PSCBC

PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

ARBITRATION AWARD

Case No.	**PSCB 207 -11/12**
Date of Award:	27 November 2010
Panelist:	Adv W F Maritz

In the matter between:

PSA (CHRISTIAAN)

(Union / Applicant)

and

DEPARTMENT OF HOME AFFAIRS (NATIONAL)

(Respondent)

For the applicant: Mrs A Mosetic
Telephone: 021 409 7360
Fax 021 409 7397

For respondent: Mr. E Bosch
Telephone: 078 801 1094
Fax : 086 512 3859

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. The application was heard on 21 November 2011.
2. Ms A Mosetic appeared for the PSA and Mr. E Bosch for the respondent.
3. The parties requested to provide written argument that came to hand by 25 November 2011.

THE ISSUE IN DISPUTE

4. The Interpretation and Application of a Collective Agreement (Resolution 7 of 2000.

THE BACKGROUND TO THE DISPUTE

5. The applicant employee worked for the Department since 1 April 2005 and is currently employed as a senior registry clerk at the Refugee Reception office.
6. She applied for sick leave from 12 May to 5 July 2010. The period 12 May to 3 June 2010 was dealt with as normal sick leave but the applicant had to apply for Temporary Incapacity Leave in respect of the period 4 June to 5 July 2010.
7. The applicant had applied for that leave on 15 June 2010 and the decision of the respondent had provided the outcome to her Department in October 2010 but had only been communicated to the applicant on 20 December 2010 and it was the case of the applicant that the Department had violated the 30 day rule.
8. The substantive issue was not contested by the applicant who only relied on the failure of the Department to comply with the procedure.
9. The respondent pointed out that the original application for TIL on 14 June 2010 had been outside the five days stipulated in the Resolution.

SUMMARY OF EVIDENCE

10. The union called the applicant, Naeemah Christiaan, who confirmed that she had lodged a grievance because she felt she was unfairly treated. She had been hospitalised from 17 May to 4 June 2010 and had not been able to get to the office without the assistance of her husband.
11. She had not been sure whether her sick leave had been exhausted so had handed both forms in together on 15 June 2010. Her husband had taken the forms in on her behalf.
12. An official, Ms L Mzamani, had been in touch because she had wanted to do an assessment as a part of the performance management development system. Her employer had called the clinic when informed that she had been hospitalised.
13. She had been hospitalised for post traumatic stress with anxiety and panic symptoms as well as having received counselling related to a recent diagnosis of Chrones disease and the doctor had said that she could not do the test in the clinic as she was not well enough.
14. She had been in the hospital until 4 June and she had received the forms from the office, signed them on the 11th and returned them via her husband on the 15th of June.
15. She had received the outcome of the application on 20 December 2010 when she was informed that the period from 4 June to 5 July had not been approved.
16. The reason for the refusal related to the fact that she had a history of major depression and had been absent frequently. She had been hospitalised twice in August and December 2007 and then again in 2010.
17. There had been frequent consultations with psychiatrist, psychologists and a team of occupational therapists. The occupational therapists had been seen while she was in

hospital but she had seen the psychologist every second week and the psychiatrist monthly.

18. Her medication had been adjusted from time to time and she had been given a higher dosage while she was in the hospital.
19. She noted the various forms of medication.
20. She had been dismissed for incapacity but had been reinstated after arbitration proceedings in July 2011 and was working again since October 2011.
21. Money was being deducted from her salary since December 2009 and was still being deducted. The last deduction had been R2000 during the previous month. Administration could not give her details of the deductions.
22. She had been prejudiced by the failure of the respondent to adhere to the times set in the Resolution.
23. In cross-examination she confirmed that she had been suffering from depression since 2008 and had previously utilised TIL applications to supplement her sick leave allocations.
24. After leaving the hospital on 3 June she had been at home.
25. She had used normal sick leave for a portion of the period that she had been sick.
26. She had not been sure from when she had to apply for TIL but had completed both forms in June. When she signed the form she was aware that she was going to be off until July. The TIL form had been completed as a safety measure as she was not sure how much sick leave she had left.
27. She had previously applied for TIL but it was only in 2009 when she was charged that she became aware of the time frames. This had related to the fact that she had at the time become aware that she had to hand in the application in five days. She had been given a final written warning and a period of unpaid leave had been imposed for abusing sick leave. She had appealed and at the time of the outcome she had been in hospital.
28. She had been dismissed during an October hearing but had been reinstated after arbitration.
29. She said that she had to approve the deductions.
30. She had been paid her salary during the period under review – 4 June to 5 July. She was not sure whether the remuneration she had been paid had been deducted. She was not sure whether the present deductions were in respect of the salary that she had been paid during the June/July period.
31. She thought she had been back at work from 5 July until 13 July but had then not been at work between 14 July and 23 August.
32. She had been absent on some days to see the psychiatrist
33. She conceded that it was not unfair for the respondent to deduct for absence when she had authorised it.
34. It was put to her that there was no proof of deductions in respect of the period under review.
35. In re-examination she confirmed that she had used normal sick leave when that was available.

36. She said that some forms she sent in had been rejected and she had been told that they had to be handed in when she returned. That had been the office manager, Richard Sikelane, but he was no longer there.
37. Unpaid leave was reflected on the payslips.
38. She had not received any reply from the Department after she registered the grievance.
39. The case for the applicant was closed and the respondent elected not to call any *viva voce* evidence.
40. It was submitted that the applicant had been prejudiced by the failure of the respondent to advise her within 30 days of the outcome of her application and it was only when she was informed on 20 December that she became aware that she should have provided evidence as to the management of her condition including hospitalisation and frequent consultations with a specialist psychiatrist etc. Had she been aware of these requirements she would have been able to provide evidence of such management as was evident from her evidence.
41. The respondent submitted that it was common cause that the Department was entitled to make deductions in respect of salary paid provided the applicant was advised and agreed to the deductions.
42. There was no evidence that deductions had been done in respect of the period under review and there could be no question of actual prejudice in the circumstances.

ANALYSIS

43. The substantive issue has not been placed in dispute, the dispute being confined to the failure by the respondent to follow the prescripts of Resolution 7 of 2000 in terms of which it was required within 30 working days *to investigate the extent of the inability to perform normal official duties the degree of inability and the cause thereof* and the consequences of that failure.
44. It was common cause that, whereas the applicant had applied for TIL on 15 June 2010 no outcome had been given until October or December 2010.
45. It was the case for the applicant that she had been prejudiced by that failure. The nature of the prejudice refers to the fact that when such an application is refused the period would, unless the employee has normal leave that can be utilised, be taken as unpaid leave and, as it was common practice to pay an applicant for any such period until the application had finally been processed, the extent of the prejudice was that any salary so paid would be recovered from the employee.
46. The TIL application is only necessary in the event that an employee no longer has any sick leave due to her. In the instant case the applicant's sick leave had run out on 3 June 2010 and the period to which this TIL application referred had been from 4 June to 5 July 2010.
47. In terms of the Resolution the respondent, as employer, has a discretion to grant any such period as leave with full pay.

48. It is, firstly, incumbent on the employer to properly exercise its discretion before refusing the leave but if that has been done it is conceded that the employer would be entitled to recover any remuneration paid to the employee in respect of such a period.
49. It is apparent that there would be potential prejudice if there is any untoward delay in informing the employee of an adverse outcome. I refer to it as potential prejudice as, on the face of it, an early advice to an employee of a refusal to grant the leave with full pay would enable the employee, at least in principle, to abort the leave taken or accept that it would be unpaid should she continue to absent herself.
50. The respondent has argued that in the present case the applicant had been subject to the condition which had caused her to apply for temporary incapacity leave for some time as she had previously made such an application on a number of occasions. In the result she would have been aware that she was at risk that any remuneration paid to her during her absence could be recovered. On that basis it was submitted for the respondent that the employee had not been prejudiced as she was aware from previous experience deductions would probably follow. Secondly it was submitted that it was not proved that any deductions had been made and the application was therefore premature on that basis.
51. The applicant has maintained that the prejudice was not avoided where the applicant was aware of the consequences of continuing her absence as, had she been made aware of the precise shortcomings of her application in the prescribed period, she would have been able to produce additional evidence of her incapacity and, more importantly, to show that all reasonable efforts had been made to avoid being absent.
52. It would appear that the original application had been submitted to SOMA, considered on what had been presented in support of the application, and, on an adverse recommendation being made by SOMA the application had been summarily refused.
53. Having considered the above I have come to the conclusion that the duty of the employer did not stop when it had submitted the initial application to SOMA and had received an adverse recommendation from that instance but that it is incumbent on the employer not only to advise the applicant within the prescribed period of the probable outcome but also to advise the applicant of the shortcomings raised by SOMA so as to give the applicant an opportunity to meet the criticism or shortcomings raised in respect of her application before making its decision on whether to grant or reject the application.
54. It is apparent that the reasons for the rejection was provided when the application was rejected but even if there is a further opportunity to provide additional material at that stage the delay had prohibited the applicant to deal timeously (before a final decision was made) with the shortcomings.
55. I have come to the conclusion that the respondent had not exhausted its obligations.
56. Although only the procedural aspect has been put before me it seems to me that this aspect is so integrated with the substantive issue that the failure to follow the procedure had made the decision to reject the application premature.
57. The respondent has submitted that no evidence has been offered to show that deductions had been made in respect of this period. This is of no consequence as it

would follow from the finding that it would beg of an order that the applicant must be reimbursed in respect of any deductions that may have been made.

AWARD

1. The failure of the respondent to conform to the 30 day rule envisaged in Resolution 7 of 2000 in applying the Resolution has caused prejudice to the applicant related to her inability to meet the criticism of and comply with the demands of the Department before the application was refused.
2. The failure to timeously give the applicant an opportunity to address the criticisms and meet the standards set by the Department that had been at the base of the rejection of her application had the result of making the rejection of her application premature and the decision of the respondent not to allow the TIL application is reversed.
3. The applicant is accordingly entitled to be fully paid for the 21 working days in the period 4 June to 5 July 2010 despite her absence from work.
4. Should the respondent have deducted or is in the process of deducting remuneration previously paid to the applicant in respect of the said period the respondent is ordered to desist therewith and to reimburse the applicant any such amount on or before the next normal pay day.

Adv W F Maritz
PSCBC Panellist