ARBITRATION AWARD

Panellist: John Cheere Robertson
Case No.: PSCB11-13/14
Date of Award: 3 March 2014

In the ARBITRATION between:

C Madasi
(Employee)

and

Department of Labour: National
(Employer)

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DETAILS OF HEARING AND REPRESENTATION

1 This matter was scheduled for arbitration on 12 December 2013 at the Department of Labour offices in Port Elizabeth. Mr M Randell represented Ms C Madasi (employee). Mr C Skosana represented the Department of Labour (employer). The parties agreed on a written statement of case, see below. The employee submitted their written closing argument on 13 January 2014 and the employer on 24 February 2014.

PRELIMINARY MATTERS

2 Subsequent to the agreement on common cause facts and statement of case, see below, the employer requested that the matter be reopened to afford it the opportunity to lead the evidence of Dr D Baard, the current managing director of the SOMA initiative to testify on why the employee's application was not approved and to give an overview of the medical reports that led to the employee's application for Ill Health Retirement being declined.

3 I requested the employer, via the PSCBC, to make an application in terms of the PSCBC Rules, on notice to the employee, in order to properly consider the matter. No such application has been made and the relevant periods have expired. The employer filed its written closing arguments under cover of its letter dated 30 January 2014, received on 24 February 2014.

ISSUE TO BE DECIDED

4 The issue to be determined is whether the employer complied with Resolution 7/2000 in not approving the employee's application for Permanent Incapacity Leave (PIL) / Ill Health Retirement (IHR) and dependent thereon appropriate relief.

BACKGROUND TO THE ISSUE

5 The parties agreed on a statement of case as follows:

1. *The employer wishes to include comments from the HRM after consultation with them, on the documents handed up, in their closing arguements.*
2. *The employee has been booked off sick, on a periodical basis, as a result of her condition and has been off sick continuously since 2005 to date.*
3. *The various applications for temporary incapacity leave (TIL) long temporary incapacity leave (LTIL) for the period she has been off work are not the subject of this dispute.*
4. *The employee suffers from cervical degenerative disc disease and underwent a surgical procedure to her neck. She currently suffers from depression arising from chronic back and neck pain, (which is the primary cause of her disablement). She also has a generalized anxiety disorder. Her medical condition is set out in greater detail in the various medical reports in Exh. A1-A162).*
5. *This dispute concerns the employee's application for permanent incapacity leave / ill heath retirement which the employer has not granted.*
6. *The first application for PIL / IHR was made 17 August 2007 (A8) and was not approved by the employer as of 8 April 2008 (A26)*
7. *The second application was made 4 November 2011 (A99) and not approved by the employer on 18 May 2012 (A110)*

4 The employee seeks that her application for PIL / IHR be approved, the employer to initiate the process of IHR in terms of the Government Employees Pension Law. The employer seeks that the employee's case be dismissed.

SURVEY OF EVIDENCE AND ARGUMENT

The employee's submissions

5 The employee argued to the effect that the various medical reports submitted by her and the reports obtained from specialists to whom she had been sent at the employer's instance all supported the fact that she was unable to work. Notwithstanding this the HRM had quoted references, from such medical reports out of context and interpreted the medical reports to the effect that the employee was not incapacitated. The employer had failed to apply its mind to the matter and simply relied on the recommendation of the HRM in refusing the employee's application for IHR.

6 The employee also took issue with the time taken by the employer in deciding on her IHR applications. The first application was made on 17 August 2007 and declined on 8 April 2008 (8 months later). The second application was made on 4 November 2011 and declined on 18 May 2012 (6 months later). This delay had unfairly prejudiced the employee.

The employer's submissions

7 The employer argued to the effect that:

7.1 In so far as no evidence was presented of hospitalisation or that the employee had requested intensive management such as hospitalisation or electro convulsive therapy during the 8 years she has been off work this suggested that she did not suffer from a mood disorder. The was nothing to suggest that the employee was compliant to psychiatric medication or that her regime had been monitored or changed to suit her

7.2 The employee had attended on a Counselling Psychologist and not a Clinical Psychologist. Her attendances in this regard over the 8 years were erratic and contradicted her claim of psychopathology

7.3 No evidence was submitted to the effect that the employee consulted a Neurologist/Neurosurgeon for her neck and back pathology or that she attended a pain clinic. There were no MRI scans with regard to her claim of neck pain. Neither was there any evidence of her consulting an Occupational Therapist for her back and ergonomic adaptations to her environment

7.4 Two independent occupational therapists (one of whom was Ms L Strauss) and an independent orthopaedic surgeon were in agreement that the employee was able to return to work subject to certain accommodations. (Ms Strauss reported the employee was able to independently perform a variety of daily tasks, including occupational duties e.g. computer skills and literacy and would benefit form returning to work. Prof. Kaliski's view was that she was functional provided she was allowed to work at her own pace. Prof. Vlok was of the view the employee could perform clerical work.) The employee however never presented herself to the respondent to discuss suitable options

8 The employee had been off work for 8 years, during which period she had received her full salary. It was the employer's view that the employee did not want to work and sought medical boarding desperately.

9 The HRM consisted of professionals who analysed and made decisions on the facts and information at their disposal. The employee's representative, who was not a medical practitioner, could not suggest that the employer blindly followed the HRM recommendations without applying its mind.

ANALYSIS OF EVIDENCE AND ARGUMENT

10 I have made awards on similar facts concerning R 7/2000 and in respect of IHR. In so far as the law, reference to R 7/2000 and arguments are concerned, what follows, will where relevant be similar.

11 PSCBC R7/2000 provides at paragraph 14 that disputes about the interpretation or application of the agreement are dealt with in terms of the dispute resolution procedures of the PSCBC. Interpretation refers to the situation where the parties differ over the meaning of a provision of the collective agreement.[1] "Application" includes whether an agreement applies to the facts in question and "the manner in which the agreement is applied, which includes non-compliance."[2]

12 Resolution 7 of 2000 as amended by PSCBC Resolutions 5 of 2001, 15 of 2002 and 1 of 2007 (Referred to herein as Resolution 7/2000) amongst other things at paragraphs 7.4 and 7.5 cover **normal sick leave**, and **incapacity management** i.e. ***temporary incapacity leave (TIL) and permanent incapacity leave (PIL) / Ill Health Retirement (IHR)*** as follows:

"***Normal Sick Leave:***

(a) Employees shall be granted 36 working days sick leave with full pay in a three-year cycle
(b) The employer shall require a medical certificate from a registered medical practitioner if three or more consecutive days are taken as sick leave
(c) Practitioners shall, for this purpose, include practitioners as defined by the Health Professionals Council of South Africa (Medical and dental practitioners)
(d) An employee shall produce a medical certificate at the request of the employer where a pattern has been established
(e) Unused sick leave credits shall lapse at the end of a three-year cycle"[3]

13 Paragraph 7.5 of PSCBC Resolution 7 of 2000 deals with incapacity management relating to temporary and permanent incapacity in excess of the 36 days normal sick leave. Paragraph 7.5.1 provides for the extension of sick leave in the case where an employee has exhausted their 36 working days sick leave in a particular sick leave cycle and reads as follows:

*"**Temporary Incapacity 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 incapacity 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 incapacity except where conditions do not allow.

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[1] PSA obo Swart v Department of Correctional Services: EC (2006) 27 *ILJ* 653 (BCA), SAMWU v SALGBC [2012] BLLR 334 (LAC) 29 November 2011 [27]

[2] Referred to as the wider approach, see *IMATU obo Bubb & others v SALGBC and others* (SALGBC) HQ 051003 dated 7 August 2012 at [27-28] and authorities cited. And see SAMWU v SALGBC [2012] BLLR 334 (LAC) 29 November 2011 [29], [30], [31]

[3] Paragraph 7.4 of PSCBC Resolution 7 of 2000

(b) The employer shall, during 30 working days, investigate the extent of the inability to perform normal official duties, the degree of incapacity and the cause thereof. Investigations shall be in accordance with item 10(1) of Schedule 8 in the Labour Relations Act of 1995"

14 In the circumstances an employee, who has exhausted their 36 working days sick leave *vide* paragraph 7.4, may be granted additional sick (incapacity) leave (TIL) on full pay where the provisions of paragraphs 7.5.1(a) (i) & (ii) of R 7/2000 are complied with and the employer after investigations, including investigations in accordance with Item 10(1) of Schedule 8 to the LRA, so decides. In this regard R 7/2000 lays down no minimum / maximum period. In terms of PILIR, TIL is divided into TIL less than 30 days and Long TIL i.e. 30 days and more. This however is a requirement of PILIR and not R 7/2000

15 Paragraph 7.5.2 deals with the situation where an employee's incapacity has been **certified as permanent** and reads as follows:

Permanent Incapacity Leave

(a) Employees whose degree of disability has been certified as permanent shall, with the approval of the employer, be granted a maximum of 30 working days paid sick leave, or such additional number of days required by the employer to finalise the process set out in (b) and (c) below.

(b) The employer shall, within 30 working days, ascertain the feasibility of:
(i) alternative employment; or
(ii) adapting duties or work circumstances to accommodate the incapacity

(c) If both the employer and the employee are convinced that the employee will never be able to perform any type of duties at her or his level or rank, the employee shall proceed with application for ill health benefits in terms of the Pension Law of 1996*."*

(emphasis added)

16 R 7/2000 is amplified by the Policy and Procedure on Incapacity Leave and for Ill Health Retirement (PILIR) determined by the Minister for Public Service and Administration in terms of section 3(3) of the Public Service Act 1994[4].

17 In summary, where an employee whose incapacity has been certified as permanent, they are granted a maximum of 30 working days paid sick leave, which may be extended, if necessary, for the employer to finalise its investigations. This is limited to an additional 30 days in PILIR, although no additional maximum is set in R 7/2000 (however given the fact that the employer is without its full staff complement and bearing in mind issues of service delivery and optimal utilization of financial resources, the employer is required to act expeditiously) to enable the employer to ascertain the feasibility of:

- alternative employment[5]
- adapting the employee's duties or work circumstances to accommodate the incapacity[6]

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[4]. PILIR, in addition to adding detail in the form of time periods, structures, reporting, nature of and submission of documents and reference to the health risk manager HRM, a company of multi disciplinary medical experts, specializing in occupational medicine, appointed by the **dpsa** and National Treasury: Pensions Administration, who assess and advise the employer on employees' applications for inter alia Ill Health Retirement, the employer being responsible for the final decision (see e.g. PILIR paragraph 8). PILIR does not necessarily fall within the ambit of jurisdiction of the PSCBC, however it provides the context for the consideration of applications for IHR in terms of R 7/2000 and in the instant case, the employer is required, at the very least, to comply with its own policy documents relative to PIL / IHR.

[5] Para 7.5.2 (a) & (b)(i) R 7/2000

[6] Para 7.5.2 (a) & (b)(ii) R 7/2000

Where both employer and employee are convinced the employee will never perform any type of duties at her level or rank, the employee shall proceed with an application for ill health benefits / IHR in terms of the Pension Law 1996. PILIR provides that, subject to the employer informing the employee in writing of its decision and if declined furnishing the reasons, *"[o]nce it has been decided that an employee must be retired on the grounds of ill health, the employer must, without delay, submit the prescribed forms…to the GEPF for instituting the payment of ill health benefits".*

18 In *PSA obo Liebenberg v Department of Defence & others (2013) 34 ILJ 1769 (LC)* the Labour Court per Steenkamp J reviewed and set aside an arbitration award in which it had been held that the PSCBC did not have jurisdiction to hear a dispute concerning the interpretation or application of a collective agreement relating to temporary incapacity leave.

19 The employer had cross – reviewed relying on *Minister of Safety & Security v SSSBC & others (2010) 31 ILJ 1813 (LAC) (SSSBC)* arguing that the interpretation and application of R7/2000 was only "an issue in dispute" and that the real dispute was whether its decision to refuse the employee's application for Temporary Incapacity Leave was fair, in which event the PSCBC did not have jurisdiction. The Labour Court considered the judgements in *SSSBC* & *Johannesburg City Parks v Mphahlani NO & others (2010) 31 ILJ 1804 (LAC)* in which the court distinguished between "a dispute" and an "issue in dispute" and found that where the interpretation or application of a collective agreement was merely an issue in dispute which had to be dealt with in order to resolve the real dispute, the bargaining council did not have jurisdiction. **However, the court noted that these decisions had to be reconsidered in the light of the LAC judgement *in PSA obo De Bruyn v Minister of Safety & Security & another (2012) 33 ILJ 1822 (LAC*) which dealt with the issue of granting Temporary Incapacity Leave (PSCBC Collective Agreement R7/2000), and was the most recent decision of the LAC on the point and by virtue of the principle of *stare decisis* the Labour Court was bound thereby**.[7]

20 "That dictum[8] is directly applicable to the facts of the matter before me and I am bound by that decision. Although the LAC in De Bruyn did not refer to its earlier decisions in City Parks and SSSBC, it appears to me that De Bruyn

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7 The same would apply in respect of PSCBC arbitration

8 ***PSA obo Liebenberg v Department of Defence & others*** (2013) 34 ILJ 1769 at [37] as follows: *"That dictum*

"[31] The appellant's complaint clearly concerns the denial of incapacity leave. The alleged right the appellant seeks to assert derives from the provisions of the PSCBC resolution as the Labour Court, correctly in our view, found. The resolution deals with leave of absence and what steps an employee should take in case of a dispute arising regarding attendant matters. There is no doubt that the aspect of leave of absence is an issue falling squarely under the PSCBC resolution. In deciding whether the relief sought ought to be granted the court a quo had to have regard to the provisions of the resolution.

[32] Therefore, the court a quo (although of the opinion that the application before it was in terms of S 158(1)(g) of the LRA) correctly proceeded to consider whether the LRA required the kind of dispute, which existed between the appellant and the respondent to be resolved through arbitration. The court concluded that leave, including incapacity leave and temporary incapacity leave at the respondent's organization, is governed by the provisions of Resolution 5 of 2001 of the PSCBC, which is a binding collective bargaining agreement. This means that the dispute between the parties was required to be submitted to arbitration as it concerned the application and/or interpretation of the provisions of the PSCBC resolution.

…

[34] It follows therefore that where an employee...is dissatisfied with a decision by the employer with regard to the issue of leave of absence...his remedy lies in the provisions of the resolution. It follows that the appellant is confined to its remedy in terms of s 24 of the LRA." (Public Servants Association of SA obo De Bruyn v Min of Safety & Security & Others (2012) 33 ILJ 1822 (LAC)).

See also UASA & another v BHP Billiton Energy Coal SA Ltd & another (2013) 34 ILJ 2118 (LC),

is more directly applicable to the facts of the case before me and thus to the case that served before the arbitrator. ***De Bruyn makes it clear that, in a case such as the current one, where the employee and her union are dissatisfied with the employer's refusal to grant temporary incapacity leave, and the procedure for granting or refusing TIL is governed by the collective agreement of the bargaining council, her remedy lies in the referral of a dispute over the application of the resolution to the bargaining council in terms of s 24 of the LRA. I also take into account that De Bruyn is the most recent decision of the LAC on this point."***[9]

21 The same would apply in the case of PIL / IHR. In the circumstances where an employee is dissatisfied with the decision of an employer concerning the interpretation or application of a collective agreement, the employee is confined to the remedy in terms of s 24 (read with 32 and 33 in the case of a Bargaining Council) of the LRA and cannot take the employer's decision on review to the Labour Court in terms of S 158(1)(*h*). The employee has formulated her claim as one relating to the interpretation and application of a collective agreement[10], namely R7/2000 and essentially complains of non-compliance by the employer with the collective agreement.

22 Accordingly the appropriate forum for the employee (a public servant) to challenge the employer's decision in refusing the grant of TIL / PIL / IHR comprehended in R 7/2000 is the PSCBC. In the circumstances I am satisfied, given the recent and binding case law and the nature of the employee's dispute, that the PSCBC has jurisdiction to entertain the employee's claim[11].

23 Failure by the employer to exercise its discretion properly i.e. take into account relevant information, follow laid down procedures, act within the framework of the collective agreement and provide reasons[12], will invite judicial scrutiny for want of compliance with the collective agreement. The Labour Court has recently held, that an employer's decision, arising out of the exercise of its discretion in terms of a collective agreement, may not apply **retrospectively**, as to do so is an **unreasonable and arbitrary exercise of discretion with unfair consequences** to an employee[13].

24 In the circumstances the discretion to grant or refuse TIL / PIL, must be exercised properly, expeditiously and fairly (e.g. it should not have a retrospective effect)[14], be accompanied by reasons[15] and be in accordance with the

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[9] ***PSA obo Liebenberg v Department of Defence & others*** *(2013) 34 ILJ 1769 (LC)*

[10] **R 7/2000 and see *PSA obo Liebenberg v Department of Defence & others*** *(2013) 34 ILJ 1769 (LC)* [29]

[11] ***PSA obo Liebenberg v Department of Defence & others*** *(2013) 34 ILJ 1769 (LC)* and see *Spies v National Commissioner SAPS* [JOL] 21525 (LC) [22] referred to in *Janse Van Rensburg and others v Minister of Safety and Security* [2009] 4 BLLR 400 (LC) [25]

[12] See Valuline & others v Minister of Labour & others (2013) 34 *ILJ* 1404 (KZP) [54], [55], [56], [57].

[13] Dealing with the exercise of the employer's discretion in PSCBC Resolution 7/2000 (As amended by R 5/2001, R 15/2002 and R 1/2007). See ***PSA and HC Gouvea v PSCBC, Commissioner R Lyster NO and Department of Land Affairs*** (D751/09) [2013] ZALCD 3 (26 February 2013) at [20] "The limited facts of this matter suggest that on 24 June 2008 the third respondent had finalised all investigations and had made its decision which it communicated to Ms Gouvea by a letter it issued to her on that day. She had to report back at work on 1 July 2008. From the given facts, as I understand them, a report was issued by the Health Risk Manager declining the application for a periodical temporary incapacity leave for 4 December 2007 to 30 June 2008. This report sought to have a retrospective effect. The consequence of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of discretion with unfair consequences to an employee. Nowhere in clause 7.5 of Resolution 7 of 2000, is there a suggestion that the employer may not grant further sick leave after the lapse of a 30-day period. On the contrary, as investigations shall be in accordance with item 10 (1) of Schedule 8 of the Act, a further sick leave period may be granted to the employee."

[14] See ***PSA and HC Gouvea v PSCBC, Commissioner R Lyster NO and Department of Land Affairs*** (D751/09) [2013] ZALCD

[15] See Valuline & others v Minister of Labour & others (2013) 34 *ILJ* 1404 (KZP) [54], [55], [56], [57].

provisions of R 7/2000, which in this instance (PIL) requires that the employer (**"shall") within 30 days [or such further number of days required] ascertain the feasibility of alternative employment or adapting the work circumstances to accommodate the employee's incapacity** (See paragraphs 7.5.2 (a) & (b) of R 7/2000.

25 The employee suffers from cervical degenerative disc disease (notwithstanding an operation to her neck), depression arising from chronic back and neck pain (which is the primary cause of her disablement) and a generalized anxiety disorder.

26 The employee's first application for IHR submitted 17 August 2007 was declined 8 months later on 8 April 2008. The second application for IHR made 4 November 2011 was declined 6 months later on 18 May 2012. The prescribed time period in R 7/2000 is 30 working days or such extended period as required by the employer, no indication has been given of whether additional time was required by the employer.

27 The general tenor of medical opinions submitted by both the employee's and employer's medical practitioners is to the effect that the employee is unable / incapacitated to such a degree that she cannot resume work. e.g.:

07 November 2006: *"**Psychiatric Diagnosis**:*
Axis I: Major depressive disorder-Moderate severity Generalised anxiety disorder
Axis II: Defer
Axis III: Chronic Back pain unresponsive to treatment.
Axis IV: Social stressors
Axis V: Global assessment of functioning score of 50. (A64)
…
Assessment of Functional Impairment
…The pain would certainly impair her ability to function in her position as a clerk. She would not be able, at this stage, to perform light manual or heavy physical work. Her depressive and anxiety symptoms would also impair her ability to perform sedentary work and this would be exacerbated by the fact that she still experiences pain at rest.
…" (It is the psychiatrist's view that the employee is partially compliant in respect of the anti depressant medication, due to side effects, that this should be attended to and if she does not respond to conventional anti depressant therapy consideration be given to augmenting this with a mood stabilizer e.g. lithium (A65))
*"**Prognosis**:*
…her prognosis for recovery is poor. The major depression and anxiety occurred secondary to her severe back pain and it appears clear from Dr Azhar's report that there is little likelihood of this pain being relieved. I could find no evidence of any secondary gain factors in the employee's application form for disability benefits."(A65)
Dr D Schaefer Specialist Psychiatrist

02 August 2007: *"Secondly I would recommend that she be boarded based on her inability to work due to her underlying autoimmune diseases and muscular skeletal symptoms" (A8).* Prof. R Dunn. Consultant Spinal and Orthopaedic Surgeon.

09 August 2007: *"Pain neck in interscapular region. Numbness both upper limbs. Diagnosis cervical degenerative disc disease".* (*A8) "Progressively increasing pain for many years" (A9*). *"No working ability" (A15). "For permanent boarding" (A15).* JA Azhar Neurosurgeon

17 August 2007:	*"Depression arising from chronic back and neck pain which is the cause of disablement. Generalised anxiety disorder" A17). "She is not capable of working" (A24).* Dr I Taylor, Psychiatric Specialist
07 August 2008	*"The assessor is of the opinion the claimant's current condition has a negative impact on all the areas of her life, including work, activities of daily living, social life, family life and leisure time. However, in the opinion of the assessor this negative impact has not yet caused permanent impairment or disability in all areas of the claimant's life, and that the claimant is still and could still be functional in most areas of her life, apart from work, should the symptoms of her condition be minimized or controlled.* *The assessor is of the opinion the claimant would not currently be able to return to her old work, or any other work, successfully. …".* L Strauss. Occupational Therapist.
04 November 2011	"*Psychogenic pain disorder. Major depression. Generalized anxiety disorder" (A92) "She can not work due to illness" (A95).* Dr I Taylor, Psychiatric Specialist (I note that here is a change in the medication from that at A21 to that at A96)
09 November 2011	*"In view of her medical condition, the severe and chronic back pain that has aggravated major depression, I would like to recommend that Ms Madasi is not able to function in the open labour environment". (A106).* W Lupuwana. Counselling Psychologist
16 May 2012	"*Major depression. Psychogenic pain disorder. … She initially presented after having had a neck operation. The surgeon recommended permanent disability. She has had unrelenting pain disorder since then and can not return to work." (A141)* "*She can not work due to illness" (A150).* Dr I Taylor, Psychiatric Specialist (I note that here is a change in the medication from that at A96 to that at A145)
18 July 2012	*"In view of her medical condition, the severe and chronic back pain that has aggravated major depression, I would like to recommend that Ms Madasi is not able to function her occupational duties". (A155).* W Lupuwana. Counselling Psychologist
23 October 2013	"*… Cervical spine X rays showed extensive degeneration of the vertebral disc between C6-C7. MRI scan of the lumbar spine was largely unremarkable. She has been diagnosed with axial lower back pain. This patient also has diabetes mellitus, hypertension and increased cholesterol in her blood. She is receiving treatment for all these ailments and being followed up on a regular basis. She is not in a position to continue her work."* Dr Z Wopula. Specialist Neurosurgeon

28 There are various issues of concern with the manner in which the employer has dealt with the employee's applications for ill health retirement, of which the following two serve as examples:

28.1 The HRM recommendation.

HRM required the employee to attend various medical practitioners for purposes of a second opinion, two of which were handed up in the bundle of documents. The independent psychiatrist report at A63 to A65 (Dr D Schaefer) apart from a comment that the employee's treatment for her depression was inadequate and that consideration should be given to possible other treatments which if not successful should be augmented by the inclusion of a mood stabiliser such as lithium, in context, finds that the employee's prognosis is very poor and that he was unable to find any evidence of secondary gain factors in the employee's application.

The report by the occupational therapist (Ms L Strauss A41-62), to whom the employee was also referred by the employer, deals comprehensively with the employee's condition and abilities. Ms Strauss is of the view that by virtue of the employee's condition, both physical and psychiatric in nature, that it would not be viable to make adaptations or otherwise accommodate her in the workplace. She too did not become aware of any secondary gain factors in the employee's wish to be declared unfit for work. She concludes that if her symptoms are minimized or controlled the employee should be able to function in most areas of her life, **apart from work**, and in her opinion the employee could **not "currently be able to return to her old work, or any other work, successfully**." The HRM's interpretation of Ms Strauss's report to the effect that she was of the view that it would be beneficial for the employee to return to some kind of work activity (A124) is accordingly misplaced.

At A126, page 13 of the HRM report dated 11 May 2012 the following is recorded:
"Accordingly, it is not only our fervent recommendation to repudiate this request for ill health retirement, but we also, again, beseech the employer to terminate the employee's services, as no employer should have to tolerate absenteeism to the extent that Ms Madasi has shown, especially in a case such as this where the employee appears to have not the slightest intent to mitigate her absenteeism."

The application for IHR that resulted in the HRM's report dated, 11 May 2012, part of the conclusion of which is recorded above, was made on 4 November 2011, just short of 6 months earlier. In addition the report does not follow the recommendation of Ms Strauss and does not refer to that of Dr Schaefer (It is noted that Dr Schaefer's report is dated 7 November 2006. The point however is that if the HRM had relied on the advice of its own independent specialists, it may not have been driven to beseech the employer to act as set out above. In addition the fact that, as is apparent, the management of the employee's sick / incapacity leave has been poor, does not appear to feature in HRM's advice.

28.2 The period of time taken to respond to the employee's applications for Ill Health Retirement submitted 17 August 2007 & 4 November 2011 (8 months and 6 months respectively)

In order to properly manage applications for sick and incapacity leave including PIL / Ill Health Retirement (IHR) in accordance with R 7/2000 and to control and streamline procedures to expedite such processes, the department of Public Service and Administration (**dpsa)** introduced PILIR. Provision was made for training and for the expeditious management of incapacity leave and the inclusion thereof in the performance agreements of the Heads of Department and the Senior Management Service[16].

Paragraph 7.5.2 (a) of R 7/2000 requires that the employer grant the employee a maximum of 30 working days or such additional days as it requires to address the issues in 7.5.2 (b) and (c) i.e. deciding on alternative work, adapting duties or the employee to proceed with an application for ill health benefits. The time taken in respect

[16] See e.g. dpsa circular addressed to Heads of all departments and Provincial Administrations on the implementation of PILIR issued by the Director general dpsa dated 5 December 2005.

of the employee's applications are set out above. The employee has been off work since 2005 and is currently off sick. She has received payment of her salary for the period in question.

By no stretch of imagination can it be argued that the employer has complied with the time frames laid down in R 7/2000 in this regard. The employee's situation has not been resolved during a period of in excess of 8 years! She is still on sick leave by virtue of her medical condition, to the detriment of the fiscus, service delivery, and herself. During this period, the employee, as confirmed by the medical reports of her doctors has been incapable of working. It is apparent from the various reports, that the employee is incapable of working and that her applications have been poorly managed

29 In ***PSA and HC Gouvea v Commissioner R Lyster NO and Department of Land Affairs*** (D751/09) [2013] ZALCD 3 (26 February 2013), the Labour Court in dealing with the employer's failure to comply with the time period of 30 working days in paragraph 7.5.1(b) for TIL, held that the fact that the decision had a retrospective effect ***"amounts to an unreasonable and arbitrary exercise of a discretion with unfair consequences to an applicant"***. Paragraph 7.5.2 (b) which deals with PIL / IHR requires a finalisation of the "processes" within 30 days or such additional number of days required. The periods between the employee's submission and outcome of her applications for IHR have been in excess of 8 months and 6 months respectively. No additional days were requested and accordingly the case law is equally applicable to the situation in question, and the employer's delay herein also results in unfair consequences to the employee.

30 In my view the failure of the employer, who is responsible overall for the management of incapacity leave, to deal with the employee's applications for Ill Health Retirement appropriately and within the time frames, coupled with the fact that the employee has been incapacitated / has not worked for the last 8 years (without her incapacity being effectively and timeously managed as required by R 7/2000), has severely prejudiced not only the employee but also the fiscus, the employer and service delivery and constitutes a failure by the employer to comply with the provisions of R 7/2000 particularly in regard to the employee.

31 Section 138(9) of the Labour Relations Act 66 of 1995 provides that:

"The commissioner may make any appropriate arbitration award in terms of this Act, including but not limited to, an award-

(a) that gives effect to any collective agreement;

(b) that gives effect to the provisions and primary objects of this Act;

(c) that includes or is in the form of a declaratory order"

Awards may vary, depending on the matter at hand[17].

32 In addition to the comments above it is apparent that for all practical purposes the employer by its conduct (i.e. allowing the employee to remain on paid sick leave since 10 September 2008), in addition to the employee, is

[17] Self evidently any relief that may be applicable will vary / be influenced by the nature of the collective agreement in question

convinced that the employee will never be able to perform any type of duties at her level or rank. In the circumstances I make the following award.

AWARD

33 The employer (The Department of Labour) failed to comply with the provisions of PSCBC Resolution 7/2000 in declining the employee (Ms C Madasi's) applications for Ill Health Retirement.

34 The employee Ms C Madasi PERSAL No. 16077091 is entitled to proceed with an application for Ill Health Benefits in terms of the Pension Law of 1996

35 The employer (The Department of Labour) is directed to initiate the process of Ill Health Retirement / Ill Health Benefits in terms of the Pension Law of 1996, in respect of the employee within 30 days of the date of this award.

36 There is no order as to costs

John Cheere Robertson
PSCBC Panelist
Sector: Public Labour