ARBITRATION AWARD

Panellist: John Cheere Robertson
Case No.: PSCB627-12/13
Date of Award: 8 February 2014

In the ARBITRATION between:

SAPU obo A Van Der Berg
(Union / Employee)

and

South African Police Service
(Employer)

Union/Employee's representative: Mr L Naude
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DETAILS OF HEARING AND REPRESENTATION

1 This matter was scheduled for arbitration on 10 December 2013 at the SAPU offices in Port Elizabeth. Mr L Naude of SAPU represented Mr A Van Der Berg (Persal No. 0429473-4) (employee). Col. A De Witt represented the South African Police Service (SAPS) (employer) on 10 December 2013. The parties agreed on a written statement of case, see below, and submitted written closing arguments by 13 December 2013 and 23 January 2014 respectively (Col. R Mahloromela submitted written closing arguements for the employer).

ISSUE TO BE DECIDED

2 The issue to be determined is whether or not the employer complied with Resolution 7/2000 in declining the employee's application for temporary incapacity leave (TIL) and dependent thereon appropriate relief.

BACKGROUND TO THE ISSUE

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

3.1 The employee referred a dispute relating to the interpretation and application of collective agreement 7/2000.

3.2 The employee suffered a stroke during April 2010, was admitted to hospital and unconscious for three (3 days). He was on sick leave and booked off sick by his treating doctor (specialist physician Dr. Bester) by way of various certificates for the period April 2010 to 09 December 2010. During this period he was not required to return to work.

3.3 As at 29 June 2010 the employee's existing vacation and sick leave entitlement were exhausted.

*3.4 The treating doctor booked the employee off (medical certificate dated 10 June 2010 **A.1**) for a period of 6 months (10 June 2010 to 09 December 2010). The doctor completed the sick certificate for a period of six months. The employee duly applied for Temporary Incapacity Leave (long period) for the above period within the prescribed time limits as per the sick certificate.*

3.5 On enquiry by the employee as to the status of his application during or about September 2010, the employer informed the employee that the sick certificate cannot be accepted and that they require monthly certificates. On 20 September 2010 the employee's treating doctor completed separate monthly medical certificates (June, July, August and September).

3.6 These certificates were then used to completed fresh monthly TIL applications for the months in question (as required in 3.5 above) and which was duly submitted by his station commissioner to the relevant authority.

3.7 For the months of October to December 2010 monthly applications for TIL were timeously submitted accompanied with the relevant medical certificates.

3.8 On 02 January 2011 the employee returned to work and is currently employed as a SAP 13 clerk.

3.9 More than two (2) years later these TIL applications were declined by the employer. The employee contends he was never informed of the decision.

3.10 As of March 2012, without consultation, the employer commenced deduction of varying amounts from his salary and is currently deducting approximately R500 per month.

3.11 On enquiries the employee was informed that this was in respect of a debt due to declined TIL.

*3.12 After making a representation and lodging a grievance, the employee was informed that his applications for TIL was declined for the following (**A.2**):*

- *No start and end date to the sick leave*
- *The medical certificate was issued after the sick leave commenced*
- *The diagnosis is not specific.*

3.13 The relevant policy documents are Resolution 7/2000, National Instruction 2 of 2004, Delegation of Powers: Consolidation Notice 22/2005 as amended by CN 3/2008 and PILIR and are applicable to this dispute.

314 The contents of the documents handed up (A.1 to A.2) are admitted and require no further proof as to authenticity, delivery and receipt.

SURVEY OF EVIDENCE AND ARGUMENT

The employee's submissions

4 The employee argued to the effect that the employer had not complied with the collective agreement in not making a decision within 30 days as required. In respect of the application for 6 months TIL, this was covered in terms of the employer's policies on TIL, namely in respect of long TIL. Further that the resolution was binding on the parties and accordingly the employer's decision, made out of time, amounted to a unilateral act outside of the agreement and could not serve to deny the employee his TIL

The employer's submissions

5 The employer argued to the effect that in respect of the period 10 June 2010 to 9 December 2010, in respect of which TIL was not approved that:

- The medical certificate was issued in hindsight for the period 10 June 2010 to 3 August 2010. The decision not to approve was taken on 18 February 2011 and the employee informed accordingly
- The application for TIL for the period 8 August 2010 to 9 December 2010 was initially not approved on 30 November 2011 as there was no application on record at head office. The employee resubmitted his application which was not granted as the medical certificate was issued on 4 October 2010, there were no start or end dates given for the recommended sick leave and the diagnosis was not specific.
- The grant or decline of TIL was made at the employer's discretion and that barring a right in legislation, contract or a collective agreement an employee had no right to paid sick leave after exhausting their entitlement to the 36 days normal sick leave (Para 7.4 of R 7/2000)

ANALYSIS OF EVIDENCE AND ARGUMENT

6 I have issued prior awards on the interpretation or application of PSCBC R 7/2000 and accordingly references herein to the provisions of R 7/2000 and case law will be similar.

7 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*"[1] (the successor to R 7/2000).

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

8 Interpretation refers to the situation where the parties differ over the meaning of a provision of the collective agreement.[2] "Application" includes both the question whether an agreement applies to the facts in question and "the manner in which the agreement is applied, which includes non-compliance."[3]

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

"***Normal Sick Leave:***

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

(b) The employer shall require a medical certificate from a registered medical practitioner if three or more consecutive days are taken as sick leave

(c) Practitioners shall, for this purpose, include practitioners as defined by the Health Professionals Council of South Africa (Medical and dental practitioners)

(d) An employee shall produce a medical certificate at the request of the employer where a pattern has been established

(e) Unused sick leave credits shall lapse at the end of a three-year cycle"

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

*"**Temporary Incapacity Leave:***

*(a) An employee whose normal sick leave credits in a cycle have been exhausted and who**, according to the relevant practitioner, requires to be absent from work due to incapacity which is not permanent,** may be granted sick leave on full pay provided that:*

i) her or his supervisor is informed that the employee is ill, and

ii) a relevant registered medical and/or dental practitioner has duly certified such a condition in advance as temporary incapacity except where conditions do not allow.

(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" (Emphasis added)

11 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

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[2] 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]

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

period and refers to a period of **absence from work due to incapacity which is not permanent**. In terms of the Policy and Procedure on Incapacity Leave and for Ill Health Retirement (PILIR), see below TIL is divided into TIL less than 30 days and Long TIL i.e. more than 30 days. This however is a requirement of PILIR and not R 7/2000

12 R 7/2000 is amplified by PILIR determined by the Minister for Public Service and Administration in terms of section 3(3) of the Public Service Act 1994[4].

13 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 as set out in Paragraph 7.5.1 of R 7/2000. In the circumstances whether or not an employee is granted TIL depends on the discretion of the employer after investigations in accordance with Para 7.5.1 (b).

14 In summary, where an employee has exhausted their sick leave, is further temporarily incapacitated and:

- Their supervisor is informed of their illness[5]
- A registered medical/dental practitioner, certifies in advance (unless this is not possible in the circumstances)[6], 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[7] 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 that may be used.

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

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4. PILIR, (and the N/I 2/2004 in respect of the SAPS) 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 amongst others, TIL, the employer being responsible for the final decision (see e.g. PILIR paragraph 6.4, 6.5, 7.1.1, 7.2.9; N/I 2/2004 paragraph 2(e), 4(4), 7.), *inter alia* emphasize that TIL is not an automatic entitlement but is granted at the discretion of the employer and that where TIL is refused the employer must cover the period of absence as requested by the employee or where the employee fails to notify the employer or there are insufficient annual leave credits by unpaid leave (see e.g. 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); N/I 2/2004 paragraph 7(4) & 7(5)). In practical terms this will mean, that where there are no leave credits the employer will effect deductions from the employee's salary to recover the amount already disbursed as salary, to the employee, for the period/s in question. While PILIR (and the N/I 2/2004), do not necessarily fall within the ambit of jurisdiction of the PSCBC, they provide the context for a consideration of applications for TIL and in the instant case, the employer is required, at the very least, to comply with its own policy documents relative to sick leave/TIL.

5 Para 7.5.1 (a)(i) R 7/2000

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

7 Para 7.5.1 (b) R 7/2000

16 The respondent had cross – reviewed relying on *Minister of Safety & Security v SSSBC & others (2010) 31 ILJ 1813 (LAC) (SSSBC)* arguing that the interpretation and application of R 7/2000 was only "an issue in dispute" and that the real dispute was whether its decision to refuse the employee's application for Temporary Incapacity Leave was fair, in which event the PSCBC did not have jurisdiction.

17 The Labour Court considered the judgements in *SSSBC* & *Johannesburg City Parks v Mphahlani NO & others (2010) 31 ILJ 1804 (LAC)* in which the court distinguished between "a dispute" and an "issue in dispute" and found that where the interpretation or application of a collective agreement was merely an issue in dispute which had to be dealt with in order to resolve the real dispute, the bargaining council did not have jurisdiction. **However, the court noted that these decisions had to be reconsidered in the light of the LAC judgement *in PSA obo De Bruyn v Ministers of Safety & Security & another (2012) 33 ILJ 1822 (LAC*) which dealt with the issue of granting Temporary Incapacity Leave (PSCBC Collective Agreement R 7/2000), 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**.[8]

18 *"That dictum[9] is directly applicable to the facts of the matter before me and I am bound by that decision. Although the LAC in De Bruyn did not refer to its earlier decisions in City Parks and SSSBC, it appears to me that De Bruyn 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 applicant 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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[8] 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.

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[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."

[9] PSA obo Liebenberg v Department of Defense 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),

19 In the circumstances where an employee is dissatisfied with the decision of an employer concerning the interpretation or application of a collective agreement, the employee is confined to the remedy in terms of s 24 (read with 32 and 33 in the case of a Bargaining Council) of the LRA and cannot take the employer's decision on review to the Labour Court in terms of S 158(1)(*h*). The employee has formulated his claim as one relating to the interpretation and application of a collective agreement[10], namely R 7/2000 and essentially complains of non-compliance by the employer with the collective agreement.

20 Accordingly the appropriate forum for an employee to challenge the employer's decision in refusing the grant of TIL is the PSCBC.[11] In the circumstances I am satisfied, given the recent and binding case law and the nature of the employee's dispute, that the PSCBC has jurisdiction to entertain the employee's claim.[12]

21 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[13], will invite judicial scrutiny for want of compliance with the collective agreement.

22 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[14].

23 In the circumstances the discretion to grant or refuse TIL, must be exercised properly and fairly (e.g. it should not amongst other things have a retrospective effect)[15], be accompanied by reasons[16] and in accordance with the provisions of R 7/2000, one of which is that the employer **"shall" in terms of 7.5.1 (c) conduct investigations in accordance with Item 10(1) of the Labour Relations Act 66 of 1995 (LRA) within 30 working days.**

24 Essentially the employee claims he be granted TIL for the period, namely 10 June 2010 to 9 December 2010. The employer argues that he is not entitled to such leave on the basis:

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

[11] Footnote 8 and 9 above and see Spies v National Commissioner SAPS [JOL] 21525 (LC) [22] referred to in Janse Van Rensburg and others v Minister of Safety and Security [2009] 4 BLLR 400 (LC) [25]

[12] The cases of *Van Rensburg and Others v Minister of Safety and Security* [2009] 4 BLLR (LC) (28 November 2008) and *Spies v National Commissioner of SAPS and others* (2008) 29 IILJ *2022* (LC). These cases concerned an application for urgent relief to the Labour Court and reflected the courts concern that neither employee was able to show proof that they had a prima facie right and further that in the one matter the employee was able to proceed for relief in the Bargaining Council. In the circumstances these cases are not authority for the contention that an employee is not entitled to the award of TIL or refund of monies advanced conditionally.

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

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

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

24.1 That the application for the period 10 June 2010 to 3 August 2010, was not granted because the medical certificate was issued in hindsight. The application was declined on 18 February 2011 and the employee informed thereof.

24.2 The application for TIL for the period (August 2010) to 9 December 2010, was not granted as the medical certificate was issued on 4 October 2010 and did not set out start or end dates or a specific diagnosis. This application was initially declined on 30 November 2011 as there was no record of the application at head office. On the employee resubmitting the application it was declined for the reasons given above.

24.3 Insufficient information was contained in the medical certificate to enable the employer to make an informed decision on the employee's condition and in any event barring a right in law, contract or a collective agreement the employee had no claim for paid leave once the threshold of 30 days sick leave had been exceeded in a leave cycle of 3 years.

25 The employer sketches a different set of background facts as that agreed in the parties' statement of case, see paragraphs 4 to 7 thereof, recorded at paragraph [3] above. In so far as there is a variance I am bound to observe the facts as agreed. I am of the view, however, that any differences are not material to the end result, see below.

26 In my view given that the employer should in terms of PILIR place the employee on conditional leave and further in terms of Para 7.5.1(b) of R 7/2000 conduct an investigation in accordance with item 10(1) of Schedule 8 to the LRA, which was not done, and further that it is not disputed that the employee submitted his application for TIL for the period 10 June 2010 to 9 December 2010 within the prescribed time limits (see para 4 of their stated case) his application for TIL complies with Para 7.5.1 of R 7/2000. In any event it is not disputed that the employer accepted the application/s for TIL for processing and decision thereon.

27 The employee submitted one application for TIL for the period 10 June 2010 to 9 December 2012 on the basis of a medical certificate from his doctor dated 10 June 2010 stating that the employee had suffered a heart attack and had severe communication dysfunctions and required 6 months temporary incapacity leave to recover (A1). On making enquiries as to the status of his application "during or about September 2010" he was told that the medical certificate could not be accepted and that monthly certificates were required. The employee then obtained monthly medical certificates from the medical practitioner and these were duly submitted along with monthly applications for TIL for the remaining period.

28 It is self evident that the certificates for the period prior to the date of enquiry would be post dated. As to why this should be a problem and render the certificates unacceptable is not clear as the original medical certificate, covering the employee's medical condition, was dated 10 June 2010. As to employer's concern regarding the diagnosis and period required for recovery, again the employer's reasons are not clear. The doctor unequivocally states that the employee suffered a heart attack and suffered from a severe communication dysfunction. The medical certificate is dated 6 June 2010 and the period recommended for incapacity leave is six months. In the event the employer did not agree with this it could have arranged for a second opinion and in any event the matter

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

in so far as the employer was concerned and in terms of R 7 /2000 would have been addressed had the employer conducted the investigations as required in terms of paragraph 7.5.1(b). No reference whatsoever is made to this, in fact it was the employee, who during or about September 2010 made enquiries as to the status of his TIL application.

29 Paragraph 7.5.1 makes no reference to a period in respect of which TIL may be granted. The point being that the incapacity must be of a temporary nature as opposed to permanent. Permanent incapacity is dealt with in paragraph 7.5.2. In the circumstances there is no requirement that TIL may only be granted for 30 days. This is supported by the fact that PILIR recognizes this by way of reference to TIL (less than 30 days) and Long Temporary Incapacity Leave (LTIL) of more than 30 days.

30 Notwithstanding the employee's submission of his application for TIL within the prescribed time limits and further upon the advices of the employer submitting applications supported by monthly medical certificates, over the period 6 June 2010 to December 2010 (as from October 2010 but with effect from 6 June 2010), the employer declined his application/s for TIL two years later (12 December 2012, A2) and commenced deducting monies from his salary as from end March 2012.

31 It is evident that the employer did not act in accordance with item 10(1) of Schedule 8 to the LRA or comply with the 30 working day time period as prescribed in the collective agreement.

32 An employee may be granted sick leave 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 and within 30 working days,** so decides. 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 the *"employer must cover the period of absence…by unpaid leave"*[17]. In the instant case the decision to refuse the grant of TIL was made *ex post facto* (approximately two years after the application was made i.e. outside the prescribed period and not in compliance with R 7/2000).

33 The recovery of salary paid for "conditional leave" initially granted, pending the outcome of an application for TIL, is done either by deductions from salary, vacation leave credits, capped leave or unpaid leave and is inextricably linked to the decision to decline TIL and ancillary thereto, a consideration of the one involves the other, in addition R 7/2000 concerns the grant or not of paid sick leave for TIL, 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 TIL, recovery of salary paid or appropriation of capped or vacation leave, relative to such application. In any event a decision one way or another on the grant of TIL impacts on whether or not an employee may be remunerated for TIL

[17]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…)

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

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

(a) that gives effect to any collective agreement;

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

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

Awards may vary, depending on the matter at hand[18].

35 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* a period of approximately two years), and acts to the prejudice of the employee, (in this case the declining of TIL (A2) and the implementation of monthly deductions from his salary for the recovery of salary paid whilst he was on conditional sick leave), 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"***[19]. In other words employees cannot be subjected to leave without pay / and in this case monthly deductions from their salary, in order to recover salary paid, where an application for TIL is declined for a period they have been off work sick, 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. The employer may only recover salary paid, if TIL was declined within 30 days, subject to investigation in accordance with paragraph 7.5.1(b) of R 7/2000 alternatively, if it is declined at a later date, for the period after the employee was required to return to work and could not and e.g. was placed on unpaid sick leave. If not, the refusal to grant TIL acts with retrospective effect on the employee in question and for that reason is unfair. In the instant matter the employee returned to wok on 2 January 2011.

36 The fact that employees are aware that their applications for TIL 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 TIL an unreasonable and arbitrary exercise of a discretion with unfair consequences to the employee. In the circumstances I make the following award.

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

[19] *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 to return to work.

AWARD

37 The employer (The South African Police Service), failed to comply with the provisions of PSCBC Resolution 7/2000 in declining the employee W/O A Van Der Berg's application for temporary incapacity leave for the period 10 June 2010 to 9 December 2010.

38 The employee W/O A Van Der Berg is entitled to temporary incapacity leave for the period 10 June 2010 to 9 December 2010.

39 The employer (The South African Police Service) is ordered to amend the employee's personnel / leave file accordingly and to refund the employee all amounts deducted from his salary for purposes of covering the period 10 June 2010 to 9 December 2010 and

40 The employer is ordered to attend to 38 and 39 above, within 30 days of the date of this award.

John Cheere Robertson
PSCBC Panellist
Sector: Public, Safety & Security