



# ARBITRATION AWARD

Panellist/s: U Bulbring  
Case No.: PSCB 341-08/09  
Date of Award: 12 June 2010

In the ARBITRATION between:

PSA obo Wynand Heyns

(Union / Applicant)

and

Department of Correctional Services

(Respondent)

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION

The arbitration was held at the premises of the Department of Correctional Services ("the department") at Voorberg Prison on 3 June 2010 under the auspices of the Public Service Co-ordinating Bargaining Council ("PSCBC"). The applicant, Gerhardus Wynand Heyns ("Heyns") was represented by attorney, Mujahid Adams ("Adams") (briefed by the Public Servants Association ("the union")), while the department's legal administrative officer, Andre Jooste ("Jooste") appeared for the department. The proceedings were recorded. Both parties filed written closing submissions; these were received by me on 10 June 2010.

### ISSUE TO BE DECIDED

The disputes relates to the allocation and approval of temporary incapacity leave ("TIL"). Heyns argues that he is entitled to TIL in terms of section 7.5 of PSCBC Resolution 7 of 2000 ("Res 7 of 2000"), a collective agreement in terms of s 24 of the Labour Relations Act, 1995 ("the LRA") read together with the department's policy and procedure on temporary incapacity leave and ill health retirement ("PILIR"). I must decide if Heyns is entitled to such TIL and determine the appropriate award, if any.

## BACKGROUND TO THE MATTER

Heyns commenced employment with the department approximately 17 years ago. He works as a CO1, security officer: internal security at the Voorberg Prison ("the prison") in the Voorberg management area.

In the current period of dispute, Heyns was booked off from work with stress and an adjustment disorder on 6 September 2007. He exhausted his sick leave from 6 to 25 September 2007. Heyns then applied for TIL for the period 27 September to 9 November 2007 (32 days).

TIL was declined by the department.

The union avers that the department has not applied its mind or exercised its discretion fairly. The department's version is that it allowed Heyns to submit the same TIL application for the same period three times. Each time it was declined.

## SURVEY OF EVIDENCE AND ARGUMENT

### Evidence

Several of the facts and circumstances were common cause. Heyns testified for himself, while the department's manager: human resources administration at the prison, Maria van der Watt ("vdW") testified for the department.

Heyns testified that during end August/ early September 2007 there was a misunderstanding between him and the prison's assistant director: centre co-ordinator: corrections, Samuel Masemula ("Masemula"). Masemula, who is Heyns' senior had told Heyns to close certain cell doors. Heyns questioned this as the doors are always kept open. At the time Heyns was eating and Masemula told him to put his food down. Heyns said that he replied that he was eating and that Masemula should give him a chance. An investigation followed.

During a discussion between Heyns and Masemula, the head of the prison, "Adams" decided to transfer him. On 5 September 2009 Heyns received a letter from the area coordinator: corporate services advising him that management had decided to transfer him temporarily to Medium A Correctional Centre from Medium B while the incident was investigated. The letter adds that "a final decision regarding your permanent allocation will be made after the final investigation".

Heyns said that the decision to transfer him was made by Adams. Heyns felt aggrieved about the transfer. He felt it was unfair; "he could not handle it and went on sick leave". Heyns was booked off with depression. Heyns visited Dr Gert van Niekerk ("Dr van Niekerk") and was booked off further with "adjustment disorder with mixed emotional state" showing signs of "severe irritability, poor concentration and decreased energy". Heyns applied for TIL for the period that was not covered by sick leave, 27 September to 9 November 2007 (32 days of TIL).

TIL was declined on the recommendation of the Health Risk Manager ("HRM"). Part of the reasoning reads:

- *The member has already utilised more than the recommended days according to the Medical Disability Advisor guidelines.*

- *The medical information submitted is not sufficient to justify the length of period applied for.*
- *The latter part of the period is covered by a backdated sick note which PILIR regards as illegal, unacceptable and invalid and thus cannot justify sick absences.*
- *The application was not submitted within the timeframes stipulated by PILIR".*

Heyns disputed the reasoning saying that he did comply with the PILIR time frames. He submitted his application within the first five days of being ill, as required. Heyns said that the medical certificates are proof of the fact that they were not backdated. They were signed by the doctors on the days that he saw them. The certificates refer to when he was examined and when he was seen. It was an ongoing illness. He sent in all the certificates. He cannot account for what human resources did with them.

Following the TIL being declined Heyns lodged a grievance. Heyns lodged a second application for TIL with further information about his illness. The relevant portion of a note from Dr van Niekerk (who saw Heyns during August, September, October and November 2007) dated 4 February 2008 reads:

*"Hy het presenter met die beeld van 'n aanpassingsteuring met depressiewe en angssimptome. Hierdie toestand het ontstaan nada thy in 'n konflik situasie by sy werk betrokke was. Dit het veroorsaak dat sy konsentrasievermoe baie beperk was, hy was baie prikkelbaar en emosioneel labiel en sy dryfkrag het baie afgeneem.*

*Weens sy erge prikkelbaarheid is hy op siekverlof geplaas terwyl hy behandeling ontvang het met Epilim CR 500 mg saans. Hy het ook 'n sielkundige besoek vir terapie. Sy prognose vir herstel is goed indien toepaslik aandag aan sy griewe en die konflik in sy werksituasie geskenk word".*

Heyns also submitted a letter from an employee assistance practitioner ("EAP"). It refers to work related problems and coping with circumstances at work. Heyns was referred to a psychologist. Part of the letter reads:

*"(Heyns) has been consulting with his treating specialist since 1998 as a result of work related problems. He was diagnosed with major depression and post traumatic stress syndrome at the time. (Heyns) recent setback resulted again from a work related incident. He was advised to consult with his treating specialist and continue his therapy. He had continuous consultations with his therapist from August – November 2007".*

Heyns said that he had been to see the EAP before the transfer incident because of another incident that had occurred at work relating to a dispute over prisoner food. Heyns said that he has a history of emotional problems.

The HRM declined to recommend the second application for TIL (even though it appears to have been acknowledged that the sick notes were not back dated). The reasoning is as follows:

- *There is insufficient medical information to justify why the member needed such a long period of absence from work considering that the member's last day at work was 05-09-2007.*

- *The HRM notes that there are unresolved HR issues between DCS and the member and according to the member's treating doctor this is the cause of the member's condition.*
- *The treatment modalities employed in managing the member's condition do not reflect the seriousness of the member's condition".*

The HRM concludes by saying that the HR issues cannot be resolved if the member is away from work. Heyns was advised to return to work with immediate effect to assume duties to allow the investigation to continue.

Heyns then submitted a third TIL application for the same period. It was noted that Heyns had returned to work on 11 November 2007; the HRM's reasoning advising Heyns to return to work was flawed.

The third application (with a question-answer form completed by Dr van Niekerk) was also not recommended by HRM. The HRM notes that "except for a memo dated 4-2-2008 from the psychiatrist, there is no additional medical information with this re-submission. A psychologist report that was received previously has also been re-submitted".

The HRM notes further:

*"The psychiatrist indicated that the member's condition was as a result of a conflict in the workplace, this was confirmed by the departmental report. The HRM is still of the view that this is an HR related matter and should be dealt with at HR level".*

The Area Commissioner approved the recommendation of the HRM. A note on the internal memo reads:

*"I looked at all the information concerning the member's illness and agree with the decision of the HRM. I am of the opinion that much intervention was made to stabilise his working environment by shifting him from Med B to Med A. He stayed away from work instead of handling his problem or accepting decisions from management. Application disapproved".*

Heyns said that it was his view that the department did not give him a sufficient opportunity to state his case before the transfer letter. On 9 November 2007 Heyns was advised that the investigation into the incident that led to his precautionary transfer to Medium A was complete. Heyns was instructed to report for duty on 12 November 2007 at 7h00 to discuss his future placement at the office of the head of the correctional centre. Heyns said that he never worked at Medium A; he went back to work at Medium B.

Heyns said that the TIL has been deducted from his capped leave. He seeks a reversal of this i.e. that the capped leave be recredited to him and the leave marked as TIL.

During cross-examination Heyns said that he did not view the incident that happened between him and Masemula as serious enough to warrant his transfer. There had been verbal conflict but no assault or attack. He felt as if he was being victimised. The department averred that by going on sick leave Heyns made a conscious decision to decline to follow the instruction. Heyns replied that he was really sick.

Heyns said that there was a lot of communication between him and his superiors during the time of his sick leave. He made phone calls. Heyns wrote a "diary" during his illness reflecting phone calls and other interactions with the department. On 7 September 2007

Heyns manually recorded a telephone discussion between him and Masemula asking him if he could change his mind about the transfer and speak to Adams. The note reads:

*"Ek pleit hom mooi omdat ek nie by die huis wil wees nie maar om te gaan werk. Ek verloor ook my naweek gelde".*

Heyns also made a note that he phoned Adams on 27 September 2007 to ask him if he could return to work at his workplace in Medium B. He was told that the department "stands by its decision". Heyns also spoke to the unit manager with no success.

The department alleged that whilst Heyns had reported his initial sick leave to the department he had not reported to it after 25 September 2007. Heyns denied this saying that he had spoken to a Mrs Kotze at the Medium A offices to report the fact that he was sick.

The department averred that Heyns did not apply for TIL within the five days required by the PILIR policy. Heyns replied that he had handed it in on 1 October 2010. The "whole package" with all the supporting documents was then handed in to the department on 6 November 2007. Heyns submitted additional progress reports with each application. He was never asked to go for an assessment by the department (a PILIR assessment).

VdW testified that following the incident between Masemula and Heyns inside the correctional centre, Adams decided on a interim transfer of Heyns to Medium A pending an investigation into the matter. Heyns was instructed to report to Medium A on 6 September 2007. Heyns did not do so but went on sick leave for the period 6 to 25 September 2007. It was during the sick leave cycle 1 January 2007 to 31 December 2009.

After an employee exhausts sick leave s/he may apply for TIL. Heyns applied for TIL from 27 September to 9 November 2007. VdW said that the department received the TIL application five working days after the first day of incapacity. The completed application was received on 14 November 2007. Although the TIL application is signed on 1 October 2007, the doctor only completed it on 5 November 2007. Under the heading "...what further treatment you believe could be beneficial" Dr van Niekerk records: that the "conflict at his workplace must be resolved". As to how long the incapacity will last, Dr van Niekerk records that "when the conflict has been resolved he should be able to function in his work environment". The conflict at work is said to have precipitated the disorder.

VdW said that all Heyns' medical certificates were sent to HRM. A medical report from psychologist, Liza Small was included in the second application to HRM and a further report from Dr van Niekerk submitted with the third application. VdW said that the department did not have a discretion to exclude any of the documentation submitted to it. Whatever was furnished to the department was sent to HRM. The report from van Niekerk dated 4 February 2008 reads:

*"Sy prognose vir herstel is goed indien daar toepaslik aandag aan sy griewe en die konflik in sy werksituasie geskenk word".*

VdW submitted an "Internal Memo" to HRM with the third application. It's aim was to resubmit all information with a full explanation. It set out that whereas HRM had said that there were backdated sick notes, this was not the case. The memo also notes that following its declining of the second application the HRM noted that Heyns should return to work and that the matter could not be resolved if Heyns was not at work. The memo set out that Heyns was in fact back at work. Given that wrong information was used to make the recommendation, the application was resubmitted, said vdW.

VdW said that she believes that Heyns was assisted to make his application. A senior clerk, Mrs Brundyn dealt with his application; she went "over and above" what was required of her in assisting him to submit the application.

The final recommendation to approve or disapprove TIL lies with the area commissioner. The HRM makes a recommendation.

VdW said that the following the investigation Heyns received a final written warning for insubordination and/or related charges. The verdict was overturned on appeal given certain procedural errors.

VdW said that the transfer was not unfair; it was the way that the department dealt with conflict in the workplace. Heyns was not satisfied with the way Adams and Masemula dealt with it.

During cross-examination vdW said that it was not necessary for the department to send Heyns back to work. By the time the third application was sent to the HRM, Heyns was back at work. The reason for the memo to HRM was that it had made a mistake regarding the back dated sick notes and for assuming that Heyns was not yet back at work. Heyns said that the department felt that it was "too much of a coincidence" that Heyns was booked off sick for the same period of the transfer. Their belief was that he had booked off sick to avoid the transfer.

#### Argument

The argument will be addressed below, if relevant.

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

PSCBC Resolution 7 of 2000, par 7.5.1 reads as follows:

*"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."*

Paragraph 7.3.5.1(e) of the PILIR issued by the Minister for Public Service and Administration in November 2005 provides that in making a decision, "the Employer must apply his/her mind to the medical certificate..., medical information / records... , the Health Risk Manager's advice, additional information supplied by the employee and all other relevant information available to the employer".

In PSA obo du Plessis v Department of Correctional Services (PSCB 201-07/08), Arbitrator Sarah Christie set out the guidelines for an arbitrator considering an application of this nature. An applicant bears the onus of showing that the Respondent did not apply the policy fairly. An arbitrator considering a challenge must defer to the area commissioner's discretion

if it is properly exercised. This means that if the area commissioner did indeed take into account all the factors and struck a reasonable balance between them the decision must stand.<sup>1</sup> But the area commissioner's discretionary decision cannot stand if

- (a) it was not consistent with applicable rules or regulations;
- (b) it was based on an error of law;
- (c) it was based on irrelevant considerations;
- (d) it was biased or improperly motivated; or
- (e) it disregarded facts that should have been considered.

As set out by Christie, the PILIR is an elaborate policy and is clearly designed to meet two goals (a) to assist public sector workers who are suffering from serious ill-health and (b) to guard against frivolous or fraudulent claims. Each case must be decided on its own merits.

The union does not dispute that it is within the department's prerogative to allocate TIL as contained in the resolution. Their argument is that this prerogative must still be applied fairly. It is the union's contention that the department did not do so fairly.

Heyns stated that the unfairness lies in the fact that the HRM wrongly stated that his medical certificates were backdated and, after the second application, wrongly stated that he should return to work to resolve the conflict at work (at that stage he had already returned to work). These concerns are noted but the errors were rectified by the department. The department subsequently allowed Heyns to submit a second and third TIL application. He was not prejudiced by the errors because they were rectified.

To my mind whether or not Heyns complied with the five day rule in terms of paragraph 7.1.8 of PILIR is irrelevant; he provisionally complied and the department accepted all of the applications. It is too late for the department to now argue this.

In terms of Section 7.2.9 of PILIR the employer must within 30 working days after receipt of both the application form and medical certificate referred to in paragraph 7.1.4 and 7.1.5 approve or refuse temporary incapacity leave granted conditionally. The union argued that Heyns was at home for approximately two months and was not informed of the outcome of his application. This did not prejudice Heyns. He received his full pay and had regular contact with the department (on his own version) during which time he was informed of the progress of his TIL application. The department in any event notified Heyns on the 23 November 2009 of its decision to conditionally grant TIL.

I do not accept the argument that the department did not take into account "the latest information from Dr van Niekerk". It was not vdW's evidence that the latest information from Dr van Niekerk was not taken into account because it did not come to her attention. Her evidence that all of the medical evidence submitted to the department was submitted to the HRM. "Whatever he gave us was considered" was her evidence.

Heyns also asked why he was not asked to undergo a medical assessment by the HRM. The PILIR does not compel an employer to subject an employee to an assessment. It is discretionary.

Paragraph 7.1.1 of the PILIR headed Temporary Incapacity Leave at 7.1.1 reads:

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<sup>1</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC), per Justice O'Regan, para 50.

*“Incapacity leave is not an unlimited amount of additional sick leave days at an employee’s disposal. Incapacity leave is additional leave granted conditionally at the employer’s discretion, as provided for in the Leave Determination and PILIR”*

TIL is not an entitlement. It is a managerial prerogative. Heyns went off on sick leave as soon as he received notice that he was being transferred. His own evidence was to the effect that he asked the department to reconsider its decision regarding the transfer because he did not want to "sit at home". He was also concerned because he was losing out on his weekend overtime. His sick leave was motivated by the fact that he believed that the transfer was unfair (his evidence was that there was no attack or assault; he and Masemula had words; the transfer was not justified). As soon as the investigation was complete Heyns was advised to return to work and he did so at Medium B. He never worked at Medium A.

Clause 7.1.5.1 of the PILIR sets out that for TIL to be considered the employee must “submit sufficient proof that s/he is too ill/injured to perform his/her work satisfactorily”. I am not persuaded by the medical reports that this was the case. Dr van Niekerk refers to the conflict at the workplace being resolved. His report dated 5 November 2007 sets out that Heyns should be able to function in his work environment "when the conflict has been resolved".

The reasons given by the area commissioner (in a letter dated 25 April 2008) for refusing TIL in the ultimate instant were that there was insufficient evidence to justify why Heyns needed such a long period of absence from work, the unresolved HR issues ("and according to your doctors this is because of your condition") and that "the treatment modalities employed in managing your condition do not reflect the seriousness of your condition".

Considering the above reasoning and the evidence before me I believe that the area commissioner’s discretion was properly exercised. All of the factors were taken into account. It was not based on irrelevant considerations, biased or improperly motivated. To my mind, Heyns has not shown that the procedure adopted by the department was deliberately skewed to prejudice him or to subvert the intention of resolution 7 of 2000.

## **AWARD**

The Respondent’s decision to refuse the Heyns' application for temporary incapacity leave for the period 27 September to 9 November 2007 stands.

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Ursula Bulbring  
12 June 2010