IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: D642/15

In the matter between:

POPCRU	**First Applicant**
LINDANI EARL EMMANUEL MBONGWA	**Second Applicant**
and	
THE DEPARTMENT OF CORRECTIONAL SERVICES	**First Respondent**
THE MINISTER OF CORRECTIONAL SERVICES	**Second Respondent**

Heard: **18 June 2016**

Delivered: **23 November 2016**

Summary: **PILIR - employer's failure to respond to application for temporary incapacity leave within 30 working days does not translate into entitlement to such leave**

JUDGMENT

WHITCHER J

[1] Clause 3.1 of the first respondent's Policy and Procedure on Incapacity Leave and Ill-Health Retirement Policy (PILIR) provides that if an employee has exhausted his or her normal sick leave of 36 working days in a sick leave cycle of 3 years, the respondent, may at its discretion, grant temporary incapacity leave (TIL). The PILIR policy of 2005 is additionally a ministerial

determination determined in terms of section 3 (3) (c) of the Public Service Act of 1994. It amplifies a collective agreement, Resolution 7 of 2000, concluded in the Public Service Coordinating Bargaining Council.

[2] Clause 7.1.1 of PILIR provides that incapacity leave is granted conditionally at the employer's discretion.

[3] Clause 7.3.3 provides that the employer must within 5 working days from receipt of the written application for incapacity leave *conditionally* grant a maximum of 30 consecutive working days temporary incapacity leave with full pay subject to the outcome of its investigation.

[4] Clause 7.3.5 provides that the employer must within *30 working days* after receipt of the application approve or refuse temporary incapacity leave granted conditionally on conditions that the employer may determine.

[5] Clause 7.3.5 provides further that if the employer (i) approves the temporary incapacity leave granted conditionally, *such leave must be converted into temporary incapacity leave;* or if the employer (ii) refuses the temporary incapacity leave granted conditionally, the employer must notify the employee in writing of the refusal, the reasons thereof, that the employee has the right to lodge a grievance against such refusal.

[6] The first page of the application forms contains a number of warning notes to the applicant.

[7] Note 4 warns that the application for temporary incapacity leave is subject to an *investigation* and in light hereof, the employer shall grant temporary incapacity leave *conditionally* for a maximum period of 30 working days with full pay subject to the outcome of the investigation.

[8] Note 5 further cautions the applicant that if the application is declined based upon the outcome of the investigation the period of temporary incapacity leave shall be converted to either annual leave or unpaid leave.

[9] Section 38 (1) of the Public Service Act, 1994 provides that if a state employee has, in respect of his salary, including any portion of any allowance or other remuneration or any other benefit calculated on his salary or awarded to him by reason of his salary, been overpaid or received any such other benefit not due to him, an amount equal to the amount of the overpayment shall be recovered from him by way of the deduction from his salary of such instalments as the head of department, with the approval of the Treasury, may determine.

[10] The applicant is employed by the respondent as a Principal Educationist at its Westville Correctional Facility. He booked off on sick leave from 8 March 2010 citing "depression" as the reason and a salary adjustment dispute as the cause of the depression. In mid-June 2010, after he had exhausted his sick leave of 36 days, he filed an application for temporary incapacity leave; remarkably for 7 months, effective from May 2010.

[11] The applicant received no response, until 2014. In a letter dated 14 April 2014, the respondent informed the applicant that his application for temporary incapacity leave had been only partially approved by the Health Risk Manager. In summary, only 48 out of the 155 days applied for had been approved. The full report from the assessors, including their reasons for their recommendations, was attached to the letter.

[12] Three months later, the respondent sent the applicant a letter notifying him that he owed an amount of R71 498.46 to the respondent because he did not have sufficient leave credits to cover the periods of leave which had not been approved, and, accordingly, he had been on leave without pay for the periods not approved. He was advised that monthly payments of R5 958.05 would be deducted from his salary. Three months later, the respondent commenced these monthly deductions, but reduced them to R500 per month pending the outcome of this case.

The applicant's submissions

[13] The applicant contends that the deductions are unlawful because the respondent failed to make a decision and notify him thereof within the time periods prescribed in the PILIR (the 30

working day period referred to in clause 7.3.5) and because the respondent failed to afford him a hearing prior to taking the decision to effect the deductions.

[14] At the hearing of this matter (not in his founding affidavit), it was contended on behalf of the applicant that when he did not hear from the respondent after the 30 working day period referred to in clause 7.3.5 he reasonably assumed that his leave had been granted.

[15] It was further contended at the hearing that if the respondent had complied with the 30 day period, and thus advised the applicant timeously that his leave had only been partially granted, he would have reconsidered his position, which may have included returning to work to avert financial prejudice. It was contended that the policy implicitly provides the applicant with this right and the respondent's failure to afford him same caused the financial loss.

[16] Lastly, the applicant contended, section 38 of the Public Service Act, 1994 does not have application to his case because the payments made to him do not constitute "overpayments" of remuneration arising from "an error" in calculating his remuneration.

The respondent's submissions

[17] It is evident from the respondent's opposing affidavits that the processing of incapacity leave applications is cumbersome and time consuming. The application proceeds through various departments before it ends up at Proactive Health Solutions (PHS), the service provider tasked to assess all applications for temporary incapacity leave and to make recommendations thereon. The recommendation from the PHS also proceeds through various departments for approval before the employee is notified of the final outcome.

[18] According to the respondent, it only received the recommendations from PHS in April 2013. Thereafter the recommendations were sent for approval to another department, the approval was granted in May 2013 and the applicant was informed of the final outcome in April 2014.

[19] The respondent submitted that the policy and guidelines on temporary incapacity leave clearly warns applicants that temporary incapacity leave is only *conditionally* granted subject to the proviso that where leave is not approved and the employee has exhausted all sick and annual leave, then the sick leave taken will be regarded as leave without pay. The policy clears indicates that the employee assumes a risk: a risk that temporary incapacity leave may not be granted, and, if so, any leave taken will be regarded as either annual leave or unpaid leave.

[20] The respondent pointed out that nowhere in his founding affidavit did the applicant allege that he assumed the leave had been granted and that he would have reconsidered his position if he had been timeously advised of the final outcome. It is obviously an afterthought conceived by his counsel and is thus irrelevant and inadmissible.

[21] The policy in clause 7.3 permitted the applicant to lodge a grievance against the outcome of his leave application, but he had failed to do so.

[22] Section 38 of the PSA applies to the applicant's case in that he received remuneration *not due to him* - he was paid while on leave without pay.

[23] Finally, to allow the applicant to retain the money will amount to irregular and wasteful expenditure, which is contrary to the provisions of the Public Finance Management Act, 1999 (PAAM) as the applicant did not render any services during the said period.

Analysis and findings

[24] I am aware of the judgment of my learned brother, Cele, J in *Public Service Association of South Africa and Another v PSCBC, Gouvea and Others*[1]. In this he finds that where an application for temporary incapacity leave is declined outside the 30 day investigation period, any deduction from an employee's salary for the period (outside the 30 day period) that he or she was awaiting a decision from the employer would offend the prohibition against retrospectivity. Cele, J states, "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". This has been taken to mean that "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 application is declined within 30 days or unless they have been given a date to return for work and have failed to do so."[2]

[25] The decision in *Gouvea* flowed from an analysis of clause 7.5.1 (b) of PSCBC Resolution 7 of 2000, which is identical in operation to clause 7.3.5 in PILIR. PILIR, a ministerial determination, indeed amplifies the earlier PSCBC Resolution 7 of 2000.

[26] In my view this interpretation of PILIR is not sustainable in light of the fact that an employee applying for temporary incapacity leave has not been granted it yet. A late determination of an employee's application for additional leave, as lamentable as this is, and a subsequent instruction to pay back money to which the employee was not entitled does not produce a decision that retrospectively deprives the employee of a right to the payment in question. An employee seeking additional sick-leave in terms of PILIR has conditionally been paid a salary while their application for additional leave is considered. This consideration should be over within 30 days. However, if the period the employer takes to decide the application exceeds the 30 days set out in PILIR, I do not see how the conditionality of payments to an employee, subject to a medical assessment, hardens into an entitlement after the 30 day investigation period lapses. Nor, in light of clause 7.2.2.2, 7.3.3.2 and note 4 of PILIR, should a reasonable employee *applying* for additional leave assume that, should a medical assessment go against them, even if delayed, they are entitled to be paid for their absence from work. It seems to me that, if the underlying medical condition which prompted an employee to seek additional sick leave, is assessed not to have warranted such leave, this fact must determine what happens to any payments they received while applying and not the employer's delay in attending to the application.

[27] I also agree with the respondent's submission that section 38 of the PSA applies to the applicant's case in that he received remuneration *not due to him.*

Order

[28] The application is dismissed with no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicants: A P Shangase & Associates

For the respondents: Adv D N Govender, instructed by State Attorney, KZN

[1] [2013] ZALCD 3 (at para 20), unreported

[2] *Bezuidenhout / Department of Health: Eastern Cape* (2014) 23 PSCBC 4.2.2, unreported.