other officials') T.I.L.
32. Undisputed evidence was also led implicating Enver, the Administrative Supervisor, in submitting the letter to the Regional Head without the Area Commissioner's approval and knowledge.
33. The testimony of Dumbela and Nweba went unchallenged when they alluded to the fact that the PILIR Policy made no provision for the consideration of time lines before approving or declining a T.I.L applications and that any amendments to the policy would have to be concluded by the relevant Bargaining Chamber.
34. Enver tendered evidence admitting that she had photo copied Makgaila's hand written notes and handed the copies to the Duty Clerks without prior approval. She further testified that the hand written note was never intended to automatically override earlier decisions not to grant T.I.L, but rather to be used as a tool to persuade Makgaila in granting T.I.L when he reconsidered the individual applications in the future.
35. There is no reference in the letter to future applications and the letter merely refers to "applications that are submitted for the year 2001 – 2008". It is not possible to know what Makgaila's intentions were as he was not called to testify. But even if his intentions were to condone all applications received past and present, the overriding issue is the unavoidable fact that if Mr Makgaila had acted in breach of the PILIR policy by exceeding his powers. His decisions could be of no force or effect for the reasons I have submitted.
36. In any event, the evidence suggests that a formal decision was not conveyed to the affected parties and that the handwritten letter was never intended in its informal form to be distributed.
37. It can also never be that Applicant should profit from the mistakes of others. Both Makgaila and Enver failed to follow administrative procedures which in general are rigidly adhered to in the Public Service.
38. As to the merits of the applications, Applicant did not lead evidence to the effect that additional medical forms were not requested from him by the Respondent, thereby rendering his applications for T.I.L unsuccessful. Nweba testified that it was the Head of Centre who would communicate these requests to the Applicant. The onus was on the Applicant to prove that these medical documents

were not requested. It appears that the Applicant's representative did not pursue this claim in it's closing arguments and I am uncertain whether they abandoned it.

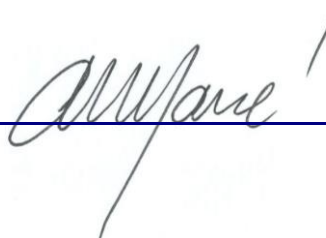
39. Finally it could not be shown that any other official benefited as a result of the hand written letter which suggests that Makgaila's Approval of T.I.L's due to time frames was never implemented. Nor is there evidence of any amendment to the Applicant's Incapacity Leave Applications.
40. It is common cause that the Respondent erred in failing to meet the 30 day deadline, and in fact should have at least followed up with the Health Risk Manager to expedite the claims. There is no evidence that they did this.
41. Makgaila also expressed empathy for officials who endured the long wait to hear of their fate.
42. The Respondent has argued that the PILIR Policy makes no mention of compensation where T.I.L applications were finalized outside the mandatory 30 days. I accept that the wheels in the system turn slowly, for which the Respondent is partly to blame, but such a long delay can never be acceptable. Having said that no evidence was led to demonstrate any severe prejudice the Applicant may have suffered as a result of the delay.
43. I am of the view that a fair and equitable resolution of this dispute is to award the Applicant 11 days paid temporary incapacity leave for all applications submitted in 2005.

AWARD

44. The Department of Correctional Services complied with the Policy and Procedure on Incapacity Leave save for paragraph 7.2.9 of PILIR where there was non compliance in conditionally approving or refusing temporary incapacity leave within 30 days.
45. The Respondent must pay the Applicant, Mr Kanelisi 11 (eleven) days temporary incapacity leave for Applications submitted in 2005 in line with his salary scale for the following periods :

2005.03.10 – 2005.03.14
2005.02.25 – 2005.02.28
2005.02.11 only
2005.02.15 – 2005.02.16
46. Payment for the period *supra* must be effected within 30 days of receipt of this award.
47. There is no costs order.

Signature:



Panelist :

Anthony Maré