



# ARBITRATION AWARD

**PUBLIC SECTOR  
CO-ORDINATING  
BARGAINING COUNCIL**

Panelist: S H Christie \_\_\_\_\_

Case No.: PSCB 183 10 - 11 \_\_\_\_\_

Date of Award: 18 January 2010 \_\_\_\_\_

**In the ARBITRATION between:**

**PSA obo J Marx**

**(Union / Applicant)**

**And**

**Department of Correctional Services**

**(Respondent)**

**Union/Applicant's representative:** Ms a Mosaic \_\_\_\_\_

Union/Applicant's address: 10<sup>th</sup> Floor \_\_\_\_\_

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**Respondent's representative:** Ms Louise Japtha \_\_\_\_\_

Respondent's address: Dept Correctional Services \_\_\_\_\_

George \_\_\_\_\_

Telephone: \_\_\_\_\_

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## **ARBITRATION AWARD**

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### **DETAILS OF HEARING AND REPRESENTATION**

1. The hearing was held at the Oudtshoorn Medium A Correctional Facility on 1 December 2010. The Applicant was represented by Ms A Mosectic of PSA and the Respondent by Ms Louisa Japtha of the Respondent's Department of Legal Services in George. The parties agreed to file closing arguments. I received submissions from the Applicant but nothing from the Respondent.

### **ISSUE TO BE DECIDED**

2. The issue in dispute relates to the Respondent's alleged wrongful refusal to grant the Applicant Temporary Incapacity Leave (TIL) for the period 29 October to 8 November 2009.
3. Ms Mosectic explained that the applicant had made three separate applications for TIL: the first ran from 29 October to 8 November 2009 (11 days) which was declined. The second, which ran from 9 November to 31 December 2009, was partially approved: 9 November to 16 December (31 days) was approved but the period 17 December 2009 to 31 December 2009 – 15 days was declined.
4. Ms Japtha for the Department stated that although the Request for Arbitration dated 3 September 2010 deals only with the period 29 October to 8 November 2009 as does the request for conciliation and that the Applicant should have asked for these matters to be joined at an earlier stage. However, after discussion the parties agreed that the Respondent's decision to decline all three periods be included in this matter.

### **SURVEY OF EVIDENCE AND ARGUMENT**

5. The Applicant Mr Jacobus Marx testified in his own cause. The Respondent tendered no evidence and did not in any material way challenge Mr Marx's version.
6. Marx has been employed by the Department since 1 January 1986 and since 1994 as a Correctional Officer, Grade one. At the time the dispute arose he was at Salary Level 7, earning R178 881 per year.

7. It is either common cause or not disputed that in 2002 he suffered an injury on duty after what was simply described as 'an incident'. He was booked off for 24 days suffering from stress. After he returned to duty and after considering the recommendations of the professionals who had been treating him the Respondent varied Marx's duties. He was transferred to Medium B which houses young offenders. Marx explained that this is 'a bit gentler' than Medium A. He was also specifically not required to unlock the prison in the morning or lock up in the evening. He worked with and supervised young offenders in the prison garden and did driving.
8. Since the changes to his work Marx's condition had improved and he had suffered no further anxiety attacks and his mental condition was under control until 22 October 2009 when he had a stress-related incident at work causing a complete breakdown. He was away from work until the end of the leave cycle 31 December 2009.
9. In 2010 Marx continued to be ill but by then he was in a new 3-year leave cycle. He used his 36 days ordinary sick leave up to 10 February. He put in the third application for the period 11 February 2010 to 21 February (9 days). This too was declined. The entire period from 29 October 2009 to 21 February 2010 related to a major depressive disorder. Marx was hospitalised on five occasions during this period.
10. Proactive Health Solutions (PHS) was appointed to conduct assessments for the Department as its health risk manager. In considering the applications PHS was inconsistent. Whereas in one of the assessments PHS suggested that there were odd trends in the taking of leave i.e. on a pay day or before or after a long weekend (see p 9 Record) in relation to the second application but relying on the same data its report states that 'significant trends were noted'.
11. The first application, for the period 19 October to 8 November (11 days) was made on 27 October. PHS recommended that it be declined. Its reasoning in para 3.1 (report undated but apparently received by the Area Commissioner of DCS on 13 January 2010) was that "the employee had 12 periods of sick leave during this cycle. PHS noted that 09 of these periods taken off sick were before or after weekends. The employee took off sick frequently, almost every month for 1 – 3 days at a time. PHD is of the opinion that sick leave was not utilized responsibly. PHS recommends EAP intervention to attempt to remedy unfavourable trends in sick leave utilization." On 19 January 2010 PHS informed the head of centre that the application was declined. No EAP was offered although the Department's HR Manager J Fourie in the office of the Area Commissioner wrote to the Head of Centre Oudtshoorn on 19 January stating that "EAP intervention is needed".
12. PHS recommended that Marx be assisted in his rehabilitation by use of an Employee Assistance Programme. It is common cause that Marx was not informed of this recommendation. The PHS report dealing with the second application shows that the

assessment was made on 14 January 2010 and it called for OT and EAP Reports. These were not prepared.

13. There is no evidence of what happened between the date of the assessment on 14 January 2010 and the date of the report – which is undated – was apparently received by the area commissioner on 15 April 2010. The Department has offered no explanation. The PSH considered<sup>1</sup> that “*according to the Medical Disability Advisory (MDA) the optimum number of days recommended for this condition is 28 days unless there were other complications for which he was being treated. This application will therefore be assessed for the optimum period.*” The Department offered no explanation of the status and relevance of the phrase ‘medical disability advisory’ and why and to what extent this is binding or persuasive.
14. On 8 February 2010 Marx challenged the decision to refuse him the TIL. He had not abused sick leave. In all but two instances in the relevant 3 year period he had produced valid and honestly drafted sick certificates and he felt it was patronising and offensive to say that he had abused sick leave. [I note that there were not 12 instances of sick leave but 11 as the PHS erroneously split one period of 4 continuous days continuous sick leave in 2007 as being two.] As to the weekend phenomenon, March contended that if there had been a problem with this leave this should have been raised with him. It is common cause that no one had ever approached him demanding additional justification/explanation about the TIL applications or about any so called abuse of sick leave.
15. One morning, it seems this was 5 October 2009 and without being warned or prepared for this Marx was instructed to open Medium A prison. At that time the head of the prison was away and a Mr Barend was standing in for him. According to Marx’s undisputed evidence Barend was aware of his problem but he nevertheless gave the order. Marx became very agitated but did not refuse to do so: it was an order and he felt obliged to try to carry it out. Within hours he had become seriously upset and had to go home he was hospitalised in George for three days and for a further week in October and again in November.
16. On 5 March 2010 at a meeting attended by Messrs Strydom (Head of the Centre), Lambertjeen (Marx’s first line manager), the treating psychiatrist Dr Van Wyk and the Reverend Kotze and Mr and Mrs Marx, arrangements were made for Marx to return to work and an undertaking was given to assist Marx in his rehabilitation into the workplace and particular arrangements in case he became very stressed.
17. On 15 March 2010 Marx returned to work. He was still on heavy medication; did not carry a fire arm and did not work night duty. He was assisted by his wife to complete the application forms. Van Wyk confirmed in a report dated 21 September 2010 that in the period between 15 March and 15 May his condition had improved but there were still signs of mood swings.

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<sup>1</sup> Bundle p 31

18. Marx could not understand why the TIL had been partially approved and on 8 February 2010 Marx lodged a grievance. The Department's response was that "the decision cannot be revisited." At the third stage of the grievance process the Head of the Centre Strydom wrote that as the 'TIL was declined by the health Risk Manager committee therefore I cannot make any decision on my level. Refer to the next level.' Much the same approach was given at the fourth and final level of the internal grievance process and confirmed by Ms T S Magagula Regional Head Corporate Services on 25 May 2010 who wrote that 'this case was considered on its own merit by the Health risk manager' and she later confirmed this in a letter dated 27 May 2010.
19. In support of this complaint Marx furnished a report from Dr Clifford Van Wyk of Oudtshoorn, treating psychiatrist who confirmed that prior to the incident which gave rise to Marx's breakdown in October 2009 there had been reliable evidence of stabilisation of his condition. What is uncontested is on 22 December 2009 Psychiatrist recorded that, but for the work related stress, Mr Marx had no other medical problems.<sup>2</sup>
20. Ms Mosetic contended for Mr Marx that this was the first time in his 24 years service with the Department that he had applied for TIL. Except for days in 2002 when he was booked off for stress after the injury on duty he had never suffered such a major depressive disorder requiring such long absence from work. Throughout the period when he had been accommodated, between 2002 and the Barend instruction he was able to continue working
21. Ms Mosetic pointed to anomalies in the PSH assessments relating to the three discrete applications. In relation to the first period 29 October to 8 November 2009 (11 days) the PSH assessor determined that he had not used his sick leave responsibly.<sup>3</sup> In relation to the second application.
22. Ms Mosetic points out that in relation to the third assessment, for the period in February 2010 the assessor, one A Madibana notes that there were five incidents<sup>4</sup> of sick leave. Not so, there was a continuous period of absence from October 2009. Ms Mosetic also points out that, oddly, the assessor of the first application thought there was a pattern pointing to irresponsible use of sick leave but the assessor of the second application, looking at the same evidence thought there was no trend worth remarking on. The discrepancy between the two is not dealt with and the Respondent's representative offered no explanation or justification.
23. Ms Mosetic points out that the Respondent did not comply with its own policy in considering the applications. The first application (on 27 October 2009) should have been considered before 26 November 2009. Marx was notified on 19 January 2010. The second application

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<sup>2</sup> Report of Dr Van Wyk Bundle, p 60

<sup>3</sup> Bundle, P 9 .

<sup>4</sup> Bundle p 75.

was made on 22 December and should have been considered within 30 days. Marx was notified on 22 April 2010 more than four months later. The third application was made on 8 February 2010 and he was notified on 5 July 2010 that it had been declined. In terms of paras 7.2.9 of the Policy and Procedure on Incapacity leave and Ill-Health Retirement (PILIR) read with para 15.10 of the Determination on Leave of Absence in the Public Service these decisions should have been made within 30 days.

24. The Employer deducted 17 days from Marx' vacation leave and 6 days capped leave and allocated leave without pay for seven days for the periods in dispute and the rest was unpaid. Mosaic seeks an order that the Applicant be granted TIL for the whole period from 29 October until 21 February 2010 and that all vacation leave and capped leave be reinstated and any monies deducted be repaid to the Applicant. The Respondent has tendered no argument.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

25. TIL is governed by clause 7.5.1 of PSCBC Resolution 7 of 2000:

### **7.5.1 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 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."

26. It is well accepted that no employee has a right to TIL; it is a grant within the discretion of the employer and as long as the employer exercises its discretion fairly that decision should stand. Fairness goes to the substance i.e. the factors/circumstances that were considered or ignored, and to the process.

27. I note that in the covering letters from the Respondent's Area HR Manager for the Area commissioner, commissioner dated 27 November and another 2 December 2009 relating to the period 29 October to 08 November 2009, specific attention is drawn to the fact that Marx ought to have worked on the week end of 7 and 8 November 2009. On 8 January 2010 an

administrator in Human Resources Administration wrote to the Health Risk Manager in relation to the Application for the period 09 November 2009 to 31 December 2009. Again mention is made that there are weekends included in the period. This is irrelevant in this case. The Applicant had a major breakdown which caused him to be hospitalised. On the very weekend which the Department notes that he ought to have worked (7 to 8 November 2009) he was in hospital.

28. The first application was for a 'short period' of TIL. The practice, as I understand it is that all that is required is a medical certificate. That was supplied. The PSH recommended declining because of the poor sick leave profile. Nothing to do with the major breakdown. I accept that the onus is on the claimant to furnish particulars but he was in hospital during the relevant period and in no position to gather information. His managers knew well his circumstances and it seems to me that in fairness and decency to an employee who has been in the service for 24 years line and/or HR manager should see to it that a person such as Marx who had suffered a major collapse following a work-related incident should have been assisted to put in a more detailed application if this was needed. The Respondent was well aware of the Applicant's condition as it had afforded him reasonable accommodation. It is self-evident that the PSH did not know this but it was up to the Respondent's management to inform the PSH. For reasons that are not explained the Respondent gave no information of any kind to the PSH. In each of the three applications the Applicant's manager and the Head of Centre – who were all aware of the other applications, offered no information to the PSH and simply granted leave contingent on the PSH assessing the applications. I am not persuaded that this is a rational let alone a fair way of complying with its obligations as employer.
29. Although the Respondent offered no argument I accept that the PSH is a specialist body to assist the employer to make a fair and rational decision. But it can only do so if it is properly informed. The HRM makes much of the fact that in some earlier incidents of sick leave Marx had taken sick leave surrounding a weekend or public holiday. The so-called analysis of sick leave during the sick leave cycle includes an unhelpful plotting of whether the applicant took sick leave near pay day or weekends. This may be relevant to establish prior abuse of sick leave but when dealing with a continuous absence it is nonsensical and suggests the application of an irrelevant model of analysis.
30. Apart from a vague reference "the Medical Disability Advisory" which apparently stipulates 'the optimum number of days recommended for this condition' being 28 days there is no indication that PSH considered the facts of the case.
31. The evidence shows that Marx needed reasonable accommodation for his work-related stress at least as early as 2002 from the problems he had experienced. In his second

application for long term TIL for the November/December period<sup>5</sup> he refers to ‘the hostage drama at Zonderwater prison;’ because of his condition he would not be able to handle a fire arm; he believed that incidents of assaults on members and by prisoners on each other contributed to the problem he experienced. It seems that under the management of Strydom Marx was accommodated. But for reasons that the Department has not explained on the day that Strydom was away and Barends was standing in for him, Marx was instructed to do something that triggered a serious relapse. It may be that Marx could have and perhaps should have reminded Barends that his condition made him vulnerable to panic attacks and a possible relapse but Marx’s evidence was that ‘an order is an order’ and he felt obliged to try to comply. Within a couple of hours of having to confront prisoners at the Medium A he had collapsed and was only able to return to work more than four months later.

32. Two months into his treatment on 22 December 2009 Dr Van Wyk’s report showed that at that time despite pharmacotherapy supportive and cognitive therapy, group therapy and occupational therapy he showed ‘poor response at present’. Van Wyk went further and described<sup>6</sup> under the heading functional impairment ‘impaired on all levels of functioning: occupational, social and personal levels due to severe degree of major depressive disorder.’
33. There were three separate assessors: Saddy Mashaba (first application), Busi Rungqu (second application), and A Madibana (third application) and three individuals who conducted ‘quality assurance’. Nonzaliseko Arm, Dr. S Mtyhasheni and M Mokone. None of these reports indicates any appreciation of the nature of the Applicant’s condition and that he had one period of absence artificially broken into separate applications. The Employer ought to have drawn the HRM’s attention to the other applications.
34. The assessment of the second application calculates the period applied for wrongly. It was from 9 November to 31 December 2009. At page 3 of the report<sup>7</sup> the assessor writes that Marx has applied for 83 days incapacity. This is not so. The period is 53 days. No one picked up this error. So much for quality assurance.
35. The Department’s discretionary decision cannot stand if it was not consistent with applicable rules or regulations; it was based on an error of law or on irrelevant considerations; if the decision-maker was biased or improperly motivated; or if the decision disregarded facts that should have been considered.
36. Several years ago the Applicant had been suffering from a psychological impairment which adversely and substantially limited his capacity to fulfil his work requirements as a warder in

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<sup>5</sup> Bundle pp 35 - 71

<sup>6</sup> P 55 Bundle

<sup>7</sup> Bundle, p 31.

a correctional facility. The Respondent acknowledged this and had afforded Marx reasonable accommodation from approximately 2002. The record shows that this accommodation had been effective in reducing the impact of Mr Marx's impairment on his capacity so that he was as a result able to fulfil the essential requirements of his job. There is no evidence that this accommodation imposed undue hardship on the employer.

37. The Respondent withdrew that accommodation without consultation and without there being any operational need to do so. The Applicant's effort to comply precipitated his collapse.
38. The applicable Policy and Procedure on Incapacity Leave and Ill-Health Retirement (PILIR) determined in terms of s 3(3)(c) of the Public Service Act requires the manager to complete a report to the HRM (Clause 7.2.2.3). Provision is made for this in Part D of the application. In all three applications management furnished no information to the HRM about the history and context of the breakdown. As this breakdown was as a direct result of a work-related incident there was an obligation on the Applicant's managers to explain this to the HRM. They did not. The comment of Mr Lambaatjeen on 28 February 2010 in relation to the third application is merely: 'sick leave cycle just started and already exhausted. Temporary incapacity leave not recommended.' The fact that the sick leave was exhausted is self-evident from the record and explained nothing. The form clearly expects the manager to offer remarks about the illness or condition and the work circumstances; indeed the manager is instructed "attach a loose page if necessary". I conclude that the Respondent's management did not exercise its discretion properly when considering the applications and violated the Applicant's rights.
39. As a general principle it does not follow that an applicant is entitled to a substantive outcome. The exercise of the discretion to grant or refuse incapacity leave involves a consideration not only of the seriousness of the underlying condition of the applicant but also of budgetary considerations. As a business decision this is the proper domain of management. Although the managerial process is subject to legal scrutiny by reference to standards of fairness the employer sets the standards and identifies relevant factors. But the Respondent made many mistakes in this matter: the employer's withdrawal of its reasonable accommodation triggered the relapse of the pre-existing impairment; there was no evidence that between 22 October 2009 and 5 March 2010 the Respondent assisted the Applicant in his efforts at rehabilitation into the workplace as is required; the consideration of all applications far exceeded the required time periods; there were serious errors of calculation of relevant time periods by the HRM and the applicant's immediate managers did not submit relevant information to the HRM to enable it to make a competent determination.
40. Although the claimant seeks reinstatement of all monies deducted from his capped and annual leave I am not persuaded to grant this. The purpose of TIL is to tide an employee

over through a difficult period of illness or incapacity. As the Applicant had some leave, current and capped that had accrued to him I think it fair that he should be required to apply that leave to the absence so that the Respondent does not bear the full burden of the period. I determine that the Respondent should treat the remaining period up to 21 February 2010 as paid TIL.

## **AWARD**

**I find that the Respondent violated the Applicant's rights when it refused to grant him TIL and make the following order:**

- 1. The Respondent shall before the end of February 2011 repay the Applicant any monies that it has deducted from the Applicant's salary in respect of unpaid leave from the period from 21 December until 21 February 2010 but the Applicant shall not be entitled to have the 17 days vacation and 6 days capped leave reinstated.**
- 2. I reserve jurisdiction to deal with any errors of calculation which may be contained in this award.**

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**S H Christie**

**PSCBC Arbitrator**