



PANELIST: ADVOCATE J P HANEKOM

CASE NO: PSCB258 -13/14

AWARD DATE: 5 MARCH 2014

In the matter between:

**SAPU obo ODENDAAL**

**Applicant**

and

**SOUTH AFRICAN POLICE SERVICE**

**Respondent**

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**ARBITRATION AWARD**

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**DETAILS OF THE HEARING AND REPRESENTATION:**

1. This matter was set down for arbitration on 4 February 2014 concerning a dispute about the interpretation and/or application of a collective agreement (Resolution 7 of 2000 – hereinafter referred to as the “Resolution”). Mr. Gerber, union official of SAPU represented the Applicant. Mr. J. Van Rensburg, of Legal Services within the Department represented the Respondent. Both parties agreed and requested to argue the case on paper and to submit written argument respectively on 12 February 2014 and 19 February 2014. I would then issue my award on or before 5 March 2014.

**ISSUE TO BE DECIDED:**

2. Whether the Respondent correctly applied and interpreted the Resolution.

**HISTORICAL BACKGROUND:**

3. The Applicant is employed as a Sergeant by the Respondent.
4. The Applicant whilst on duty was involved in a motor vehicle accident on 23 April 2010. As a result thereof the Applicant suffered certain consequences and was booked off sick for the period 3 May 2010 to 21 May 2010. During this period the Applicant was also admitted to hospital as recommended by her psychiatrist Dr. M.F. Williams as she was diagnosed with post traumatic stress disorder and major depression. According to the Applicant she was driving the Government vehicle when she knocked over a pedestrian (child) who crossed the street in front of the Applicant's oncoming vehicle. The child subsequently died of the impact. This caused the Applicant to suffer from post traumatic stress. The incident according to the Applicant was supposed to be considered as an injury on duty, but instead the Applicant used her normal sick leave during this illness.
5. As a consequence thereof the Applicant exhausted her sick leave and applied for Temporary Incapacity Leave (TIL) for the period 22 June 2011 to 11 July 2011 (13 days). On or about 2 September 2011 Major-General H.S. Burger disapproved the Applicant's TIL application on the basis that the Applicant did not manage her sick leave well. The Applicant thereafter registered a grievance and made representations to the Provincial Commissioner: Western Cape on or about 29 September 2011. No feedback was received and the Applicant again made a follow-up enquiry (appeal) on or about 22 March 2012 to the Provincial Commissioner: Western Cape for a progress report, to no avail.
6. At the end of November 2012 the Applicant noticed on her salary advice that the employer started to deduct money from her salary in respect of leave without pay. After further enquiry the Applicant received a copy of the final disapproval of her TIL by the Provincial Commissioner: Western Cape.
7. According to the Applicant she did not abuse her sick leave as she still had 14 days

left from the previous cycle. In the present sick leave cycle she exhausted her sick leave due to the trauma caused by the motor vehicle accident.

8. According to the Applicant's appeal to Provincial Commissioner: Western Cape to reconsider the TIL application, it appears that the Applicant became seriously ill and was hospitalised after she was diagnosed with diabetes and became unfit to work.

#### **ARGUMENT BY THE APPLICANT:**

9. I have decided to summarise the Applicant's argument as far as I consider relevant for the purpose of my award.
10. It was the Applicant's argument that the Respondent did not apply its mind to the TIL application in terms of paragraph 7.5.1 (b) of the Resolution. It was quite evident that the Applicant did manage her sick leave well according to the Applicant's sick leave history. Further the Respondent based its decision not on medical reasons as required by paragraph 7.5.1 (b) of the Resolution.

#### **ARGUMENT BY THE RESPONDENT:**

11. Again I have again decided to summarise the Respondent's argument as far as I consider relevant for the purpose of my award.
12. It was the Respondent's argument that the Applicant did not prove a *prima facie* case that she has a right to relief. John Van Rensburg for the Respondent cited case law in support of his argument.
13. The Respondent therefore submitted that according to the Respondent's discretion the Applicant did not qualify for TIL.

#### **ANALYSIS OF THE ARGUMENT:**

14. I decided to focus only on those issues I consider relevant.

15. It is apparent from paragraph 7.5.1 (a) of the Resolution that the Respondent has discretion to grant TIL under certain conditions. It is further trite law that the Applicant does not have an automatic right to TIL and will have to show a *prima facie* case in that regard according to the case law cited by the Respondent.
16. The issue before me is paragraph 7.5.1 (b) of the Resolution which reads as follows: *“The employer shall, during 30 working days, investigate the extent of inability to perform normal official duties, the degree of the inability and the cause thereof. Investigation shall be in accordance with item 10(1) of Schedule 8 ...”* (my italics). To my mind therefore the employer has a duty to investigate once the requirements in paragraph 7.5.1 (a) are met. It is also so that an employee cannot be entitled to TIL for ever and ever and for unreasonably long periods. It is my understanding of the case law cited by the Respondent that if an employee is ill and unfit to work it does not automatically give the Applicant the right to TIL. The employment relationship is built on *quid pro quo* (something for something). That means that the employee is paid a salary to perform a certain task or job. That is why reference is made to item 10 (1) of Schedule in paragraph 7.5.1 (b) of the Resolution. Item 10 (1) deals with dismissals for incapacity. If an employee is not fit for the job due to medical reasons he or she may be dismissed for incapacity due to medical reasons, other than ill health retirement. Therefore, if an employee exhausted his or her sick leave credits the employee may apply for TIL, which the employer “may” grant or refuse.
17. I am limited to the written submissions and the common cause documentary evidence submitted by the parties and therefore did not have the opportunity to have a full apprehension of the merits of the case.
18. It appears from the common cause documentary evidence that Deputy Provincial Commissioner, H.S. Burger at the office of the Provincial Commissioner declined the Applicant’s TIL application due to the fact that the Applicant did not manage her sick leave well. It is apparent from the undisputed documentary evidence that the Applicant was involved in a motor vehicle accident that caused her to be off sick during 2010. Applicant exhausted her sick leave credits because of that. This was not contested by the Respondent in it written argument.
19. According to my calculation of the Applicant’s sick leave record she took 20 days sick leave during 2011. It is unclear when the Applicant’s sick leave cycle started in 2011. Be it as it may, the 20 days referred to includes the 13 days of the TIL application. It further appears from the documentary evidence that the Applicant’s TIL application

was not submitted to the Health Risk Manager (HRM) for its recommendation and that the Respondent itself decided to decline the Applicant's TIL application, because it was of the view that the Applicant abused her sick leave. The Applicant on the other hand also did not present detailed medical evidence submitted as part of her TIL application to illustrate her incapacity and extent thereof. In the light of limited written argument and in absence of detailed medical evidence I cannot simply infer that the Respondent did exercise its discretion reasonably. After consideration of documentary evidence and submissions made by the parties, as well as the fact that the Applicant was hospitalised and that she did not abuse her sick leave, I find that the Respondent should review the Applicant's TIL application.

**AWARD:**

20. In the premises I make the following award:

- (1) I find that the Respondent did not exercise its discretion reasonably in terms of paragraph 7.5.1 (b) of the Resolution. Therefore the Respondent is ordered to review the Applicant's TIL application for the period (22 June 2011 to 11 July 2011- 13 days) and to stop any further deductions from the Applicant's salary in that regard. The Applicant must resubmit her TIL application with the necessary detailed medical evidence to the Respondent on or before **24 March 2014** for the Respondent's Health Risk manager to consider.
- (2) I make no order as to costs.



ADV J P HANEKOM