ARBITRATION AWARD

Panelist: John Cheere Robertson
Case No.: PSCB532-13/14
Date of Award: 22 May 2014

In the ARBITRATION between:

MA Bezuidenhout
(Employee)

and

Department of Health: Eastern Cape
(Employer)

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DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for hearing on 11 April 2014 at the Department of Health, Livingstone Hospital, Port Elizabeth. Mr M Randell an attorney represented Mr MA Bezuidenhout (employee). At the time the employer's representative (Mr Qwayiza) who was dealing with this matter was booked off sick and Mr MC Kolweni represented the Department of Health EC (employer). A provisional narrowing of the issues was prepared and the parties' representatives agreed to meet at a mutually agreeable time and place on or before 22 April 2014 to settle the narrowing of issues, common cause and stated case. The parties submitted written closing arguments by 29 April 2014.

ISSUE IN DISPUTE

2 The issue to be determined is whether the employer complied with Resolution 7/2000 in refusing the employee's application for Ill Health Retirement (IHR) and dependent thereon-appropriate relief.

BACKGROUND TO THE ISSUE

3 The parties agreed on the following as common cause and which forms the background to this dispute:

1 "This dispute concerns the employee's application for IHR, which the employer has not granted, see below.

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 March 2006 to date during which period she has submitted applications for TIL.

3. The various applications for temporary incapacity leave (TIL) for the period she has been off work are not the subject of this dispute.

4. The employee suffers from and has been diagnosed with Major Depression and generalized anxiety disorder by Dr S Prinsloo (Treating Psychiatrist) (A37). Major depression is the main diagnosis and cause of her incapacity as more fully detailed in Dr Prisloo's full report at A50.

5. The employee's treatment includes psychiatric medication and psychotherapy (Dr Isobel Marais, Clinical psychologist (A49) and was hospitalised (17 June 2008) see (A40).

6. The employee applied for IHR on 28 July 2009 (A45), the outcome of which was on 28 July 2011 (A52) in terms of which it was declined. The Health Risk Manager's (HRM) report is dated 29 November 2010 (A55) and recommends the employee's IHR be declined

7. Over the period 2 November 2009 to 4 May 2012 (A79 to A99) the applicant submitted various application for TIL, which were all declined as set out in the documents (A79 to A99). The letters declining the TIL applications further required the employee to return to work within 5 working days. However she was unable as she was again booked off sick by her treating, psychiatrist. Subsequent applications for TIL e.g. A135 although submitted by the employee have not been responded to as at the date hereof. A167 is the conditional approval for the employee's latest TIL application.

8. The employee's supervisor was notified in accordance with Item 7.5 of R 7/2000 of the employee's incapacity in respect of the applications above. The employee's supervisor has at all material times been informed and aware of the employee's illness / incapacity, in respect of her absence from work, which absence has been covered by a medical practitioner's certificate

9. The employee was granted conditional incapacity leave by the employer subject to the advices of HRM and decision thereanent of the employer on the application for incapacity leave in question

10. Dr Prinsloo the employee's treating psychiatrist referred the employee to Laura Melim Occupational Therapist for assessment and her report appears at (A148)

11. Each application for TIL and the application for IHR was supported by the required medical certificates and the Psychiatrist, Dr Prinsloo completed Part C of the pro forma for such applications

12. The employer / HRM apart from submitting the recommendation against IHR (see above) to the employer did not clinically examine the employee or refer the employee to another medical practitioner / specialist for a second opinion

13. The employer has not proceeded in accordance in terms of 7.5.2 (b) of R 7/2000, with a view to ascertaining alternative employment or adapting her work duties or work circumstances to accommodate her disability ***within 30 working days, or such additional days as required by the employer to finalise the process.***

14. *The employee was instructed to return to work within 5 working days of the letter in question, see above. The employee was however unable to return to work as she was booked off sick by her treating doctor. The employee subsequently made further applications for TIL*
15. *The employee was granted conditional approved temporary incapacity leave for the period 20 January 2014 to 18 June 2014 on 9 January 2014 (A167-168). The employee has however also received a letter seeking to invoke section 17 (5)(a)(i) of the PSA and threatening to charge her with misconduct (A169 dated 20 March 2014)*
16. *The employee is convinced that she will never be able to perform any type of duties at her level or rank and wishes to proceed with an application for ill health benefits in terms of the Pension Law of 1996 / PIL / IHR*
17. *Currently the applicant is still under the care of Dr Prinsloo, has been off work (sick) in addition to the above periods and continues to submit regular medical certificates covering her absence.*
18. *The employer stopped payment of the employee's salary as from 1 September 2011, since when no further salary payments have been.*
19. *The employer did not consult the employee prior to the stopping of salary*
20. *The employee's annual remuneration / notch at the time (1 September 2011) R 210 360.00"*

4 The employee seeks that her application for IHR be approved, the employer to initiate the process of IHR in terms of the Government Employees Pension Law and refund / payment of stopped salary. The employer seeks that the *status quo ante* remain

SURVEY OF EVIDENCE AND ARGUMENT

The employee's submissions

5 The employee a professional nurse employed in the intensive care unit (ICU) with 32 years experience argued to the effect that the conditions in her workplace, i.e. short staffed, loss of patients, very often acting without the guidance of doctors, had over time led to her condition. Notwithstanding that she was under the care of a psychiatric specialist, was on psychiatric medication and attended psychological counseling her condition had not improved and she was unable to continue working. She had been off work since 2006 and was currently booked off duties until June 2014.

6 While off sick she had made various applications for incapacity leave, which had been declined. Her application for IHR, the subject of this dispute, which she submitted on 28 July 2009 (A45), was declined two years later on 28 July 2011. Her grievance (A163) in this regard did not remedy the situation.

7 It was the employee's argument that the Health Risk Manager (HRM) and by extension the employer, had not considered the various medical and psychiatric reports from which it was patently obvious that she was unable to work. That the delay in responding to her application for IHR had prejudiced her. The decision of the HRM / employer, considering the content of the medical reports, not to recommend / grant her IHR was irrational, irregular and unfair. The HRM had come to its decision contrary to the finding of the employee's specialist psychiatrist Dr Prinsloo without seeking a second opinion and or clinically examining her. In addition the reference by HRM to a supposed finding by Dr Prinsloo, that **she could perform tasks such as operate heavy machinery and carry heavy weights**, which in HRM's opinion "required cognitive ability e.g. thinking clearly and making decisions" was not only surprising but also nowhere to be found in Dr Prinsloo's reports.

8 The employee contended that she cannot work and that the medical reports including that of Dr Prinsloo unequivocally indicated this. In addition and in view of her incapacity, "*major depression (severe recurrent)"* (A37), that she suffered from *"severe memory impairment causing functional impairment. Concentration very poor. Disorganised. Poor adaptability"* (A40) she considered herself at risk in the event she had to make a decision concerning a patient in ICU in that she may place the patient's life at risk.

The employer's submissions

9 The employer argued to the effect that the time period within which a decision was rendered on an application for incapacity leave or IHR had never been a factor. In so far as the referral of the employee for a second opinion, this in terms of PILIR, would be identified by the HRM who would advise the employer accordingly. The employer had complied with its obligations and informed the employee of the outcome of her application and advised her to return to work. On her failure to return to work there was no obligation on the employer to continue paying her salary.

ANALYSIS OF EVIDENCE AND ARGUMENT

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

11 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 covers **normal sick leave**, and **incapacity management** i.e. **temporary incapacity leave (TIL) and permanent incapacity leave (PIL)** including **Ill Health Retirement (IHR)**. 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 **(dpsa)** in terms of section 3(3) of the Public Service Act 1994[1]. PILIR was introduced by the department of Public Service and Administration (**dpsa)** in order to guide departments 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. 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 Service2.

12 Paragraph 7.4 of Resolution 7 of 2000, as amended by PSCBC Resolutions 5 of 2001, 15 of 2002 and 1 of 2007 (Resolution 7/2000) deals with normal sick leave and provides as follows:

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[1] 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 incapacity relief, the employer being responsible for the final decision. PILIR *inter alia* emphasizes that TIL is not an automatic entitlement but is granted at the discretion of the employer. While PILIR does not necessarily fall within the ambit of jurisdiction of the PSCBC, it provides the context for a consideration of applications for incapacity leave / IHR and in the instant case, the employer is required, at the very least, to comply with its own policy documents.

[2] 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.

"***Normal Sick Leave:***

(a) Applicants shall be granted 36 working days sick leave with full pay in a three-year cycle

(b) The respondent 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 applicant 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"

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 and Ill Health Retirement (IHR).

14 PSCBC Resolution 7 of 2000, par 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 as follows:

*"**Temporary Incapacity Leave:***

(a) An applicant 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 applicant 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.

(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"

15 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 (LTIL) i.e. 30 days and more. This however is a requirement of PILIR and not R 7/2000

16 Para 7.5.1(a) of R 7/2000 provides that an employee "**may**" be granted sick leave on full pay, in this case TIL. The word "may" signifies that the grant is discretionary. Read with paragraph 7.4 an employee's entitlement to sick leave is limited to 36 days in a 3 year cycle and any further paid sick leave, referred to as temporary incapacity leave (TIL), is subject to the employer's approval. In the circumstances whether or not an employee is granted TIL depends on the discretion of the employer after investigation and approval as per Para 7.5.1 (b).

17 In summary, with regard to TIL & LTIL where an employee has exhausted their sick leave, is further temporarily incapacitated and:

- Their supervisor is informed of their illness[3]

[3] Para 7.5.1 (a)(i) R 7/2000

- A registered medical/dental practitioner, certifies in advance (unless this is not possible in the circumstances)[4], that the employee is required to be absent from work, due to a temporary incapacity

The employer **shall**, within 30 working days, investigate, in accordance with Item 10(1) of Schedule 8 of the LRA, the nature and extent of the incapacity in relation to the employee's duties, the cause of the incapacity[5] and dependent thereon the employee in question, **may be granted additional paid sick leave (TIL)** at the discretion of the employer, according to the terms of the collective agreement. Where an employee is not granted TIL the period is covered by way of unpaid leave, unless the employee has existing leave credits (annual leave or capped leave) that may be used.

18 Paragraph 7.5.2 deals with the situation where an employee's incapacity has been **certified as permanent** 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)

19 With regard to PIL / IHR, 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[6]. (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, and that the employer is required to act expeditiously the additional 30 days maximum is more appropriate) to enable the employer to ascertain the feasibility of:

- alternative employment[7]
- adapting the employee's duties or work circumstances to accommodate the incapacity[8]

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*

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4 Para 7.5.1 (a)(ii) R 7/2000

5 Para 7.5.1 (b) R 7/2000

6 Paragraph 4(5) NI 2/2004 & Par. 7.5.2 a), (b) and (c)

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

8 Para 7.5.2 (a) & (b)(ii) R 7/2000

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".

20 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. The refusal of TIL "i*s not an administrative action or exercise of a public power as contemplated in PAJA*" rather it is the exercise of "*a discretion provided for and governed by resolution 5 of 2001 of the PSCBC*"[9] (the successor to resolution 7/2000).

21 Our courts have held that regard is to be had to the ordinary and popular meaning of the words employed[10] and to consider the document as a whole when interpreting its provisions and where different parts appear contradictory, to reconcile these in line with the purpose / intention of the framers of the document[11]. Subject to the understanding that the meaning of words may be coloured by the context in which they occur,[12] one should be slow to depart from this and resort to external sources, unless there is ambiguity or it will result in an anomaly. In other words, one must attempt to derive the meaning of the collective agreement from the agreement itself, unless to do so will result in an anomaly, or where the word/s are ambiguous and the meaning does not give effect to the purpose / intention of the parties. In addition, the meaning of words are interpreted within the context of the agreement, and where there are contradictions in the agreement, they are interpreted so as to reconcile one another in line with the purpose of the agreement / intention of the parties[13]. Self evidently, the aim is to establish the purpose / intention of the parties to the collective agreement involved in the negotiations at the time and not that of a party[14].

22 The purpose of an Act, or as in the current case, of a collective agreement, is the guiding factor in determining the

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9 PSA obo WJ De Bruyn and Minister of Safety and Security and others (2009) *ILJ* 1631 (LC) [26]

10 See *Food & Allied Workers Union V Commission For Conciliation, Mediation & Arbitration & Others* (2007) 28 ILJ 382 (LC) [31]-[35], [39] and cases cited therein, per Nel AJ, with regard to inter alia, the parol evidence rule, the application of the ordinary and popular meaning, ambiguity and the intention of the parties to the collective agreement.

11 See *CUSA v Tao Ying Metal Industries and others* (2008) 29 *ILJ* 246 CC [90] "The proper approach to the construction of a legal instrument requires a consideration of the document taken as a whole.[46] Effect must be given to every paragraph in the instrument and, if two paragraphs appear to be contradictory, the proper approach is to reconcile them so as to do justice to the intention of the framers of the document. It is not necessary to resort to extrinsic evidence if the meaning of the document can be gathered from the contents of the document."

12 *See CUSA v Tao Ying Metal Industries and others* (2008) 29 *ILJ* 246 CC [92] "… "It is trite that the context in which a word occurs may colour the meaning to be given to a word."

13 See *CUSA v Tao Ying Metal Industries and others* (2008) 29 *ILJ* 246 CC [90]

14 See PSA, Commissioner R Lyster v PSCBC, Dept of Land Affairs (D751/09) [2013] ZALCD 3 (26 February 2013)
"[17] The review application turns on whether the second respondent applied her mind appropriately in her interpretation of clause 7.5 of the resolution 7 of 2000[14]. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those who are responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context, it is to make a contract for the parties other than the one that they in fact made[2].

meaning thereof and accordingly a meaning which facilitates the attainment of the purpose of the collective agreement, which in turn is informed by the purposes of the LRA, will be adopted above another that does not.[15] Our courts have now adopted a purposive approach to the interpretation of statutes including the LRA and collective agreements[16].

23 Section 1 and 3 of the LRA set out the primary objects and manner of interpretation thereof. Section 1 reads as follows:

> *1 "**Purpose of this Act**. – The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the work place by fulfilling the primary objects of this Act, which are –*
> *(a) to give effect to and regulate the fundamental rights conferred by Section 27 of the Constitution[17].*
> *(b) to give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation;*
> *(c) to provide a framework within which employees and their trade unions, employers and employers' organizations can –*
> *i. collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and*
> *ii. formulate industrial policy; and*
> *(d) To promote-*
> *i. orderly collective bargaining;*
> *ii. collective bargaining at sectoral level;*
> *iii. employee participation in decision-making in the workplace; and*
> *iv. the effective resolution of labour disputes.*
>
> *…*
> *3 **Interpretation of this Act***
> *Any person applying this Act must interpret its provisions-*
> *(a) to give effect to it primary objects;*

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[15] See Hogg. P.W. 1992. *Constitutional Law of Canada.* 3rd edition. 809-815 to the effect that a purposive approach, unlike a generous broad or liberal approach, which may overshoot the meaning of a statute in this case a collective agreement, may be helpful, but only so long as it is subordinate to purpose. A purposive approach will normally narrow the scope of meaning or a right to include activity that comes within that purpose and exclude activity that does not. This is echoed in the LRA in the provisions of Section 3 namely:
"Any person applying this Act must interpret its provisions-
to give effect to its primary objects;
in compliance with the Constitution; and
in compliance with the public international law obligations of the Republic."

[16] *NEHAWU v University of Cape Town and others BCLR 154; 2003 (3) SA 1 (CC) 6 December 2002,* [40], [41]; *SAMWU v SALGA and others* (LAC), Case No. DA 06/09 dated 29 November 2011 [14] per Mlambo JP. …
"[40] In my view the focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.
The Labour Relations Act
[41] The declared purpose of the LRA "is to advance economic development, social justice, labour peace and the democratization of the workplace."[45] This is to be achieved by fulfilling its primary objects which includes giving effect to section 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations.[46] The LRA must therefore be purposively construed in order to give effect to the Constitution. This is the approach that has been adopted by the LAC and the Labour Court in construing the LRA.[47]"

[17] See Section 27, [Section 23] which is in the Chapter on Fundamental Rights in the Constitution entrenches the following rights:
'(1) Every person shall have the right to fair labour practices.
(2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' originations.
(3) Workers and employers shall have the right to organize and bargain collectively.
(4) Workers shall have the right to strike for the purpose of collective bargaining.
(5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33 (1)'.

(b) in compliance with the Constitution; and
(c) in compliance with the public international law obligations of the Republic"

24 The purpose/s of the LRA, see above and following, and the values of the RSA Constitution[18] e.g. fairness and equity[19], to promote orderly collective bargaining[20], to ensure effective and sound industrial relations, the effective fair and speedy resolution of disputes,[21] "to advance economic development, social justice, labour peace and democratisation of the workplace"[22], human dignity, equality, advancement of rights, non discrimination, to uphold the rule of law, accountability and transparency as may be relevant to the case in question, also inform the interpretation of a collective agreement.

25 Collective agreements differ markedly from conventional contracts[23], and are binding on and may vary existing contracts of non-signatories by virtue of the LRA and this also should be taken into account e.g.:

- "…a collective agreement in terms of the Act is not an ordinary contract and the context within which a collective agreement operates under the Act is vastly different from that of an ordinary commercial contract"[24]
- "…[A] collective agreement is unlike other ordinary contracts and that the primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements. This, it was stated, was better suited to promote the 'effective, fair and speedy resolution of labour disputes"[25]
- In terms of Section 23 and 31 of the LRA, not only the actual parties to the collective agreement, but each member of the trade unions in question / employer's organisations are also bound, and in this case the parties to the PSCBC[26] i.e. the State as employer and Union parties[27].

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[18] *See CUSA v Tao Ying Metal Industries and others* (2008) 29 *ILJ* 246 CC [103], The Constitution of the Republic of South Africa, 1996
[19] *SAMWU v SALGA and others* (LAC) Case No. DA 06/09 dated 29 November 2011
[20] *eThekwini Municipality (Health Department) v IMATU obo Foster (*2012) 33 *ILJ* 152 (LAC) at [26]
[21] *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others*, 1997) 18 ILJ 971 (LAC)
[22] *NEHAWU v UCT and others*. Se also See *CUSA v Tao Ying Metal Industries and others* (2008) 29 *ILJ* 246 CC [95]
[23] See also Fakude & others v Kwikhot (Pty) Ltd (2013) 34 *ILJ* 2024 (LC [24], [25]
[24] *eThekwini Municipality (Health Department) v IMATU obo Foster and others* (2012) 33 *ILJ* 152 (LAC) at [27] citing from North East Cape Forests *v SA Agricultural Plantation and Allied Workers Union and Others*, 1997) 18 ILJ 971 (LAC)
[25] (Per Mlambo JP citing with approval the comments of Froneman DJP, as he then was, *in SAMWU v SALGA and others* Case No. DA 06/09 dated 29 November 2011 at [15] and *North East Cape Forests v SA Agricultural Plantation and Allied Workers Union and Others*, 1997) 18 ILJ 971 (LAC)
[26] See also SAMWU and SALGA and others (LAC) supra
[27] Section 23 (3) of the LRA provides that:
"[W]here applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by a collective agreement."
Section 31 of the LRA provides that a collective agreement concluded in a bargaining council, subject to section 32, binds:
"(a) the parties to the bargaining council who are also parties to the collective agreement;
(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employer's organization that is such a party, if the collective agreement regulates-
terms and conditions of employment; or
the conduct of employers in relation to their employees or the conduct of the employees in relation to their employers."

26 An arbitrator is empowered to determine a dispute concerning the interpretation or application of a collective agreement by way of an appropriate award that gives effect to such collective agreement[28]. It is axiomatic that if a labour practice is found to be unfair, fairness will have to be taken into account in arriving at a determination of the dispute[29]. This is also in line with an employee's constitutional right to fair labour practices. An arbitration hearing in terms of the LRA is an opportunity for an aggrieved employee to challenge a decision of the employer and not a review of the employer's decision. In the event an arbitrator makes a determination contrary to that of the employer, this is not a review of the employer's decision but a determination based on the facts presented by the parties, by virtue of the provisions of the LRA[30].

27 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"* (emphasis added)

Awards may vary, depending on the matter at hand[31].

28 Interpretation refers to the situation where the parties differ over the meaning of a provision of the collective agreement.[32] "Application" includes whether an agreement applies to the facts in question and "the manner in which the agreement is applied, which includes non-compliance."[33]

29 Accordingly 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 and s 138(9) (read with s 31 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 or application of a collective agreement, namely R7/2000 and essentially complains of non-compliance by the employer with the collective agreement relating to IHR

30 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

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[28] S138(1) and 138(9) read with S1 and S 3 of the LRA

[29] Section 23(1) of the Constitution of the RSA, 1996, Section 185(b) and Section 1(a) of the Labour Relations Act 66 of 1995

[30] See Minister of Safety and Security v SSSBC and others (2010) 31 ILJ 2680 (LC) [24]. Although this matter deals with promotion and S 193(4), the argument is equally applicable to the interpretation or application of collective agreements and S 138 (9).

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

[32] 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]

[33] 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. See also SAMWU v SALGBC [2012] BLLR 334 (LAC) 29 November 2011 [29], [30], [31] and Oelofsen & another and SAPS (2006) 27 *ILJ* 639 (BCA) at 648 D-E and authorities cited.

have jurisdiction to hear a dispute concerning the interpretation or application of a collective agreement relating to temporary incapacity leave.

31 The Labour Court considered the judgements in *Minister of Safety & Security v SSSBC & others (2010) 31 ILJ 1813 (LAC)* & *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 Ministers 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**.[34]

32 *"That dictum[35] 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 [Minister of Safety & Security v SSSBC & others (2010) 31 ILJ 1813 (LAC)], it appears to me that De Bruyn 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."***

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[34] The same would apply in respect of PSCBC arbitration. See Public Servants Associates of SA obo De Bruyn v Min of Safety & Security & Others (2012) 33 *ILJ* 1822 (LAC)

"[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."

[35] PSA obo Liebenberg v Department of Defence and others (2013) 34 *ILJ* 1769 at [37] as follows: *"That dictum ([31], [32] and [34] Public Servants Associates of SA obo De Bruyn v Min of Safety & Security & Others (2012) 33 ILJ 1822 (LAC)*). See also the references in the above footnote, and UASA & another v BHP Billiton Energy Coal SA Ltd & another (2013) 34 *ILJ* 2118 (LC),

33 In the circumstances I am satisfied, given the recent and binding case law and the nature of the employee's dispute that:

- The main issue concerns the interpretation or application of a collective agreement, *in casu* R 7/2000
- The appropriate forum for the applicant to challenge the respondent's decision in refusing the grant of TIL, in so far as the applicant alleges failure by the respondent to comply with the collective agreement, is the PSCBC[36].

34 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[37], will invite judicial scrutiny for want of compliance with the collective agreement.

35 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[38].

36 In the circumstances the discretion to grant or refuse IHR, must be exercised properly, rationally and fairly (e.g. it should not have a retrospective effect resulting in unfair consequences)[39], must be accompanied by reasons[40], and in accordance with the purpose and provisions of R 7/2000, which in this instance (IHR) 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).

37 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. In this instance the employer took one day short of two years to deal with the employee's application for IHR i.e. from 28 July 2009 to 28 July 2011. The employee was then required to return to work within 5 working days of receipt of the employer's letter (A52, 53).

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[36] ***PSA obo Liebenberg v Department of Defence & others (2013) 34 ILJ 1769 (LC)*** [29] 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]

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

[38] *Public Service Association of South Africa and HC Gouvea v PSCBC, Commissioner R Lyster and Dept 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 a 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 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."

The employee had applied for TIL covering the period December 2007 to February 2009 and had been required to return to work on I July 2008. The LC found that the employee was entitled to TIL for the period December 2007 to June 2008 and not to TIL for the period 1 July 2008 to February 2009 on which date the employee was required toreturn to work.

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

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

38 Subsequently the employee has made a further application for TIL and has been granted conditional TIL for the period 20 January to 18 June 2014 (A167). The employee's salary was stopped as of 1 September 2011. The employer has drawn the attention of the employee to Section 17(5)(a)(i) of the Public Service Act 1994 per its letter dated 20 March 2014 (A169). Given that the employer has placed the employee on conditional incapacity leave one is hard put to understand the logic in this and clearly this must be an oversight on the part of the employer. It is not possible for the employer to approbate and reprobate.

39 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 serve as examples:

39.1 The period of time taken (One day short of two years) to respond to the employee's application for Ill Health Retirement submitted 26 July 2009.

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[41].

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. Notwithstanding the refusal of IHR the employer has once again granted the employee TIL on a conditional basis, for the same condition! Bearing in mind that the employee has been of sick since 2006, that she has submitted several applications for TIL and the application for IHR, all for the same condition, it is difficult to comprehend how the employer justifies its refusal of IHR, stopping of the employee's salary as of 1 September 2011, and conditional grant of TIL for the period 20 January 2014 to 18 June 2014 (A167-168)

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 position has not been determined as per R 7/2000, for over a period of 7 years and she is still on sick leave (all be it conditional) on the basis of her medical condition, which has not changed, but if any anything has been exacerbated by the failure of the employer to deal with it appropriately and further the stopping of her salary. Not only is this prejudicial to the employee as can be seen from the psychiatrist's reports but it is also to the detriment of the fiscus, service delivery, staff morale (as per the employee the ICU is already short staffed) and cannot amount to the effective management of incapacity leave let alone management in general.

[41] 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.

39.2 The failure of the HRM to seek a second opinion.

The HRM is required to advise the employer on the medical aspects and possible alternative placement or adaption of the work environment, alternatively IHR, has contented itself with an analysis of the employee's condition based on the reports and its assessment based thereon. Dr S Prinsloo a specialist psychiatrist, who is the employee's treating psychiatrist is of the view that the employee is incapable of working due to the nature of her incapacity, and that given the impairment of her higher cognitive functioning ability will impose a risk not only for herself but for her patients and consequently the department. In simple terms the specialist's reports indicate that the employee will never be able to resume her work or attain her former condition as she has been incapacitated in so far as her higher cognitive functions and motivation are concerned and that even though she is compliant in respect of her medication, several regimes of which have tested on her, there is no positive response.

In advising the employer to repudiate the employee's application for Ill Health Retirement in the face of the psychiatrist's specialist medical reports to the contrary, the HRM is effectively making a contrary diagnosis to such specialist, without the benefit of their own clinical examination and or a second opinion, from a specialist nominated by them. In fact the HRM takes issue with some of the Specialist's findings and prescribed treatments in its recommendation to the employer. Dr S Prinsloo the Specialist psychiatrist in question has raised this in her medical reports and in Part C of the Application for incapacity e.g. see A131 where it is stated:

"Kindly note that it is illegal for a General Practitioner to evaluate the treatment schedule of a Medical specialist. The treatment should be peer reviewed by a psychiatrist- therefore the recommendation by SOMA should be disregarded until SOMA can provide appropriate peer review. …"

The above is repeated at A 118, A133/134 and A146.

In addition the HRM appears of the view that Dr Prinsloo indicated that the employee would be able to perform tasks such as operate heavy machinery and carry heavy weights, which in their opinion requires cognitive abilities such as thinking clearly and making decisions (e.g. A73). A perusal of the reports of Dr Prinsloo including Part C of the incapacity forms does not reveal the above at all. In fact it is apparent from the reports that one of the aspects, which has played a part in the onset/development of the employee's condition, is the operation of life support systems, a wrong decision in respect of which could have terminal consequences for a patient.

40 It is apparent from the various reports, that given her condition, not only is the employee incapable of working, because of her incapacity, but that this would constitute a medico legal risk for the employer, in that the employee simply would not be able to perform or give the necessary attention in respect of her duties, possibly with life threatening consequences. This has also been drawn to the attention of the employer / HRM.

41 The employer has not complied with the time frames laid down in R 7/2000, namely taking one day short of two years to respond to the employee's application for IHR as opposed to the 30 days prescribed in R 7/2000. The employee is currently booked off until 18 June 2014 conditionally for the same condition. It is apparent from the various reports, that the employee is incapable of performing at her level/rank and that her application has been poorly managed. Given that she has been off work since 2006, is currently off work for the same condition which has not responded to treatment over the years, that the employer has de facto accepted the situation, notwithstanding the delayed negative response to her application for IHR. In any event it is evident that the employer did not comply with the 30 working day time period as prescribed in the collective agreement.

42 An employee may be granted sick leave on full pay in terms of paragraph 7.5.2 where the provisions of paragraph 7.5.2 (b) of R 7/2000 are complied with. If both the employer and employee are convinced that the employee will never be able to perform any type of duties at her level or rank the employee shall proceed with application for ill health benefits.

43 R 7/2000 is amplified by the Policy and Procedure on Incapacity Leave and for Ill Health Retirement (PILIR). PILIR requires that where TIL is refused[42] the *"employer must cover the period of absence…by unpaid leave"*[43]. In the instant case the decision to refuse the grant of IHR was made outside the prescribed period (considerably so) and not in compliance with R 7/2000. The employer consequent on the refusal of IHR stopped the employee's salary (01 September 2011), which has not been paid since then. The fact that the HRM did not attend to the application within the required time frames does not affect the issue as in terms of R 7/2000 the "employer" is required to deal with such applications within 30 days.

44 The recovery of salary paid for "conditional leave" initially granted, pending the outcome of an application for TIL or IHR is done either by way of deductions from salary, vacation leave credits, capped leave or unpaid leave and is inextricably linked to the decision to decline TIL alternatively IHR, a consideration of the one involves the other and accordingly the dispute falls within the interpretation and application of R 7/2000. It follows that the PSCBC has jurisdiction to hear the matter in respect of the award of IHR, recovery of salary paid, appropriation of capped or vacation leave or stopped salary thereanaent.

45 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 period between the

[42] And by analogy in the case f refusal of IHR

[43] See PILIR paragraphs 7.2.11, 7.3.5.1 (g) or 7.3.5.2 (j), depending on whether an application is for Short Period of TIL (1-29 working days requested per occasion) or Long Period of TIL (30 working days or more…)

employee's submission and outcome of her application for IHR was one day short of two years. No additional days were requested, and the employer's delay herein has resulted in unfair consequences to the employee and accordingly the case law is equally applicable to the situation in question.

46 In accordance with the decision in ***PSA and HC Gouvea v Commissioner R Lyster NO and Department of Land Affairs*** (D751/09) [2013] ZALCD 3 (26 February 2013), where an employee's application is declined outside of the 30 days in question (*in casu* one day short of two years), and acts to the prejudice of the employee, (in this case the declining of her IHR application and subsequent stoppage of her salary, the fact that the decision has a retrospective effect ***"amounts to an unreasonable and arbitrary exercise of a discretion with unfair consequences to an employee"***[44]. In other words employees cannot be subjected to leave without pay / monthly deductions from their salary (in order to recover salary paid, where an application for TIL / IHR is declined for a period they have been off work sick) or stoppage of salary unless the apllication is declined within 30 days or unless they have been given a date to return for work and have failed to do so. In this case although the employee was required to return to work within 5 working days (two years late) she was subsequently booked off sick for the same condition. The employer may only recover salary paid, if TIL / IHR was declined within 30 days alternatively, if it is declined at a later date, for the period the employee was required to return to work and did not. If not the refusal to grant TIL / IHR acts with retrospective effect on the employee in question and for that reason is unfair.

47 In my view the failure of the employer, who is responsible overall for the management of incapacity leave, to deal with the employee's application for Ill Health Retirement appropriately and within the time frames, coupled with the fact that the employee has been incapacitated / has not responded to various treatment regimes although has been compliant and did not work for the entire period, has severely prejudiced not only the employee (both in respect of her medical condition and financially) 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.

48 Taking into account the employee's poor response to treatment, her cognitive impairment and that for all practical purposes the employer, (by its conduct e.g. taking two years to respond and then placing the employee on conditional TIL for the same condition and in not resolving the matter since 2006), in addition to the employee, are convinced that she will never be able to perform any type of duties at her **level or rank**.

49 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-

(d) that gives effect to any collective agreement;

[44] *Public Service Association of South Africa and HC Gouvea v PSCBC, Commissioner R Lyster and Dept of Land Affairs* (D751/09) [2013] ZALCD 3 (26 February 2013): at [20

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

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

Awards may vary, depending on the matter at hand[45].

50 The fact that employees are aware that their applications for IHR may be declined, and that they have no right other than a right that their application be properly and fairly considered, does not affect the issue as it is the retrospective effect that renders the decision to decline IHR an unreasonable and arbitrary exercise of a discretion with unfair consequences to the employee. In the circumstances I make the following award.

AWARD

51 The employer (The Department of Health: EC), failed to comply with the provisions of PSCBC Resolution 7/2000 in declining the employee, Ms MA Bezuidenhout's, (PERSAL No. 51268060) application for ill health retirement

52 The employee Ms MA Bezuidenhout **is entitled** to proceed with an application for ill health retirement in terms of the Pension Law of 1996 and in view of the employer's failure to comply with the provisions of PSCBC Resolution 7/2000 is accordingly entitled to payment of her salary with effect from the date of stoppage, i.e. 01 September 2011 until such time as she as her ill health retirement is finalised

53 The employer (The Department of Health: EC) 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 together with payment of her salary with effect from 1 September 2011 within 30 days of the date of this award.

54 The employer is ordered to amend the employee's personnel / leave file accordingly.

John Cheere Robertson
PSCBC Panellist

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