



# ARBITRATION AWARD

Panellist/s: U Bulbring  
Case No.: PSCB 231-09/10  
Date of Award: 18 May 2010

In the ARBITRATION between:

PSA obo Evadne Hendrikse

(Union / Applicant)

and

Department of Public Works

(Respondent)

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION

The hearing was held at the premises of the Department of Public Works ("the department") on 22 April 2010 under the auspices of the Public Service Co-ordinating Bargaining Council ("PSCBC"). The applicant, Evadne Hendrikse ("EH") was represented by Aileen Mosectic ("Mosectic") from Public Servants Association ("the union"), while the department's labour relations officer, Julia Mahasha ("Mahasha") appeared for the department. The proceedings were recorded. The union filed written closing submissions; these were received by me on 28 April 2010.

### ISSUE TO BE DECIDED

The disputes relates to the allocation and approval of temporary incapacity leave ("TIL"). EH argues that she is entitled to TIL in terms of section 7.5 of PSCBC Resolution 7 of 2000 ("Res 7 of 2000") read together with the department's policy and procedure on incapacity leave and ill health retirement ("PILIR") and the Determination on Leave of Absence in the Public Service, a collective agreement in terms of s 24 of the Labour Relations Act, 1995 ("the LRA"). I must decide if EH is entitled to such TIL and determine the appropriate award, if any.

## **BACKGROUND TO THE MATTER**

EH has been employed by the department since September 1991. She is currently employed as a State Accountant and is on a salary level 7. EH applied for TIL for the periods: 25 October 2006; 23 to 27 July 2007 and 24 to 28 October 2008. All periods were declined other than 28 October 2008. The amounts in respect of the periods that she did not work have subsequently been deducted from her salary other than the period 24 to 27 October 2008. The latter period does not reflect on her leave record (at all) and has not been deducted.

It was common cause that the following amounts have been deducted:

R271.00 in respect of 25 October 2006;

R1471.19 in respect of 23 to 27 July 2007

EH was informed on 7 July 2009 (nearly three years after she applied for TIL in respect of the 25 October 2006 application) that it was not approved. The union set out that by the time that EH was informed that the TIL was declined she had exhausted her vacation leave and could not use it for that period.

EH seeks repayment of the monies deducted for the periods 25 October 2006 and 23 to 27 July 2007 and that the department be ordered to reflect the period 24 to 27 October 2008 as TIL on her leave record / register.

The department contends that it has complied with clause 7(5) of the resolution. It is an employee's duty to manage her leave responsibly. EH has not done so.

## **SURVEY OF EVIDENCE AND ARGUMENT**

### Evidence

Several of the facts and circumstances were common cause and these were set out by the parties. EH testified for herself, while the department's senior personnel practitioner, Nomathemba Gusha ("Gusha") and assistant director: leave and records management, Elizabeth Mathebula ("EM") testified for the department.

EH applied for sick leave for the day, 25 October 2006. The application is dated 26 October 2006 and signed by her supervisor on the same day. She applied for sick leave for the period 23 to 27 July 2007. The application is dated 30 July 2007. She applied for sick leave for the period 24 to 28 October 2008. The application is dated 29 October 2008 and signed by the supervisor on 3 November 2008.

EH testified about each incident and how she was genuinely ill and couldn't work on the said days. EH testified that she was pregnant in February 2006 and her blood pressure had been high. She had been hospitalised during that period and her child was born prematurely. Her doctor advised her that he thought her high blood pressure was as a result of the pregnancy and would normalise thereafter. Yet, it didn't. On 25 October 2006 she experienced high blood pressure and was required to change her blood pressure medication. The sick certificate records her illness for the day as "hypertension". She was booked off by her doctor for the period 23 to 27 July 2008 for sinus and bronchitis. She was booked off from 24 to 28 October 2008 for a stomach ulcer.

EH said that a stomach operation for reflux during the period February to April 2007 used up most of her sick leave (26 days). The department's rule is that you use up your sick

leave first before applying for TIL. TIL for 28 October 2008 was approved by the department; it was the day that she went to hospital for a scope.

EH testified that she has, on several occasions used her vacation leave for days that she has been sick. This includes using her vacation leave for blood tests, gastro and a shoulder injury. She is accordingly not abusing TIL.

EH testified that she always puts in her sick leave on the day she returns to work, since her supervisor, Deputy Director: Accounts and Budget Finance, Nico Fourie is very strict about this.

She received an email from the department dated 8 July 2009 in reply to her application for two of the periods. No reasons were given. The email reads:

*"Please be informed that your application for (TIL) for the following periods are as follows*

*25 October 2006 declined*

*23 July 2007 -27 July 2007 does not qualify*

*If you have any queries related to the above matter please contact Tembi at x21234 or HR room 915"*

For the period 24 to 27 October 2008 EH received a letter dated 7 July 2009. It reads:

*"We wish to inform you that your application for short period temporary incapacity leave for the period 24 – 28 October 2008 has been partially approved.*

*\*24-27 October (declined)*

*\*28 October (approved)*

*In respect of the current application, given all of the objective medical information pertaining to this application, we are of the view that you were temporarily incapacitated from performing your occupation ... as a result of the peptic ulcer. This application therefore meets the requirements necessary for granting of incapacity leave.*

*Notwithstanding, in light of the fact that you have already exhausted your 36 days of normal sick leave for 2007 to 2009 sick leave cycle , you should be cautioned to avail of all future sick leave with care bearing in mind that until the end of 2009 all sick leave applications will be considered as incapacity leave. Similarly we would like to advise you that the manner in which you use sick leave in the 2007 to 2009 sick leave cycle will also have a significant impact on the assessment of any future incapacity leave applications. Where such incapacity leave is not validated, it will be regarded as unpaid leave, or alternatively you may elect to convert such absence to annual leave should such leave be available to you".*

EH replied by email asking for the dates that the application were sent to head office and then the dates that they were sent to SOMA (the outsourced service provider that considers the applications). She did not receive a reply. EH again addressed an email to HR asking why it had taken three years to get back to her; she did not receive a reply.

EH then filed a grievance on 14 July 2009. She did not receive a reply. EH then went to the union who lodged a dispute with the PSCBC.

EH said that she had seen the SOMA findings and the SOMA reports for the first time at the arbitration hearing, other than the one for the period 24 to 28 October 2008. .

EH said that when her TIL was declined she was advised that she could use her vacation leave. This was not possible though as the vacation leave for those periods had been exhausted. It was three years later.

EH said that the deductions placed her in a financial predicament. She could not afford the deductions.

EH testified that when she hands in application forms for leave, she takes them to Human Resources ("HR"), who then advise whether there is sufficient leave credit available. She relies on their advice. If there aren't any leave credits, she is required to put in an application for TIL; which she does. This is all done on the advice of HR. For the period 23 to 27 July 2007 EH said that she was advised by HR that she did not have enough sick leave credits and had to apply for TIL. According to SOMA's report she did not qualify for TIL, because her normal sick leave had not been exhausted. This is also confirmed in the sick leave cycle table for 2007, where it shows that at the time, she had utilised 33 days sick leave and therefore she still had 3 days to her credit. EH said that she did not know this and it could not have been the case. She relied on HR; she did not have sick leave credits and applied for TIL. She was not told in the letter declining her TIL that it was because she still had sick leave credits. It simply stated "does not qualify".

EH testified that she did not receive any feedback; she did not receive additional correspondence from the department.

The monies for 25 October 2006 and 23 to 27 July 2007 have been deducted from her already.

The department asserted that EH's new sick leave cycle began in January 2007 (the three year cycle had ended in December 2006). For the period 23 to 27 July 2007 she had three sick leave credits. EH repeated that HR had advised her. In this regard EH said that she underwent an operation on 25 February 2007, using up 26 days sick leave. EH expressed the view that the operation should have been recorded as TIL leave and then she could use her ordinary sick leave for other sick days.

EH said that she knows that TIL is not a right but asked why it had taken the department so long to get back to her. EH agreed that the deductions were communicated to her before they were made. She thought that she had to agree. She did not know that she could wait for the finalisation of the grievance and arbitration.

The department's version was that the application dated 25 October 2006 was submitted to head office on 23 June 2008 from HR, Cape Town. Soma then took six months with it.

EH agreed during cross-examination that TIL for other periods during which she was hospitalised had been approved. Each employee has 36 days leave in a sick leave cycle. If one exhausts sick leave, an employee can apply for TIL. Leave is captured on the system (persal). If the system reflects "insufficient leave" for sick leave to be taken, an employee is given a TIL leave form to fill in. It goes from HR to head office to SOMA. TIL is not additional leave, it is conditional and at the discretion of the department.

Gusha testified that her job is to deal with leave including TIL. Employees are required to manage their leave habits. She commenced employment with the department in September 2007. Her supervisor advised her that there was a backlog. Approximately 200 leave forms had not been captured. During 2008 she found EH's 2006 TIL leave form. It was sent to head office. SOMA declined it. Gusha informed EH. EH was not satisfied and referred a grievance.

Gusha said that she gave EH SOMA's reasons for declining her application (this was disputed). She showed EH SOMA's reports (all in the bundles). EH's version was that

she received the October 2008 report. Gusha said that she explained to EH that if she was not happy with the outcome she should submit a full medical report for the period. EH said that she was not able to do so because the doctor who booked her off had emigrated.

EM testified that she manages the leave at head office and PILIR within the department. She sees to it that employees manage their leave. TIL is not a right it is a privilege. The department has a discretion. EM confirmed that EH's applications for 25 October 2006 and 23 to 27 July 2007; were sent to head office on 24 June 2008. Head office sent it on to SOMA on 14 July 2008 and received feedback from SOMA on 29 January 2009. The department then advised EH in July 2009. EH's application for the period 24 to 28 October 2008 was sent to head office on 20 January 2009. Head office sent it to SOMA 26 January 2009 and received feedback from SOMA on 22 June 2009. The department informed EH by means of a letter dated 7 July 2009 that this period had been declined.

EM said that 25 October 2006 was declined because SOMA's view was that EH was not temporarily incapacitated on that day. The department felt that it was reasonable to follow SOMA in this regard. If an employee is not satisfied with the decision s/he can bring additional information to the department. EH's grievance letter advising the department that she cannot obtain further information from her doctor to prove that the leave was necessary because he had emigrated, is proof that EH knew that she could bring additional medical evidence to the department's attention. Had she done so the department's EAP (employee assistance program) would have considered it. It would not have been resubmitted to SOMA because SOMA charges the department a set fee for each application, even if it is resubmitted. EAP would have considered it and made a recommendation.

As to the delay EM set out that at the time SOMA was dealing with all the department's applications and those of other government departments. The department sends approximately 100 applications to SOMA a week. There are now, from 1 May 2009 two groups of SOMA doctors to lessen the workload.

EM's view was that EH should have submitted additional information to substantiate the periods that she was off. EM said that 23 to 27 July 2007 was declined because EH had three days sick leave credits owing to her. Three days should have been captured as sick leave and then she should have applied for TIL for the other two days.

#### Argument

The argument will be addressed below, if relevant.

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

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

*"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 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.”*

The applicant bears the onus of showing that the respondent did not apply the policy fairly. An arbitrator considering a challenge must defer to the department's discretion if it is properly exercised. This means that if the department did indeed take into account all the factors and struck a reasonable balance between them the decision must stand.<sup>1</sup>

But the department's discretionary decision cannot stand if

- (a) it was not consistent with applicable rules or regulations;
- (b) it was based on an error of law;
- (c) it was based on irrelevant considerations;
- (d) it was biased or improperly motivated; or
- (e) it disregarded facts that should have been considered.

As set out by Christie in PSA obo du Plessis v Department of Correctional Services (PSCB 201-07/08), the PILIR is an elaborate policy and is clearly designed to meet two goals (a) to assist public sector workers who are suffering from serious ill-health and (b) to guard against frivolous or fraudulent claims. Each case must be decided on its own merits.

The union does not dispute that it is within the department's prerogative to allocate TIL as contained in the resolution. Their argument is that this prerogative must still be applied fairly. It is the union's contention that the department did not do so fairly.

The first issue raised by the union (in respect of all three application periods) is that the unfairness lies in the fact that it took too long to inform EH that the TIL was disapproved. According to the prescripts TIL should be administered within 30 days. This is in terms of the resolution under discussion as well as the determination and PILIR (Paragraph 7.2.9 sets out that the “employer must within 30 working days after the receipt of both the application form and medical certificate . . . . approve or refuse temporary incapacity leave.”) According to the PILIR, the employer must approve or refuse TIL within 30 working days. Here, the department disapproved EH's TIL between two and a half years to nine months after her applications, thereby not complying with the PILIR and consequently with Resolution 7 of 2000.

The department attributed the non compliance to its backlog and further delays caused by SOMA and its backlog.

Senior managers are accountable and are required to ensure that the time frames set for the employer in the above-mentioned policies are adhered to. If time periods are not going to be adhered to employees should be notified. That said, monies were only deducted over a period of time after EH's application was declined. EH knew that her leave was exhausted and that she ran the risk of the TIL not being approved. That the department did not investigate the matter within the 30 working day period is in breach of the collective agreement but EH did not suffer any prejudice simply because of the time delay.

I turn now to deal with each of the individual TIL applications.

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<sup>1</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC), per Justice O'Regan, para 50.

25 October 2006 – Here, the department accepted SOMA's recommendation to decline the TIL. It was declined on the basis of the SOMA report dated 20 January 2009. Here, SOMA dealt with the sick leave cycle from 2004 to 2006 saying that EH had exhausted her 36 days normal sick leave on 13 February 2006 over 16 incidents ranging in duration from 1 to 7 days. SOMA points out in the report that diagnoses include bronchitis, gastro, migraines, pregnancy and carpal tunnel syndrome. During this period there was a further 32 days of long TIL. TIL was applied for 25 October 2006 for hypertension. SOMA declined it; part of the reasoning is as follows:

*"Soma is unable to grant approval ... devoid of further objective information outlining the severity of the employee's symptomatology to have necessitated this absence from work. In this regard an individual's blood pressure can be elevated and not render incapacity and/ or require absence from work... there is no indication that the employee's condition was significantly serious as to require hospitalisation, special investigation and treatment. Consequently where an employee wishes to access paid incapacity leave objective proof of definitive incapacity associated with the hypertension will at the very least have to be provided."*

To my mind, in considering all the factors presented to me, the department's discretion, in following SOMA's recommendation was exercised fairly. It was EH's responsibility to manage her sick leave here. There are no extraordinary circumstances here. It was another day's sick leave.

23 to 27 July 2007 – Here SOMA analysed the matter and concluded that the application did not qualify for short period TIL. Part of the report reads:

*"In this context, there is no evidence to indicate that the employee exhausted her 36 days of normal sick leave during the 2007 to 2009 sick leave cycle, prior to the current application period of 5 days extending from 23 July to 27 July 2007".*

SOMA went on to say that if EH had in fact exhausted her normal sick leave for that period prior to this absence from work, then the department should "resubmit this application, together with updated personal records, all medical certificates and sick leave application forms to support that the current period should be assessed as an incapacity leave application and that it is actually not normal sick leave". EH was not informed about this.

The department did not follow SOMA's recommendation that it resubmit the application together with the updated personal records. It simply advised EH that the TIL was declined. It did not check its personal records to check whether the period fell under TIL or normal sick leave. That the department has inadequately investigated this means that EH has been prejudiced. She was advised by HR and had relied on their advice in the past. EM conceded that "the person capturing maybe didn't look properly".

The department's failure to follow SOMA's recommendation here and its failure to update and verify the personal records leads me to conclude that the department improperly exercised its discretion here; it was not applied or handled fairly. It is too late to now require the department to resubmit the application based on the correct personal records. The period 23 to 27 July 2007 is accordingly to be noted as and credited to EH as TIL.

24 to 27 October 2007 – This period of TIL that EH applied for fell during her sick leave cycle period 2007 to 2009. It was during this sick leave cycle that EH took 26 days continuous normal sick leave for a reflux stomach operation. It used up all her "normal" sick leave.

EH was off from 24 to 28 October 2007 with peptic ulcers. She was hospitalised and underwent a gastroscopy on 28 October 2008. She applied for TIL. TIL was granted for

28 October 2008 (the day she was hospitalised). The remainder of the period was declined. Part of SOMA's motivation reads:

*"... the accompanying medical certificate does not provide objective justification of and necessity for the further granting of sick leave subsequent to the exhaustion of the 36 days' normal sick leave".*

No other reasons in respect of the medical condition are given.

During her evidence EM suggested that here, the department could possibly have overruled SOMA's recommendation. This response came from a question that was posed in respect of the 26 days of EH's sick leave that had been used up because of an operation. I agree with EM. To my mind this is indeed a consideration. Were it not for the operation, EH would have had normal sick leave to her credit. I infer based on this that the department improperly exercised its discretion here. TIL is to be applied for this period. That EH could have submitted additional medical evidence here, is not relevant.

I find that in respect of 23 to 27 July 2007 and 24 to 27 October 2008 the department did not comply with the prescripts of collective agreement, PSCBC resolution 7 of 2000.

TIL is to be allocated for the periods 23 to 27 July 2007 and 24 to 27 October 2008.

The amounts deducted from EH salary for the period 23 to 27 July 2007 should be repaid to EH. This is the amount of R1471.19.

It was put to EH that she has agreed to have the Department deduct the monies from her and there was an inference that because she did so, she cannot now claim that she wants the monies back. EH is a lay person. She did not know that she could decline to have monies deducted until the finalisation of the matter. I accept this.

## **AWARD**

The department is in breach of resolution 7 of 2000.

The department's decision to refuse EH's application for TIL for the periods 23 to 27 July and 24 to 27 October 2008 is hereby set aside.

The department must reimburse the deductions for the period 23 27 July 2007 in the sum of R1471.19 on or before 11 June 2010.

The period 24 to 27 October 2008 is to be reflected as TIL on EH's leave records.

**Dated at Cape Town this 18<sup>th</sup> day of May 2010.**

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Ursula Bulbring