ARBITRATION AWARD

Commissioner: **Retief Olivier**

Case No.: **PSCB 756 -12/13**

Date of Award: **2 March 2014**

In the ARBITRATION between:

PSA obo Roelofse
(Union / Applicant)

and

Department of Correctional Services (National)
(Respondent)

Applicant representative:	Eileen Mosetic - PSA
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PARTICULARS OF PROCEEDINGS AND REPRESENTATION

The arbitration was held in Cape Town at the Dept. of Correctional Services, Edgemead, on 11 October 2013, 27 November 2013 and 12 February 2014. Ms E Mosetic a Union official from PSA, represented the employee, Ms Roelofse. Mr N Nxele represented the respondent, the Department Correctional Services. Final closing arguments were received from the employer on 25 February 2014.

THE ISSUE IN DISPUTE

I must decide whether the respondent is in breach of Resolution 7 of 2000 i.e. the interpretation or application of a collective agreement as contained in Sections 24(2) and 24(5) of the LRA and more specifically had the respondent applied the provisions of clause 7.5.1 fairly in declining the Temporary Incapacity Leave (TIL) application.

THE BACKGROUND TO THE DISPUTE

The Department of Correctional Services has employed Ms Roelofse since 10 February 1986.She is currently employed as a Correctional Officer grade 1 and is based at Goodwood Correctional Centre. She is on permanent night duty.

She applied for Temporary incapacity leave for the following periods:

- **27 June to 5 July 2012 (9 days)**

  The period 27 to 30 June 2012 (4 days) was taken from her vacation leave after the health risk manager declined it.
  The period 1 – 5 July 2012 (5 days) was allocated as unpaid leave, after it was declined by the health risk manager.
  For the period 6 - 9 July 2012 Ms Roelofse did not apply for temporary incapacity leave due to the fact that she wasn't required to work those days, as it was her "off days" as per the shift roster. It was however, allocated as leave without pay because the department argues that leave without pay is taken as calendar days.

- **10 – 19 July 2012 (10 days)**

This period was allocated as unpaid leave after it was declined by the Health Risk Manager

- **27 September 2012**

This period was allocated as unpaid leave after it was declined by the health risk manager

The applicant argued that the employer had not complied with the Collective Agreement and did not investigate the matter within 30 days, and did not apply their discretion fairly.

The employer denied that they did not comply with the time frames in the Collective Agreement and that the investigation was conducted within 30 days on the basis of insufficient medical evidence. The TIL application for 27 September 2012 was declined as the applicant had not submitted a medical certificate, therefore it was an incomplete application.

SUMMARY OF EVIDENCE AND ARGUMENT

A bundle of documents, which included the HRM reports, were presented as evidence, together with the witnesses that testified.

Applicant's version:

Ms Roelofse testified that she has been working in the main control room for 5 years, the control room was a small room with no windows and she had an asthmatic condition and she requested a transfer, but received no response. She was working night shift but was also required to do dayshifts due to problems other employees had, and this caused her considerable stress as she had to work continuously. She again asked to be moved and wrote the Head of Prison. Her health deteriorated and went to EAP, and again asked for a meeting with Mr Hanekom, head of prison and also saw a psychologist. She was only able to see Mr Hanekom a year later when he changed her back to nightshift only. In

this time she had to take sick leave at certain times, and submitted applications for temporary incapacity leave.

Ms Roelofse testified that she handed in her applications for temporary incapacity leave on the following dates:

1. For the period 27 June – 5 July 2012 submitted on **1 July 2012** and she received feedback on **4 September 2012.** The reply stipulated that 4 days would be taken from her annual leave and the other five days would be covered by unpaid leave

2. For the period 10 – 19 July 2012 she submitted on **13 July 2012** and received the feedback on **4 September 2012.**

3. For the period 27 September 2012 her application wasn't processed at all and the leave was declined on her leave application form, 2 days after she handed it in. It was never forwarded to the health risk manager due to her not attaching a medical certificate. It is not in dispute that one is required to submit a medical certificate with all applications for temporary incapacity leave. She testified that she did not complete the leave form, for at that time her leave record showed she had leave days available. The employer completed the leave form on her behalf and signed for it, which was totally irregular. To date no feedback was received on the application. Monies were deducted from her on 15 November 2012.

She testified that monies were deducted from her salary without any notification to her, and the applications were declined on the basis that there was insufficient medical evidence, but she had submitted psychologist reports together with the applications and she was never asked to provide additional medical evidence.

Regarding the period 27 September 2012, she stated that she did not give consent to the employer to sign her leave from, as at that time she had 19 days leave left in terms of her leave record, but this was taken away when the TIL applications were declined. She did not know that at that time as she had not received any feedback about the applications. The employer completed the leave form and that was a fraudulent action.

In closing it was argued that the Employer did not comply with the time frames in the collective agreement.

1. For the period 27 June to 5 July 2012 on feedback given on **4 September 2012,** the 30 working day period allowed for the department to give her feedback expired on **10 August 2012**. Consequently the department did not reply within the prescribed time frame.

2. For the period 10 -19 July 2012 on feedback given on **4 September 2012** (pg 23 of bundle A). The 30 working days allowed for the department to provide feedback expired on **24 August 2012.** Consequently the department did not reply within the prescribed time frame.

3. For the period 27 September 2012, the leave was declined on her leave application form, 2 days after she handed it in. It was never forwarded to the health risk manager due to her not attaching a medical certificate. Mr Brecht, for the employer, testified that they had to complete it due to internal deadlines that they have for completing leave forms. It is our submission that it is irregular for an official to complete a leave form on behalf of another employee.

It was further argued that the Health Risk Manager and Area Commissioner's reasons for declining the applications was that they required detailed medical reports, yet they acknowledge they received a report from her counseling psychologist. Furthermore, Ms Roelofse testified that she was never requested to provide further medical reports and it should be noted that for both the above mentioned applications, the health risk manager found that there were no significant trends in her sick leave.

Regarding to the period 6 – 9 July 2012, the Ms Roelofse wasn't scheduled to work on these days. They were her "days off." Due to the fact that sick leave is calculated in working days, she only applied for temporary incapacity leave for the days she was scheduled to work. However, the department allocated unpaid leave for these days. Mr Brecht for the department testified that the policy for implementing unpaid leave stipulates that it must be calendar days.

The applicant submitted the argument is erroneous, since Ms Roelofse did not apply for temporary incapacity leave for this period. Neither was it considered and declined by the health risk manager or the department. Para 8.4.2 of the Determination of leave of absence in the Public Service makes specific provision for instances like this of shift workers. i.e. **An employee does not forfeit the off duty periods that results from the design of the shift roster. (**para 8.4.2, bundle F).Para 8 refers specifically to vacation leave, but para 15.15 of the same determination stipulates that para 8 also applies to normal sick leave and temporary incapacity leave (bundle F).

It is common cause that Ms Roelofse's shifts were as follows during the time period in this dispute:

- 27 – 30 June 2012 – scheduled to work
- 1 - 5 July 2012 – scheduled to work
- 6 - 9 July 2012 – duty free days
- 10 – 19 July 2012 – scheduled to work
- 27 September 2012 – scheduled to work

The monies for these periods were deducted from her without notifying her that it would be done. The first deduction was done on 15 October 2012 and another on 15 November 2012.

The deductions were done as follows:

1. 15 October 2012: R 3010.27 was deducted for the period 1 – 5 July 2012 and R 2408.21 was deducted for the period 6-9 July 2012.

2. 15 November 2012 – R 6020.54 was deducted for the period 10 – 19 July 2012 and R 602.05 was deducted for 27 September 2012.

3. Ms Roelofse also wrote to the Regional Commissioner requesting the deductions to stop, but they proceeded.

It was submitted and requested that that the arbitrator finds the employer did not apply the collective agreement correctly in that they did not comply with the 30 day time frame

to reply; neither did they apply their discretion fairly. Furthermore they allocated leave without pay for a period she wasn't required to work. It is requested that the days that were taken from her vacation leave be re-allocated to her record and implemented as temporary incapacity leave (27 – 30 June 2012 = 4 days). Alternatively, since that leave cycle has expired, that she be paid out the cash value of the days. (equal to R 2408, 21 – the amount would be equal to the four days deducted for 6 – 9 July 2012).Furthermore, that the monies illegally deducted as unpaid leave be re-paid to her (4 days i.e. 6 – 9 July 2012).Lastly that the periods 1 – 5 July and 10 – 19 July 2012 be allocated as temporary incapacity leave and the monies deducted repaid to her.

The amount is calculated as the following:

- R 2408, 21 (27 – 30 June 2012 – if leave cannot be re-allocated to her).
- R 3010, 27 (1- 5 July 2012 – TIL declined.
- R 2408, 21 (6-9 July 2012 – leave without pay for days she wasn't required to work.
- R 6020,54 (10 – 19 July – TIl declined)
- R 602, 05 (27 September 2012)

Total: R 14 449-33

Respondent's version:

Ms Molichi Sebotsi, Area Commissioner Goodwood testified that TIL applications are sent to the HRM, and they make a recommendation that is sent back to her. Once she receives it's the recommendation, she makes a decision. In this case the HRM declined the applicants. As she is not a doctor she relies on the HRM recommendation, and accepted the recommendation to decline. The applicant was entitled to resubmit it.

Regarding the delays in giving feedback she stated there may be many reasons, the applicant may be on leave, or the duty office may not be able to het hold of the applicant. Regarding the leave without pay (for the period 6 – 9 July 2012) she stated that sick leave is calculated in calendar days.

During cross-questioning she stated that she did not see any reason to deviate form the HRM report. Regarding her testimony that an employee can resubmit an application, she stated that it is in the TIL policy, but she could not find it, she was speaking under correction. She could also not answer as to whether the employer can take people of the shift roster and could also not answer for Human Resources about filing in a leave form on behalf of an employee.

Mr Dennis Brecht, center co-ordinator staff support, stated that if there are changes to TIL application and the leave is declined it is converted to unpaid leave. In this instance the TIL was declined, the leave determined thus was for the continues period of her absence from 27 June to 19 July, hence the period 6-9 July was also included and converted to unpaid leave. He acknowledged that she was not scheduled to work during that period. This was done because the leave policy states unpaid leave is calculated as calendar days. Regarding the 27th September 2012 leave day he stated that she had not submitted a medical certificate, therefore they could not accept the TIL application. He acknowledged that no TIL application had been submitted to the HRM.

In closing it was argued that It was correct that the applicant applied for TIL for the period 27 to 30 June 2012 (4 days) was taken from her vacation leave after TIL was declined by the health risk manager. The period 1 – 5 July 2012 (5 days) was allocated as unpaid leave after it was declined by the health risk manager. Evidence was submitted that the applicant was supposed to work from the weekend of 30 June and 1st July 2012 and continue from 02nd till 05th of July 2012. In line with duty sheet (work arrangement) she was supposed to be from 06 July to 09 July 2012. Initially pending the HRM decision on her TIL application she was booked as per work arrangement. However after the TIL application was declined as per unpaid leave policy which stipulates that unpaid leave should regarded as calendar days which Saturday and Sunday and should be continuous(not be broken).

It was submitting during arbitration that the applicant was supposed to be off Friday including weekend and Monday, however because she was on sick leave until 10 July to 19 July 2012. Then in terms of the applicable policy her weekend off was regarded as being on sick leave until the 19 July. After she was informed of the HRM decision that her application was declined she applied for unpaid leave and it was approved. Since

the applicant has exhausted her leave credits no other option was available but to book her unpaid leave. As it was submitted during the arbitration hearing leave should be regarded as continuous therefore it is not correct to argue that she was supposed to be off duty during the weekend of 06 - 09 July 2012. As indicated the unpaid leave policy does not authorize the respondent to break continuous sick leave, also if the HRM approved the applicant application the period of TIL was going to be counted continuously without being broken.

The period 10 – 19 July 2012 (10 days) was allocated as unpaid leave after it was declined by the Health Risk Manager.

The period 27 September 2012 was allocated as unpaid leave after the applicant failed to submit medical certificate to be included in the TIL application as required by determination and directives on leave of absence in the public service. Since the applicant failed to submit a sick certificate her application was not sent to the HRM for further assessment. It is not true as submitted by the applicant that her application was declined by the HRM.

Resolution 7 of 2000 states that the employer should within 30 days investigate the extent of inability to perform normal official duties, the degree of inability and the causes therefore. It is fact that in terms of the policy her application was referred to HRM for further assessment. It's a common cause that as a results of huge volume of applications being referred to HRM it normally take the HRM more than the stipulated period to advice the employer on how to finalize the application.

The dispute in this matter is about whether the respondent complied with stipulated time frame (30 days). The respondent requests that the matter being evaluated on the principles of fairness without looking purely on the number of days. As submitted earlier that as a result of huge volume of work experienced by HRM is also common cause as with other previous cases that they will take more than 30 days as stipulated in the resolution. Since the applicant refer to the interpretation and application of the resolution with specific reference to whether the respondent complied with time frame or not. It will

be appropriate to refer to the number of days the respondent and the HRM took to finalise the applicant applications.

With regard to the first period (27 June to 05 July 2012) the applicant submitted her application on the 01 July 2012 and receives feedback on 04 September 2012. When calculating from 01 July 2012 to 04 September 2012 it's about 62 continuous days. The resolution indicates that decision should be made within 30 working days. In term of the resolution directives and on calculating working days after the application has been submitted it will mean that the decision was supposed to be made on 10 August 2012. The respondent informed the applicant on the 04 September 2012, which is 17 working days after the required period. It was submitted that the 17 working days taken to finalize the application should be regarded as fair period, and should not be viewed as so extreme and further take into account the HRM work load.

With regard to second application from the 10 to 19 July 2012 the applicant submits her application on 13 July 2012. The applicant was supposed to get feedback on the 23 August 2012. The applicant received feedback on the 2012-09-04. It is a fact that the respondent exceeded the required period by 7 days. As indicated above to exceed by 7 days should not be viewed as extreme and in applying the principles of fairness the respondent requests request that the reasons for the delay be accepted as fair.

With regard to the 27 September 2012 since the application was not referred to HRM for assessment it should not be viewed or regarded as forming part of the interpretation of the resolution. It should be remembered that the applicant failed to comply with the requirements, i.e., submitting medical certificate. The respondent submitted that this part of the dispute does not fall within the interpretation of the resolution since no action was done in attempt to comply with the resolution. Hence the respondent is submitting that this part of the dispute the Council does not have jurisdiction to handle. It could have been referred as unfair labour practice, not interpretation and or application of the resolution.

It was therefore requested that the arbitrator dismiss the application because the period taken by the respondent were not so extreme and also that the applicant contributed to the delays to inform her of the outcome.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

The issue in dispute is whether the respondent is in breach of PSCBC Resolution 7 of 2000.

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

> *"a) An employee who normal sick leave credits in a cycle have been exhausted and who, according to the relevant practitioner, requires to be absent from work due to disability which is not permanent, may be granted sick leave on full pay provided that:*
> *i) her or his supervisor is informed that the employee is ill, and*
> *ii) a relevant registered medical and/or dental practitioner has duly certified such a condition in advance as temporary disability except where conditions do not allow.*
>
> *b) The employer shall, during 30 working days, investigate the extent of inability to perform normal official duties, the degree of inability and the cause thereof. Investigations shall be in accordance with item 10(1) of Schedule 8 in the Labour Relations Act of 1995."*

Resolution 7 of 2000 Paragraph 7.5.1 b) requires as stated above, that the employer shall, during 30 working days, investigate the extent of inability to perform normal official duties, the degree of inability and the cause thereof. Investigations shall be in accordance with item 10(1) of Schedule 8 in the Labour Relations Act of 1995.

This must also be read together with paragraph 7.2.9 of the Policy and Procedure on Incapacity Leave and Ill-Health Retirement (PILIR) which states “The Employer must within 30 days after receipt of both the application form and medical certificate referred to in paragraphs 7.1.4 and 7.1.5, approve or refuse temporary incapacity leave granted conditionally.”

It is common cause that temporary incapacity leave is not a statutory entitlement but can be applied for in cases where an employee's normal sick leave had been exhausted. It is also not an unlimited amount of additional sick leave at the employee's disposal, but can be granted at the employer's discretion based on its investigations.

It was initially argued that the Employer had complied with the time frames in the collective agreement, but it was conceded in closing argument that applicant's TIL applications had not been dealt with in terms of the time frames in the Collective Agreement. It is obvious that the parties to the resolution intended that such applications should be dealt with speedily and expeditiously. The employer representative acknowledged in closing argument the application had not been dealt with in terms of the time frames, but that because the time delays were not lengthy it should not be viewed as extreme and in applying the principles of fairness the respondent like to request that the reasons for the delay be accepted as fair.

Compliance with a Collective Agreement is however not a discretionary matter, and whoever or whatever is responsible for the delay does not change the fact that the employer does not comply with the Collective Agreement.

Regarding the reasons for declining the applications it was also submitted by the applicant that the employer did not attempt to seek any further medical evidence from the applicant or the applicant's doctors, as the applicant had agreed too in her application, yet the employer indicated there was not sufficient medical evidence to grant the application. The employer confirmed that the applications were declined because the applicant did not submit sufficient medical information. The applicant witness, Ms Sebotsi, who decided on the TIL applications, testified that she accepted the recommendation from the HRM, as she was not a doctor, and could not express a medical opinion. However the applicant had submitted a psychologist report together with her application, which implies that the Ms Sebotsi rejected the psychologist report, yet acknowledged that she is not a medical expert. No evidence was presented as to the medical qualifications of the persons conducting the HRM assessment.

It is clear that the employer had not requested the applicant to provide more medical evidence **before** the application was declined, or that a second medical opinion was

requested form her. It should be noted that it is the employer that deals with the application once it is submitted, and has to decide whether further medical evidence is required, or whether the applicant should go for a second medical opinion. It can not be used as the reason for declining the application if it was not requested. The policy on PILIR indicates that it is the employer that must request this from either the applicant or the applicant's doctors.

The employer witness Ms Sebotsi stated that the applicant could resubmit her applications, as per the policy, but could not provide any such evidence. Ms Sebotsi declined the application, rejecting the psychologist report without having any medical knowledge, and without asking for more information.

I find that the employer acted unreasonable in this respect and did not comply with the PILIR policy. The evidence before me shows that the respondent had not investigated the applicant's situation thoroughly by requesting more medical evidence, if that was required, nor within the required time frame. Neither is it proven that the applicant was a sick leave abuser. I therefore find that it is in breach of Resolution 7 of 2000.

It is also necessary to note the determination in the matter of ***PSA obo H C Gouvea v PSCBC and others, LC Case no D751/09, dated 26 February 2013*** where it was found:

"[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**." (my emphasis).

I therefore deem it fair to order the respondent to grant the applicant the TIL for the periods submitted and the applicant be paid back accordingly.

Regarding to the period 6 – 9 July 2012, due to the fact that sick leave is calculated in working days, the applicant only applied for temporary incapacity leave for the days she was scheduled to work. However, the department allocated unpaid leave for these days. Mr Brecht for the department testified that the policy for implementing unpaid leave stipulates that it must be calendar days.

The applicant submitted the argument is erroneous, since Ms Roelofse did not apply for temporary incapacity leave for this period. Neither was it considered and declined by the health risk manager or the department. Para 8.4.2 of the Determination of leave of absence in the Public Service makes specific provision for instances like this of shift workers. i.e. **An employee does not forfeit the off duty periods that results from the design of the shift roster. (**para 8.4.2, bundle F).Para 8 refers specifically to vacation leave, but para 15.15 of the same determination stipulates that para 8 also applies to normal sick leave and temporary incapacity leave (bundle F).

The employer argued although the applicant did not apply for TIL for the period of 6-9 July 2012, the whole period should be considered as the TIL was declined for the working days from 27 June 2012 to 29 July 2012. The employer clearly did not consider the provision of the Leave Policy in Para 8.4.2 above, in conjunction with para 15.15, stating "As regards the management of shift workers to normal sick leave and **temporary incapacity leave the provisions contained in para 8**, above, apply mutatis mutandis."

Clearly if the employer converted the period 6-9 July 2012 as unpaid leave because the TIL application was declined, the provision in para 15.15 applies and as I have found that the Employer was in breech of the Collective Agreement and that the TIL for the periods submitted should be granted as per the decision in ***PSA obo H C Gouvea v PSCBC and others*** (supra), the unpaid leave deducted should also be converted to paid leave and paid back to the applicant.

Regarding the 27th September 2012 leave day it is common cause that no medical certificate was presented and that there was no proper TIL application submitted. I therefore do not find that that period qualifies for the approval of TIL. The allegation that

the employer acted unfairly is therefore, as argued by the Employer, not an issue that I can determine as part of this dispute.

AWARD

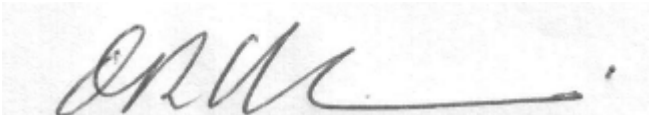
The respondent is in breach of Resolution 7 of 2000. I therefore order the following:

1. That the Employer approves the Temporary Incapacity Leave for:
    1. Period 27 – 30 June 2012.
    2. Period 1 – 5 July 2012
    3. Period 10 – 19 July 2012
    4. Period 6 - 9 July 2012 paid back for the deduction of unpaid leave.

2. The employer pays back to the applicant amounts calculated as the following:
    - R 2 408, 21 (27 – 30 June 2012 TIL declined. Since that leave cycle has expired, that she be paid out the cash value of the days.
    - R 3 010, 27 (1- 5 July 2012 – TIL declined.)
    - R 2 408, 21 (6 - 9 July 2012 – leave without pay for days she wasn't required to work.)
    - R 6 020,54 (10 – 19 July – TIL declined)

Total to be paid back: R 13 847-28

3. That the employer implements this award by not later than 31 March 2014.



Arbitrator: Retief Olivier
PSCBC 756-13.14
2 March 2014