



PANELIST: ADVOCATE J P HANEKOM

CASE NO: PSCB457-09/10

AWARD DATE: 23 SEPTEMBER 2011

In the matter between:

PSA obo KELLY

Applicant

and

DEPARTMENT OF HEALTH – WESTERN CAPE

Respondent

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION:

1. This matter was initially set down for arbitration on 25 May 2011 concerning a dispute related to the interpretation and application of collective agreement (Resolution 7 of 2000- hereinafter referred to as the “Resolution”), and in particular Temporary Incapacity Leave (TIL). Mr. C. May, Attorney of the firm Adams and May, Cape Town, represented the Applicant. Mr. F. Rodriguez of Labour Relations within the Department represented the Respondent. The

parties agreed and on request to postpone the matter until 18 July 2011 to consider further medical evidence in order to try and resolve the dispute. Notices of set down were not issued in time and the parties also could not resolve the dispute. The matter was then set down on 23 August 2011 when the case was finalized and digitally recorded. Both parties agreed and requested to submit written closing arguments on or before 9 September 2011, after which I would issue my award by 23 September 2011.

ISSUE TO BE DECIDED:

2. Whether the Respondent interpreted and applied the Resolution correctly as far as the timeframes were concerned.

HISTORICAL BACKGROUND:

3. The Applicant is employed as an Administrative Clerk at Lentegour Hospital. He exhausted his sick leave and applied for TIL involving seven periods starting 7 April 2008 until 14 August 2009. All seven applications were refused by the Respondent.
4. After a grievance the Applicant referred the matter to the Council as a dispute related to the interpretation and application of the Resolution. The Applicant's initial referral only included TIL periods, namely 5 May 2009 – 6 May 2009 and 11 August 2009 – 14 August 2009. In the outcome certificate reference was made to the total period between 2008 and 2009. The Applicant now wants to include that other TIL periods in his dispute even though it was not mentioned in the initial referral.
5. On the second day of the arbitration hearing, namely 23 August 2011 the parties considered it common cause that the Respondent correctly refused the TIL applications on merit. The Applicant only wishes to challenge the fact that the employer did not follow the timeframes, in that it did not investigate and decide

on the TIL applications within 30 working days.

ARGUMENT BY THE APPLICANT:

6. I have decided to summarise the Applicant's argument only as far as I consider relevant for the purpose of my award.
7. Mr. May, for the Applicant, submitted that the employer did not follow the 30 day-timeframe in terms of the Resolution, which caused the Applicant financial prejudice.
8. May further submitted that although the initial referral only referred to certain of the TIL periods, the issue was cleared up at conciliation stage when the Applicant mentioned the other TIL periods as well. Accordingly his contention was that I am not bound by the referral form as it does not constitute pleadings like in a civil matter, therefore I should include all seven TIL periods to form one dispute.
9. May finally submitted that because the Respondent did not follow the timeframes set out in the Resolution and PILIR (Policy on Capacity Leave and Ill-health Retirement) the employer did not apply the Resolution correctly and was therefore in breach of the Resolution. Accordingly I should then grant the TIL for all seven periods concerned and order the Respondent to immediately stop deducting further monthly amounts as overpayment and repay all monies already deducted.

ARGUMENT BY THE RESPONDENT:

10. I have again decided to summarise the Respondent's argument only as far as I consider relevant for the purpose of my award.
11. Mr. Rodriguez, for the Respondent submitted that the correct interpretation of

clause 7.5 of the Resolution should be that the investigation starts after receipt of the Health Risk Manager's or the consultant's report. The TIL applications were submitted by the Applicant on 23 July 2009 and 21 August 2009 respectively. The report of the consultant was received on 5 October 2009. The Respondent informed the Applicant of its decision on 19 November 2009. The Respondent was therefore 14 days late. Accordingly Rodriguez contention was that one cannot grant the TIL simply because the timeframes were not followed.

ANALYSIS OF THE ARGUMENTS:

12. I have decided not to repeat the arguments as a whole, but would only focus on those issues I consider relevant for the purpose of my award.
13. In terms of clause 7.5.1 (b) of the Resolution the employer must during 30 working days, investigate the degree of the inability of the employee to perform normal official duties. The golden rule of interpretation is that ordinary words should be given their ordinary meaning, unless it leads to uncertainty or ambiguity. It is clear from reading this clause that it places an obligation on the employer to investigate the matter within 30 working days. The Resolution is silent on what the investigation precisely entails and what sequence the investigation should follow. All the Resolution states is that the employer should investigate the extent of the inability and that this investigation should be in accordance with item 10 (1) of Schedule 8 in the Labour Relations Act of 1995 as amended. Further the rules of interpretation require one to read clause in context and not in isolation. Sub-clause 7.5.1 (c) of the Resolution further states that the employer shall indicate the level of approval in respect of TIL applications. It therefore implies that clauses 7.5.1 (b) and (c) should be read together and that the Respondent's decision should form part of the 30 working date- time frame. There may be cases in practice where the employee's absence could be longer than 30 days, in which case more or longer investigation is required. What is clear from the Resolution is that the employer could not take forever to decide or investigate.
14. In relation to breach of the timeframes one must also look at circumstantial

evidence to ascertain what the real intention of the parties was when the Resolution was entered into. If one looks at PILIR it qualifies the 30 working day-timeframe. In terms of paragraph 7.2.9 of PILIR the employer must approve or refuse the TIL within 30 working days after receipt of the TIL application form and medical certificate in support thereof. It is my understanding that the 30 working day- timeframe is in the interest of both the employer and the employee. The employee is provisionally granted 30 consecutive working days paid leave until the employer decides otherwise. All TIL applications is limited to a 30 working day- period. In other words an employee cannot for instance apply for six months TIL in one TIL application. This could prejudice the employer operationally. The employee should also not be burdened with having to repay a substantial amount of money overpaid for a long period of absence, because the employer took its time to decide over TIL. It is therefore my interpretation of clause 7.5.1 above that the Respondent must grant or refuse TIL within 30 working days after it received the TIL application.

15. It was considered common cause between the parties that the employer correctly refused the TIL applications on merit. The Applicant only challenged the non-compliance of the timeframes.
16. The Applicant's argument that the additional TIL application should be included in this dispute cannot hold. When the referral was made it only referred to a dispute related to TIL periods, namely 5 – 6 May 2009 and 11 – 14 August 2009. It is so that the other periods were also raised during the conciliation process. I am according to the latest case law, not bound by the outcome certificate. To my mind the dispute about the other five TIL periods are new disputes and were not mentioned in the referral form. It may be so that I could condone small or minor mistakes in the referral form. However, one would not be entitled to add new disputes not included in the initial referral. I therefore find that for the purposes of this dispute I am not going to include the other five TIL periods referred to by Mr. May as they should be referred to as new and separate disputes. My focus would therefore only be on the TIL periods 5 – 6 May 2009 and 11 – 14 August 2009.
17. When I revert to the facts of the instant case it is clear that the Applicant made

his TIL applications late which were clearly not within the timeframes set out in PILIR. The employer's argument that the investigation starts when the consultant's report was received cannot hold. The consultant's report is but one of the issues the Respondent needs to consider and it does not necessarily mean that the investigation should only start at that point in time. That explains why the Health Risk Manager (HRM) is also given timeframes in terms of PILIR in which to report. Mr. Rodriguez, for the Respondent, conceded that the decision to refuse the Applicant's TIL applications were 14 days late. The Respondent was therefore in breach of clause 7.5.1 (b) of Resolution.

18. The Resolution is silent on what should happen if the 30 day- rule was not followed.
19. The Applicant's argument that because the timeframes was not met, I should grant the application also did not carry weight. It was not placed in dispute that the Respondent's decision was based on merit. The Applicant elected not to lead further medical evidence to try and prove that the Respondent did not exercise its discretion fairly when it refused the TIL applications. It does not make sense that a correct decision should simply be reversed because the timeframes were not met. The case law or arbitration awards referred to by the Applicant were discernable from the facts of the instant case. All those matters specifically dealt with the fact that the employers did not exercise its discretion reasonably when it decided to refuse the TIL applications. That was not the case in the matter before me. Further the Applicant was not burdened or prejudiced by the fact that the Respondent's decision was not within the 30 day timeframe. He applied for 17 days TIL that did not amount to a long period. The Respondent was also not excessively late with its decision. After consideration of the circumstances as a whole I find that, even though the Respondent was in breach of the Resolution, fairness and equity dictates that I should not interfere with the Respondent's decision to refuse the TIL applications.

AWARD:

20. In the premises I make the following award:

- (1) This application is dismissed.
- (2) I make no order as to costs.



ADV J P HANEKOM