PSCBC
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

IN THE PUBLIC SERVICE CO-ORINDATING BARGAINING COUNCIL

Case No. PSCB 97-09/10

In the arbitration between:

PSA obo PIETERSEN Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES Respondent

ARBITRATION AWARD

DATE OF ARBITRATION	**:**	**3 June 2010**
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VENUE	**:**	**AREA COMMISSIONER'S OFFICE, EMPANGENI**
ARBITRATOR	**:**	**R. LYSTER**
ISSUE	**:**	**INTERPRETATION AND APPLICATION OF COLLECTIVE AGREEMENT, TEMP. INCAPACITY LEAVE.**

BACKGROUND, REPRESENTATION AND ISSUES

The arbitration was held in Empangeni Prison on 3 June 2010. The Applicant was represented by PSA official L. Naidu, and the Respondent by Mr. S. Ndlovu. The issue which I was called upon to consider was the interpretation of a collective agreement, relating to the Applicant's right to temporary incapacity leave (Res. 7 of 2000).

SUBMISSIONS AND COMMON CAUSE FACTS

The following facts were common cause;

1. Applicant had been ill prior to March 2007, and had applied for sick leave and having tendered certificates by a psychologist, she had been granted her normal sick leave.
2. When her sick leave was exhausted, she took further leave, from 1 March 2007, to 5 May 2007, and on her return to work, she made application for temporary incapacity leave in terms of the Resolution 7 of 2000 and specifically in terms of Clause 7.5 thereof.
3. Her application was not accompanied by a psychiatrist's report, as required by the PILIR document (See below).
4. The application for temporary incapacity leave was declined in July 2007, by the Health Risk Manager (see below) because of Applicant's failure to attach a psychiatrist's report.

The above facts are common cause. It is Applicant's version that she was only notified of the fact that her application had been turned down in January 2008. She thereafter consulted a psychiatrist who issued a letter saying that he had been "informed" that at the time of her absence from work in 2007, she had been depressed. She re-submitted her application and this was again declined.

ANALYSIS OF SUBMISSIONS

Clause 7.5 of Resolution 7 of 2000, provides that "An employee whose normal sick leave credits in a cycle have been exhausted and who requires to be absent from work due to disability….**may** be granted sick leave on full pay…."

The Resolution states that the employee may be granted such sick leave **provided that;**

(i) the employee has informed his supervisor that he is ill and
(ii) a relevant medical doctor… has certified such a condition… as a temporary disability.

In order to provide guidance to the parties in the facilitation and implementation of this collective agreement, the Minister has issued a determination on Leave of Absence in the Public Service (July 2008) as well as a determination (April 2009), in the form of the so called **PILIR** (Policy and Procedure on Incapacity Leave and Ill Health Retirement), determined ITO section 3(2) of the Public Service Act of 1994. These documents lay down very clear guidelines as to when and how an employee in the public service will qualify for temporary incapacity leave, as it is referred to in PILILR. The document states expressly that "*Temporary Incapacity Leave (TIL) is not an unlimited number of additional sick leave days at an employee's disposal. TIL is additional sick leave granted* ***conditionally at the Department's discretion****, read with the Policy and Procedure on Incapacity Leave for Ill-health Retirement determined by the Minister for Public Service and Administration in terms of sec. 3(3)(c) of the Public Service Act, 1994 (hereafter referred to as PILIR).*

It provides that the head of department to whom the application is submitted, must refer the application with all the supporting evidence to its Health Risk

Manager in accordance with the PILIR for an assessment and advice on whether the employee's illness justifies the granting of incapacity leave.

Firstly, it is clear that Applicant did not comply with the provisions of the Collective Agreement or with the requirements of PILIR. She failed to attach a psychiatrist's report, and a letter from a psychiatrist nine months later, saying that he was "informed" that she had been ill in March 2007 does not help her.

However, more significantly, the PILIR document also spells out clearly that if the applicant for TIL is not satisfied with the outcome of the application process, he or she is entitled to lodge a grievance in terms of section 35 of the Public Service Act. Accordingly, Applicant has a remedy outside of this forum, and I do not believe that my authority as an arbitrator extends to overriding the decision of the health risk manager, and I cannot therefore make an order as to whether the Applicants are or are not entitled to temporary incapacity leave.

There is some dispute as to whether an arbitrator, who is called upon to interpret and apply a collective agreement, has the power to make a declaratory order or an order sounding in money or some form of compensation. The review in **S A Police Service v Public Service Co-ordinating Bargaining Council & others (2008) 29 ILJ 1989 (LC)** came about after a PSCBC arbitrator found that the SAPS had failed to comply with collective agreements dealing with the procedures to be followed in dealing with applications for incapacity leave in that there was an inordinate delay in dealing with the application and ordered the SAPS to pay compensation to the employee party. Regarding the powers of an arbitrator to grant relief in such circumstances Nieuwoudt AJ made the following findings on review:

> *Neither party referred me to any authority dealing with the relief that may be awarded by an arbitrator in a dispute regarding the interpretation or application of a collective agreement. Section 24 of the Labour*

> *Relations Act is also silent on this issue. Section 193 of the Labour Relations Act expressly deals with competent relief in cases of unfair dismissal disputes or unfair labour practice disputes. Mr Grobler, who appeared for the third respondent, submitted that the relief that ought to be given in a dispute pertaining to the interpretation or application of a collective agreement ought to be the same as the relief granted in unfair dismissal or unfair labour practice disputes. I do not concur. It seems to me that the Act would have provided for this if that was the intention. Furthermore, the fact that part B of Chapter 3 of the Act (dealing with collective agreements) does not expressly provide for relief in disputes about the interpretation and application of collective agreements, is not a casus omission. The normal contractual remedies are available to the parties and there is no reason why these remedies would not adequately protect their rights.*

Having made the findings referred to in the preceding paragraph Nieuwoudt AJ set aside the award on the basis that the arbitrator did not have the powers to award compensation.

This finding is in keeping with the comments made by the learned author Professor John Grogan (Grogan *Workplace Law* (8th Edition) at page 375 where the meaning of "*interpretation or application"* was considered:

> *"A dispute over the interpretation of a collective agreement exists when the parties disagrees over the meaning of a particular provision; a dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to a particular set of facts or circumstances".*

The Applicant has the remedy set out above, i.e. to lodge a grievance in terms of section 35 of the Public Service Act.

DETERMINATION

Applicant's claim is dismissed.

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R. LYSTER

ARBITRATOR

3 June 2010