PSCBC
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION AWARD

Panellist/s: Karen Kleinot
Case No.: PSCB576-12/13
Date of Award: 6th of December 2013

In the ARBITRATION between:

Ms T Du Plessis

(Union / Applicant)

and

South African Police Service

(Respondent)

Union/Applicant's representative:	Adv Gerber
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Respondent's representative:	Col Mahloromela
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DETAILS OF HEARING AND REPRESENTATION

1. The matter was heard on the 6th of November 2013. The Applicant and Respondent agreed to submit heads of argument as the matter involved an interpretation and application of Resolution 7/2000 which deals with Temporary Incapacity Leave. Parties agreed to submit final arguments on the 2nd of December 2013.

2. Documents were submitted and these constitute part of the record.

ISSUE TO BE DECIDED

3. The interpretation and application of Resolution 7/2000, deals with Temporary Incapacity Leave (TIL).

BACKGROUND TO THE ISSUE

4. The dispute is about the declining of Temporary Incapacity Leave (TIL) for the period 11th of September 2007 until the 30th of November 2007, (89 days of leave). In the event that the Applicant is successful this is to be granted.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's Version

5. The Applicant was off sick for the period 27th of July 2007 until the 22nd of June 2008. An application for Temporary Incapacity Leave (TIL) was filed. Initially the TIL was declined for the period 27th of July 2007 until the 30th of November 2007. This decision is dated the 12th of March 2008. Thereafter a portion of this period was approved, the 27th of July to the 10th of September 2007. A further period of time was approved the 3rd of December 2007 until the 2nd of June 2008. The period 11th of September to the 30th of November remains declined.

6. The documents show that on the 13th of June 2008 an application for TIL was submitted for the entire period. Apart from this submission the Applicant submits that she received no feedback as to the status of her application.

7. On the 14th of March 2012 the Applicant was informed about a Departmental debt to be deducted from her salary due to the declining of the TIL application.

8. Correspondence from the Applicant to the employer indicates that the debt has prescribed. This is dated the 27th of March 2012. A grievance is also lodged on the 30th of April 2012 and finally a dispute was referred to the Council.

9. It was argued that in terms of Resolution 7/2000 that the Respondent did not comply with the 30 day period as prescribed in the Collective Agreement item 7.5.1(b).

10. Moreover that the Department was not entitled to deduct the monies as the TIL had not been approved and that the debt had prescribed. In the PSA and Others v PSCBC and Others D751/09 the court held that a medical report that sought to have retrospective effect was an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee. This judgment it was argued reflects that the Respondent is obliged to comply with the prescribed time frames contained in the Collective Agreement. The period prior to the return date to work, is seen as paid sick leave and therefore monies cannot be deducted from employees.

11. Therefore it was argued that the Applicant is entitled to TIL, the dept has prescribed and all monies deducted for the declined TIL should be paid back.

Respondent's Version

12. The Respondent submits that in terms of Resolution 7/2000 the Respondent has discretion as to whether or not to grant leave.

13. In terms of National Instruction 2 of 2004 a medical certificate is a recommendation for the granting of sick leave. This may be refused if the National Commissioner is of the view that there are sufficient grounds to do so. If the extent of the illness or capacity is not described on the medical certificate, the period of absence may be in the discretion of the National Commissioner, be converted to annual leave, if the employee has sufficient annual leave or capped leave to his or her credit and if not as unpaid leave.

14. In this case the TIL was not approved in terms of the recommendation by the Health Risk Manager. The Health Risk Manager is a medical assessor appointed to make recommendations to the National Commissioner on all applications for TIL. The Health Risk Manager considered the concurrent medical conditions, the use of leave during the leave cycle and recommended that 31 working days temporary incapacity leave be granted, as 9 days of normal sick leave had already been used. According to the Health Risk Manager the period that was applied for exceeded the maximum recommended medical guidelines are 40 working days. This report is dated the 11th of January 2008.

15. The Respondent argued that in terms of Chellew vs National Commissioner of the South African Police Service and Others (2006) 27 ILJ 765 T where the court held that in order to claim remuneration while off duty due to illness the employee must establish a right to remuneration in his/her contract or collective agreement. The Respondent has argued that there is no right created by the applicant by way of contract or collective agreement.

16. Consequently the Respondent argued that the matter should be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT

17. There are two issues whether the debt has prescribed and the interpretation and application of the Collective Agreement relating to TIL

18. It was argued that the debt had prescribed and that the Prescription Act did not apply it appears that the period for a debt owing to the State is 15 years "…in respect of a debt arising from a bill of exchange or out of an advance" S 11 (b). It can be argued that payment of leave that has been conditionally approved may be viewed as an advance. I accept that leave that is converted to unpaid leave can be recovered by the State. However the recovering of such leave, which in this instance falls within TIL is regulated by a Collective Agreement. This Collective Agreement takes precedence over statute. Where there is a contradiction the Collective Agreement is usually preferred as long as it is in line with the Constitution. In this case I agree that a debt can be recovered but this must be read with the Collective Agreement, specifically clause 7.5.1

19. The issue is the interpretation and application of resolution 7/2000. This states the following in 7.5.1 *“a)An employee whose normal sick leave credits in a cycle has 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 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 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. “

20. The Policy and Procedure on Incapacity Leave and Ill Health Retirement (PILLIR), outlines the time period within which the application must be submitted, which is within five working days of the first day of absence. The Employer is to then respond to the employee within 5 working days of receipt of the application. This together with all the supporting documentation is submitted to the Health Risk Manager within two days and the Employer shall receive feedback within 12 working days from the Health Risk Manager.

21. In terms of item 7.3 of PILLIR long periods of incapacity leave item 7*.3.5(e)“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 paragraph 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 instruct the employee to return to work while a secondary assessment is undertaken….disciplinary action”*

22. The Respondent indicated in a letter headed final decision by the National Commissioner dated the 22nd of June 2012 that the application for temporary incapacity leave was declined for the period 2007-09-11 to 30-11-2007. The date of the medical report is the 1st of June 2012.

23. It is accepted that the Respondent has discretion as to whether to grant or decline the application for Temporary Incapacity Leave. This must be exercised in a fair and reasonable manner. From the documents and arguments submitted it is apparent that the decision to decline the Temporary Incapacity Leave was taken outside the 30 day time period as stipulated by Resolution 7/2000 item 7.5.1(b). The documents also reflect that the report and recommendations were made on the 1st of June 2012 some four and a half years later. This is not in line with the Collective Agreement or with PILLIR and has prejudiced the Applicant.

24. In essence what the Respondent seeks is to apply a decision retrospectively based on a report issued on the 1st of June 2012 for the period in dispute. According to <u>The Public Service Association of South Africa ,obo Gouvea, HC vs PSCBC The Department of Land Affairs D751/09,</u> the court held as follows" [20] *…a report was issued by the Health Risk Manager declining the application for a periodical temporary incapacity leave for 4 December 2007 to 30th June 2008. This report sought to have a retrospective effect. The consequence of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee."*

25. This is on all fours with the current case consequently I find that the Respondent has not adhered to the time frames contained within clause 7.5.1 (b) and 7.3.5 (e) of the PILLIR document, and has sought to rely on a report which sought to have retrospective effect on leave applied for, this is unfair in that it is an arbitrary exercise of discretion and as such the Respondent has not exercised its discretion in a fair and reasonable manner.

27. In summary I find that the Respondent has not applied or interpreted Resolution 7 of 2000 appropriately in that the time period within which to investigate the matter has not been adhered to, the exercise of the discretion to refuse or grant the TIL application sought to do so retrospectively which constitutes an arbitrary exercise of discretion and has prejudiced the Applicant in paying back the sum of R1000,00 per month .

28. Therefore I find that the Applicant is entitled to period from 2007-09-30 until 2007-11-30. Any deductions that were made to recover the monies for this period need to be repaid to Ms Du Plessis. In order to quantify such an application for variation may be made.

AWARD

29. The Temporary Incapacity Leave for the period 2007-09-30 until the 2007-11-30 is granted.

30. The Respondent, Department of Police-National, is to repay the amount to Ms Tania Du Plessis on or before the 25th of January 2014.

Panellist/s: Karen Kleinot

Sector: Public Sector (police)