IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD AT PAARL

Case No PSES 76-07/08WC

In the matter between

IJ FOURIE Applicant

And

DEPARTMENT OF EDUCATION WESTERN CAPE Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 25 JUNE 2007

DELIVERED: 18 JULY 2007

SUMMARY: ELRC Resolution 7 of 2001 – whether educator treated unfairly in refusal to grant paid temporary incapacity sick leave – applicable principles to determine procedural fairness in such cases analysed after implementation of PILLIR – drafters of ELRC Resolution 7 of 2001 intended that educator must be treated in a procedurally fair manner, without being concerned about the exact content of such procedural fairness;

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] The arbitration hearing in this matter took place in Paarl on 25 June 2007. Applicant was represented by Mr. R Ahmed of NAPTOSA, a registered trade union, whereas respondent was represented by Mr. D Hendricks, employed in respondent's Labour Relations

Department. The proceedings were digitally recorded on one CD-R. The arbitration was only finalised on 11 July 2007 when the final written heads of argument were received.

THE ISSUE IN DISPUTE

[2] This dispute concerns the interpretation and application of a collective agreement. I have to decide whether respondent's decision to refuse applicant's application for paid temporary incapacity sick leave for the period between 31 August 2006 and 5 December 2006, was unfair, and if so, the appropriate relief.

SUMMARY OF THE EVIDENCE AND ARGUMENTS

Evidence and arguments on behalf of applicant

[3] **Irma Joan Fourie**, the applicant testified that she has been employed by respondent as an educator since 1984. During 1996 she was injured in a motor vehicle accident. For the past ten years she has experienced pain, more particularly back pain. She consulted different medical practitioners over the years, but despite that, her condition did not improve. During August 2006, she consulted a psychologist, Dr. Odenaal, who diagnosed her with depression and PTSD. On his recommendation she started staying at home as from 8 August 2006. At that stage she still had some sick leave left, but by 31 August 2006 her sick leave was exhausted. An application for paid temporary incapacity leave was then made in respect of the period of 31 August 2006 until 5 December 2006, during which time she did not work. During November 2006 she also consulted a Dr Karen Pont, a rheumatologist, who referred her to Dr. Bouma for tests. Dr Pont then diagnosed her pain as psoriatic arthritis.

[4] Applicant did contact respondent's personnel department to advise them about her visits to Dr Pont and Dr Bouma, and the diagnosis of psoriatic arthritis, but was told that it was not necessary to submit their reports. Respondent then contacted her to attend a consultation with Dr Swingler, a psychiatrist on 24 January 2006 which she did. On 8 May 2007 she was advised that her application for paid temporary incapacity leave was unsuccessful.

Evidence and arguments on behalf of respondent

[5] **Eric William Titus** is employed by respondent as a deputy director and is involved in the granting of leave. He explained that due to the abuse of sick leave by public servants, government implemented the "PILLIR" policy. He then proceeded to explain the PILLIR policy, but since a copy of PILLIR was handed in as an exhibit, it is not necessary to summarise his evidence in that regard. After the health risk manager assessed applicant's application for paid temporary incapacity sick leave in respect of the period of 31 August 2007 and 5 December 2007 and made a recommendation, respondent decided to refuse the application.

[6] **Douglas Carl Baard** is a medical doctor and is employed by Soma (Pty) Ltd, the private company which was appointed as health risk manager in terms of PILLIR in respect of educators in the Western Cape. Much of his evidence related to explaining PILLIR and is not necessary to summarise since a copy of PILLIR was handed in as an exhibit and PILLIR is relatively easy to understand, without the need to have it explained by a witness. He explained that Soma consists of a multidisciplinary team of people with medical expertise in different areas. Medical experts with wide and extensive expertise and skills are therefore used to objectively evaluate applications for incapacity leave and then make a recommendation to respondent in this regard. He explained that when applicant's application was evaluated, it became clear that neither her physical condition, nor her psychological condition, was objectively so serious, that she needed to be absent from work. She was simply not too sick to work.

[7] Although applicant did not submit reports from Dr Pont and Dr Bouma, medical doctors on the Soma team did contact Dr Pont and had a lengthy telephonic consultation with her about applicant's condition. Based on what Dr Pont told them, it became clear that even based on that information, applicant was not too sick to work. Applicant certainly suffered from psoriatic arthritis, but this was not so severe that she could not work.

Arguments

[8] On behalf of applicant it was submitted that she was unfairly treated and that the HOD's decision to refuse her application for paid sick leave as well as the decision to recover the remuneration in respect of the relevant periods from applicant should be set aside. On behalf of respondent it was argued that the decision not to grant any further paid incapacity sick leave was fair and correct and that I should confirm the decision.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

[9] Clause 9 of ELRC Resolution 7 of 2001 provides that educators must be treated fairly as regards the granting of paid temporary incapacity sick leave. Mr. Ahmed made it clear that applicant will not attempt to persuade me to make an order directing respondent to grant to applicant paid leave in respect of the relevant period of 31 August to 5 December 2006. Instead, I was asked, based on alleged procedural irregularities, to make an order setting aside respondent's decision and referring the matter back to respondent, directing respondent to reconsider its decision. In essence applicant's case is based on three alleged procedural irregularities in that:

9.1 It is alleged that respondent delayed too long in advising applicant of its decision; and

9.2 It is alleged that applicant was not allowed to submit further medical reports in support of her application when she wanted to do so; and

9.3 It is alleged that applicant was not given the opportunity to rebut prejudicial information which respondent had in its possession.

Delaying the decision

[10] On behalf of applicant it was submitted that by only advising applicant during May 2007 of respondent's decision relating to the application for paid temporary incapacity leave, respondent contravened time frames provided for in PILLIR which ultimately caused applicant to have an expectation that the leave would be approved. There is no merit in this argument.

[11] What possible prejudice could an educator in any event suffer as a result of respondent's failure to adhere to the time frames provided for? While it could be argued that there could be prejudice in that an educator who is advised within 30 days that her application was unsuccessful, could have returned to work had she known this, this argument does not carry much weight because if that were the case, it means that the educator was never too sick to work during that period and is for that reason in any event not entitled to the leave. Even if respondent does fail to comply with time limits provided for either in PILLIR

or clause 9 of Resolution 7 of 2001, this in itself could never *per se* constitute an irregularity, sufficiently serious to justify a finding that the employee was unfairly treated to such an extent that she should become entitled to the leave or that the matter should be referred back to respondent for a fresh decision. Since the early days of Roman Dutch Law it was recognized that substance should not be sacrificed to form:[1]

> "Administrative action based on formal or procedural defects is not always invalid. Technicality in law is not an end in itself. Legal validity is concerned not merely with technical but also with substantial correctness. Substance should not always be sacrificed to form; in special circumstances greater good might be achieved by overlooking technical defects".[2]

[12] That applicant could possibly have expected that her application would be successful, is accepted, but that is of no consequence. The only basis upon which an expectation can give rise to rights in our law, is the doctrine of legitimate expectation. The Supreme Court of Appeal has however held[3] that the doctrine of legitimate expectation has merely introduced the requirement of procedural fairness in cases where the expectations[4] of people may be affected. The Court held that the doctrine cannot be used as a basis to compel a substantive benefit.[5] The existence of a legitimate expectation does not create a substantive right that can be enforced, but merely lays down the procedure to be followed before a decision is made, such as the right to be heard.[6]

[13] This means that whatever expectation applicant had, could not, in terms of our law, give her the right to paid leave, merely because she believed, because of respondent's conduct in not making a decision sooner, that the leave was or would be granted. Applicant was afforded a right to be heard before a decision was taken, because she had the opportunity to submit a fully motivated application, which she in fact did do during October 2006. This procedural right to be heard was all that the doctrine of legitimate expectation could in any event afford to her.[7] I can in any event not

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[1] see for example Johannes Voet *Commentarius ad Pandectas* 1.3.16, which was written between 1698 and 1704 and which still remains one of the most authoritative sources of our common law

[2] Baxter *Administrative Law* at 446 and the authorities referred to by the learned author at footnotes 377 to 379

[3] M*eyer v Iscor Pension Fund* (2003) 24 ILJ 338 (SCA)

[4] as opposed to the rights

[5] paid temporary incapacity leave for example would constitute a substantive benefit

[6] ibid

[7] I am not making a finding whether the doctrine of legitimate expectation is actually applicable in this case. For this doctrine to operate an applicant must show that her expectation was reasonable and that it was induced by conduct of the other party such as a regular past practice or by an express promise. I

understand how failure to make a decision sooner, even if seen in conjunction with the fact that applicant was paid during her absence, could have created the reasonable expectation that paid leave would be granted. Whilst applicant was paid during her absence from work, such remuneration was clearly only paid provisionally, and was always subject to respondent's final decision regarding her application for paid temporary incapacity leave.

The failure to allow applicant to submit further medical reports

[14] During opening statements, Mr. Ahmed indicated that one of the procedural irregularities, that he will rely on to prove that applicant was unfairly treated, was the fact that respondent's leave department deprived applicant of the opportunity to submit further medical reports when she wanted to do so after she consulted Dr Pont. I notice that this argument was not pursued in applicant's final closing arguments.

[15] Since respondent made no attempt to lead evidence to rebut applicant's evidence in this regard, I will, for purposes of this award, accept that when applicant contacted respondent's leave department during November after her consultation with Dr Pont at which stage her application for paid temporary incapacity leave was already submitted, she was advised that it was not necessary to submit the reports from Dr Pont. However, the Soma report, handed in as exhibit C4-11, and the evidence of Dr Baard, make it clear that despite the fact that applicant did not submit Dr Pont's report, Soma did nevertheless contact Dr Pont and had a lengthy consultation with her regarding applicant's condition of psoriatic arthritis. This additional information, Soma took into account, prior to make a recommendation to respondent. In the light of this evidence, I am not surprised then that Mr. Ahmed did not pursue this argument in his written closing submissions. Given this evidence, the fact that respondent's leave department advised applicant that it was not necessary to submit the reports of Dr Pont and Dr Bouma, is clearly immaterial, because whatever information could have been contained in those reports, was indeed conveyed to Soma through the investigations conducted by Soma. Accordingly, I am satisfied that applicant was not treated unfairly by virtue of the fact that respondent's leave department

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have serious doubts whether this test was met in this case and therefore believe that the doctrine of legitimate expectation is not applicable. However, since the doctrine can in any event only give rise to the procedural right to be heard, which was in any event afforded to applicant, not much turns on this and I need not make a final decision in this regard.

advised her that it was not necessary for her to submit the reports of Dr Pont and Dr Bouma.

The alleged procedural irregularity based on the failure to allow applicant the opportunity to rebut prejudicial information

[16] Mr. Ahmed's main argument was that by failing to provide applicant with copies or summaries of the reports of Dr Swingler and Soma (the health risk manager), enabling applicant to rebut prejudicial information contained in those reports, applicant was treated unfairly.

[17] In support of this argument Mr. Ahmed relied on my earlier arbitration award in the matter of *Isaacs v DOE WC*[8] where, based on procedural irregularities, I set aside a decision of respondent not to grant paid temporary incapacity leave, and referred it back to respondent for reconsideration. One of the procedural irregularities I identified in that case, was the fact that respondent did not disclose to the employee prejudicial information which it had in its possession. Arbitration awards off course have no binding effect,[9] but an arbitrator should at least, for purposes of consistency follow his or her own awards, unless there are sound reasons to depart from the earlier award. However, the facts of two cases are seldom exactly the same, and for this reason, not too much emphasis should be placed on earlier arbitration awards. There are at least three very important reasons why this case is distinguishable from the *Isaacs* matter:

First distinction

[18] In the *Isaacs* matter there were a number of procedural irregularities, the most important one being the fact that respondent prior to having received the application for paid temporary incapacity sick leave, took a decision that it would never again grant to *Isaacs* paid temporary incapacity sick leave. In this matter, there is only one alleged procedural irregularity, namely the failure to disclose alleged prejudicial information to applicant. One procedural irregularity in itself may no necessarily warrant interference by an arbitrator, whereas the cumulative effect of several serious ones may warrant interference.

Second distinction

[8] Case No PSES 461-06/07WC, delivered on 26 March 2007 by myself in my capacity as ELRC arbitrator

[9] They have the same status as judgements of the old Industrial Court. Accordingly they do not create precedents, are therefore not binding and can merely be regarded as persuasive authority.

[19] In the *Isaacs* matter, respondent secretly, without informing Isaacs, referred the medical report of the medical practitioner who supported applicant's application, to respondent's medical practitioner employed at a provincial hospital, who then disagreed with Isaacs' medical practitioner and advised respondent that Isaacs' medical practitioner was wrong and that Isaacs was not too sick to work. Since Isaacs was never asked to consult with respondent's expert, there was no way how Isaacs could have known that respondent would rely on the report of another medical practitioner, who did not support her application. Accordingly one could not have expected Isaacs to have asked respondent for a copy of his report. Under the circumstances, I felt that it was only fair that respondent should have provided Isaacs with at least a summary of its own expert's report, giving her the opportunity to rebut it, since the report of respondent's expert was obtained without Isaacs' knowledge, behind her back.

[20] The facts in this case are completely different. Applicant very well knew that there would be a report from Dr Swingler because he consulted with her. She also knew that respondent had arranged and paid for this consultation. Under the circumstances, applicant could, had she wanted to, have asked respondent for a copy or summary of the report of Dr Swingler. This is very different from the scenario in the Isaacs case.

[21] The same argument applies to the report of the independent health risk manager, Soma. In the Isaacs case, PILLIR was not yet in force. In applicant's case it was. PILLIR makes it very clear that respondent will only decide on applications for temporary incapacity leave after having received a report and recommendation from the health risk manager, consisting of a team of multi-disciplinary experts. This is not a secret, because PILLIR is a public document, available for everyone to read and it can hardly be said that it is without the knowledge of educators that respondent obtains reports from the health risk manager, in terms of PILLIR.

[22] Applicant should therefore have known that there would be a report from an independent health risk manager, and nothing prevented her from requesting a copy or summary of such report from respondent. It is no excuse for applicant or any other educator to say that they are not aware of the fact that after PILLIR has been introduced, respondent makes its decisions based on recommendations from the health risk manager and that educators

are entitled to request copies of these reports. Through circulars,[10] respondent did indeed make educators aware of the existence and contents of PILLIR. These circulars are easily accessible since they are even published on respondent's website where any member of the public can read them.

[23] Moreover, it is trite law that a person who engages in a specific area of commerce, trade, occupation or profession, is expected to acquaint herself or himself with all the relevant legal principles and statutory provisions which are applicable in that particular area.[11] To this extent the Latin maxim *ignorantia iuris non excusat* (ignorance of the law is no excuse) still applies. The *ignorantia iuris non excusat* rule equally applies to the right to ask for reports or other relevant information. The Promotion of Access to Information Act[12], allowing people to access information, has been operation for a number of years now and people should by now be aware of it, especially if it could be of relevance to issues relating to their profession. To Isaacs, the Promotion of Access to Information Act meant nothing, because she was not even aware of the report of respondent's expert and could therefore not have been expected to request a copy. Applicant, as I have already held, could or should have been aware of these reports and only has herself to blame for not having exercised her rights in terms of the Promotion of Access to Information Act.

Third distinction

[24] Finally, the *Isaacs* case was decided in respect of a period when PILLIR was not yet in force. The period in respect of which applicant's application for leave relates, is however governed by PILLIR. For reasons which I will hereinafter deal with, PILLIR has significantly changed the procedures to be followed in respect of applications for temporary incapacity leave. Procedures which may have been unfair prior to PILLIR, are not necessarily unfair after the introduction of PILLIR.

The effect of PILLIR

[10] See for example WCED circular 45 of 2006
[11] *Reynolds v Kinsey* 1959 (4) SA [FC] 50 at 65F; *S v De Blom* 1977 3 SA 513 (A); *S v Waglines* 1986 (4) SA 1135 (N); *S v Longdistance* 1990 2 SA 277 N at 283F-I
[12] Act No 2 of 2000

[25] It has always been my view, that paid temporary incapacity leave, which is unique to the public service, should be granted only in deserving cases.[13] The mere fact that a public servant is really too sick to work and has exhausted her sick leave, is in itself not necessarily sufficient reason to grant further paid leave. The State in its capacity as employer, is not a social welfare agency.[14] Tax payers cannot be expected to carry each and every public servant who has exhausted her sick leave, but needs additional sick leave. There are excellent insurance policies available on the market to provide for unexpected periods where one will be unable to work due to illness and public servants can make use of such schemes to insure themselves against unexpected absences from work.

[26] Because of the manner that paid temporary incapacity sick leave was managed by respondent's leave department, prior to the introduction of PILLIR, it was eventually not possible anymore to regard paid temporary incapacity leave as something which was granted only in deserving cases. My experience was that before the introduction of PILLIR, applicants for paid temporary incapacity sick leave, was managed by respondent's leave department in a haphazard, arbitrary, irrational and inconsistent manner.

[27] Furthermore this form of leave was granted indiscriminately, even in cases which could not be classified as deserving ones. Applications which were refused, often had much more merit than applications, which were granted.[15] Under these circumstances, it eventually became very difficult for respondent to refuse such applications because educators who applied for this leave would always have been able to refer respondent to much less deserving cases where such leave was indeed granted. To make matters worse Resolution 7 of 2001 gives very little guidance regarding the procedures to be followed by respondent in considering such applications, which resulted in the inconsistent and unfair treatment of educators as regard the procedures which were followed. It is no wonder then, that this poor management of temporary incapacity sick leave eventually

[13] such as for example the case of a single parent, who is not financially strong, who has been a loyal employee for many years, and who is genuinely too sick to work

[14] See *PSA obo J Bothma v Department of Justice and Constitutional Development* Case No PSCB 277-04 / 05, dated 26 May 2005, where the arbitrator S Christie made the same remark. Also see the remarks of Christie A in *PSA obo Makae vs Department of Education –WC* [2007] 6 BALR 555 (PSCBC) at par 28 where she remarked that " The TIL is not an insurance scheme which is triggered by illness or incapacity. It is a discretionary grant….."

[15] An excellent example of this is to be found in the facts of *De Villers vs DOE*, Case No PSES 524-05/06WC, delivered on 19 April 2006 by myself in my capacity as ELRC arbitrator

resulted in a large scale abuse of it by educators, who in many cases never deserved this form of leave. That this was a phenomena that was not limited to the WCED, but rampant throughout the public service is clear from a circular[16] from the Department of Public Service and Administration, handed in by the parties as an exhibit. An extract from this circular reads as follows:

> *"It is clear from these studies that-*
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> *1. the Public Service, as any other employer in the country, experiences absenteeism from the workplace as a major problem;*
> *1.2. the abuse and poor management of sick leave have serious financial implications and a detrimental effect on service delivery;*
> *1.3 the reasons for the poor management of sick leave and ill-health retirements could be attributed to a number of reasons, which include inter alia-*
> *1.3.1 incapacity leave and ill-health retirements are not managed consistently, since a uniform and clear policy on the management of incapacity leave and ill-health retirements is lacking; and*
> *1.3.2 incapacity is rarely if ever properly investigated and managed, because of departments' lack of medical expertise and skills to investigate incapacity and ill-health retirement;*
> *1.3.3 the usage of ill-health benefits and sick and incapacity leave are exceptionally high. Particular trends were also detected in the usage of sick leave, i.e. a high percentage of absenteeism"*

[28] I find myself in agreement with these remarks. Prior to the introduction of PILLIR, I had considerable sympathy with the personnel in respondent's leave department who had to make decisions regarding such applications. They lacked the necessary medical skills and expertise to manage such applications and the lack of procedural guidelines in Resolution 7 of 2001 made their work even more difficult. It is no wonder then that the procedures invented by respondent's leave department to deal with these applications, were inconsistent and did not always lead to fair and correct results. In many cases, the "wrong" decisions were made, because of the lack of uniform procedural guidelines and because of the lack of medical skills on the part of those who made the decisions.

[29] The lack of clearly defined procedural guidelines to manage these applications, also made it difficult for arbitrators when called on to determine whether an educator was indeed "fairly treated" as regards the granting of such leave, because clause 9 of Resolution 7 of 2001 gives very little guidance as regards the exact procedures that should be followed in

[16] Circular 1/6/2/P, dated 5 December 2005

these applications. In order to be consistent and objective, my view, before the introduction of PILLIR, was that in order to determine what procedures the drafters of ELRC Resolution 7 of 2001 had in mind when it was stipulated in clause 9 of that Resolution that educators had to be treated fairly, an arbitrator had very little choice other than to rely on the rules of natural justice as contained in our common law and as incorporated into our Constitution through the right to fair and reasonable administrative action in section 33. It is for this reason that I, in the *Isaacs* case relied on certain aspects of the *audi-alteram partem* rule, such as the right to be provided with prejudicial information and the right to rebut such information.

[30] All of this however, was prior to the introduction of PILLIR. Educators and other public servants can longer after the introduction of PILLIR expect things to remain as they were prior to the introduction of PILLIR. The aim of PILLIR was to stop the abuse of sick leave, to drastically improve the management of sick leave and to introduce clearly defined, uniform, consistent procedures for the management of sick leave.

[31] PILLIR ("Policy and Procedure on Incapacity Leave and Ill-Health Retirement") was determined by the Minister of Public Service and Administration during November 2005 in terms of section 3(3)(c) of the Public Service Act, 1994.[17] Since PILLIR was promulgated in terms of an Act of Parliament, the procedures provided for are not simply informal guidelines. PILLIR was introduced in the Western Cape Provincial Administration as from 1 June 2006.[18]

[32] PILLIR, in my view, heralds a new era. As opposed to the position prior to the introduction of PILLIR, when the procedures, required to be followed were vague and uncertain and when arbitrators had to resort to the *audi alteram partem* principle of the common law in order to determine whether an educator was treated procedurally fair, the position under PILLIR is remarkably different.

[33] Clauses 7.1 to 7.3 of PILLIR deal in detail with the procedures to be followed as regards applications for paid temporary incapacity leave. The procedures provided for in these clauses are extremely detailed and consist of 13 typed pages in fine print. Given the

[17] Section 3(3)(c) of the Public Service Act of 1994 provides that the Minister of Public Service and Administration may, "…**make determinations regarding the conditions of service of officers and employees generally…..**"

[18] See WCED Circular 45/2006, handed in as exhibit D

detailed, elaborate procedures provided for in PILLIR, describing in detail each and every procedural step in the process, I am of the view that these procedures are intended to be exhaustive. PILLIR has changed the uncertainty as regards the procedures to be followed in these applications. It is no longer necessary for respondent's leave department to improvise procedures and it is no longer necessary for arbitrators to rely on the common law or vague constitutional principles in order to determine what would constitute a fair procedure and what not. Should arbitrators start chopping and changing the procedures provided for in PILLIR, by reading in additional procedures or by scrapping certain procedures expressly provided for, this could potentially lead to disastrous consequences, because the procedures provided for in PILLIR are interrelated and forms part of a carefully planned package.

[34] Nowhere in PILLIR is it stated that an employee has the right to be furnished with prejudicial information on which the employer intends to rely(without having been requested by the employee to provide it) and nowhere is it stated that an employee has the right to rebut such information. Since the procedures described in PILLIR are very detailed, I have no doubt that had the drafters of PILLIR intended employees to have the right to be provided with prejudicial information (without the employee having asked for it) and the right to rebut such information, it would have been so stipulated. Hence, the procedures provided for in PILLIR do not allow for an educator to be provided with and challenge prejudicial information obtained by the employer (without the employee having asked for it) before the employer makes its decision regarding paid temporary incapacity leave.

[35] The next question to be determined is whether it is fair and permissible for PILLIR, not to grant to an educator the right to be furnished with prejudicial information and the right to rebut such information. The answer to this question, is to be looked for in clause 9 of ELRC Resolution 7 of 2001. When interpreting clause 9 of ELRC Resolution 7 of 2001, it is important to realise that fairness, and fairness alone, is the criteria. It is in respect of disputes about fairness, that the drafters of the Resolution provided that this tribunal should make determinations.

[36] Fair procedure facilitates accurate and informed as opposed to arbitrary decision making.[19] Procedural fairness can exists in many forms. The principles of natural justice

[19] De Lange v Smuts NO 1998 (7) BCLR 799 (CC) para 131 per Mokgoro

itself,[20] which have been developed to ensure procedural fairness, are very flexible.[21] What is unfair under certain circumstances, may not necessarily be fair under completely different circumstances. This is recognized in the following passage in *Russel v Duke of Norfolk*[22]:

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth".

[37] Moreover, our Courts have always recognized that it is possible to modify or vary the principles of natural justice.[23] This has now even been recognized by Parliament in the Promotion of Administrative Justice Act,[24] which provides for certain fair procedures, to be adhered to by decision makers.[25] Section 3(5) of that Act allows decision makers to follow a "different" procedure laid down in an empowering provision, provided that it is "fair".

[38] To the drafters of ELRC Resolution 7 of 2001, the specific form of procedural fairness was clearly not of importance, because had it been, the resolution would have dealt in detail with the procedures which had to be followed and would not have merely provided a basic framework. The main intention of the drafters of the Resolution was clearly that there must be fairness, irrespective of the procedural form that such fairness takes. As such, the drafters of ELRC Resolution 7 of 2001 must have anticipated that at some stage in future, determinations may possibility be made, either by the Department of Education or by government, which would lay down procedures to be followed in such applications. In my view, therefore, a policy document such as PILLIR, must have been in the minds of the drafters when they negotiated and drafted the resolution. Provided therefore that that such a policy provides for a fair procedure, it would be in order, and is sanctioned by the drafters of the Resolution, even if such a procedure differs from the common law requirements of the *audi alteram partem* rule.

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[20] *inter alia* consisting of the *audi alteram partem* rule
[21] Baxter *Administrative* Law 541
[22] [1949] 1 All ER 109, 118
[23] Baxter *Administrative law* 569 – 576
[24] No 3 of 2000, hereinafter referred to as PAJA
[25] These procedures are mainly a codification of the common law and include the *audi alteram partem* rule, the right to be afforded the opportunity to present and dispute information and arguments, which may, in certain circumstances include the right of reply or rebuttal of prejudicial information. See Hoexter *Administrative Law in South Africa* (2007 ed) 340

[39] Having carefully analyzed the provisions of PILLIR, I am satisfied that it does in fact provide for a different but fair procedure, albeit a procedure which deviates slightly from the traditional rules of natural justice, as I have described them in the *Isaacs* matter. In arriving at this conclusion, I have taken into account the following factors:

39.1 PILLIR does not completely exclude the *audi-alteram partem* rule; It simply modifies it. An educator still has the right to be heard and submit evidence, documents and arguments in support of her application. The only facet of the *audi alteram partem* rule not provided for is the right to be informed of prejudicial information and the right to rebut such information, but instead of these rights, other rights have been granted such as the fact that an independent, impartial health risk manager, consisting of well qualified experts, must evaluate the application;

39.2 The right to be furnished with and rebut prejudicial information, has never been an absolute right. Whether such right exists in a particular case, depends on the materiality and significance of the new information and on the seriousness of the case. [26] In considering whether such a right should be granted in a particular case, one should guard against a situation where proceedings would be endlessly protracted if a right to reply would be recognized. [27]

39.3 PILLIR provides for a detailed, clear, consistent procedural framework, containing timeframes, all aimed at ensuring that the educator is dealt with in a fair manner, that sick leave is not abused and that the employer is in a position to make an informed decision, with the assistance of the health risk manager;

39.4 PILLIR eliminates the necessity that the employer must make decisions based on its own assessment of issues relating to medical issues, of which the employer has no expert knowledge. Instead, the health risk manager, consisting of an independent, impartial panel of multi-disciplinary experts, perform the medical evaluation and makes a recommendation to the employer;

39.5 Whereas the practice prior to PILLIR was, in cases of doubt, to refer the matter for advice to a medical doctor, employed at a provincial hospital, who could not

[26] Hoexter *Administrative Law in South Africa* (2007 ed) 341

be considered as completely impartial due to his employment relationship with the employer, PILLIR has introduced the concept of a completely impartial panel in the form of the health risk management team;

39.6 The most compelling reason for having held in the *Isaacs* matter that it was unfair not to have made the report of respondent's expert in that case available to Isaacs for rebuttal, was the fact that there was at least a possibility that his assessment could have been incorrect, because he only relied on his own opinion and has limited experience only in the specific area in which he specializes. That rationale falls away under PILLIR. The system under PILLIR significantly reduces the risk of incorrect assessments, since the health risk manager consists of a multidisciplinary team. Opinions can be shared, compared and debated amongst the various experts on the health risk manager's team and because of their broad and extensive experience in different areas, the health risk management team can ensure a factually correct recommendation. This is not only fair to the taxpayer and employer, but also to the employee. Since the risk of an incorrect factual finding and recommendation is reduced so significantly under PILLLIR, and since the team is completely impartial, it cannot be said that it would be unfair not to afford the educator an opportunity to rebut the opinions contained in the report of the health risk manager or any reports of experts, such as Dr Swingler, which the health risk manager has considered and assessed prior to making a recommendation to respondent. For these reasons I am unable to agree with Mr Ahmed's argument that PILLIR has changed nothing since the Isaacs case.

[40] Mr Ahmed's reliance on Item 10(2) of Schedule 8 of the LRA, which provides that an employee should be allowed the "right to state a case in response", in support of his argument that applicant had to be afforded the right to rebut the information contained in the reports of Dr Swingler and the health risk managers, is misplaced. Item 10(2) is applicable only in those cases where an employer seriously contemplates dismissal.[28] The purpose of affording the employee an opportunity to state a case in response to the

[27] *Huisman v Minister of Local Government* 1996 (1) SA 836 (A)

employer's case, is to persuade him not to dismiss her. Given the relatively short period of time that applicant was absent, it is inconceivable that her employer could have contemplated dismissal after so many years of loyal service. In fact, during the hearing it became clear that respondent never contemplated dismissal. Accordingly Item 10(2) could not be applicable and therefore does not assist applicant in her argument that she should have been afforded the right to rebut the reports.

Concluding remarks

[41] Our Constitution Court has held that Courts and tribunals should be slow to interfere with rational decisions taken in good faith by decision makers.[29] In the absence of irrational, arbitrary or capricious conduct, arbitrators and courts should not interfere with the manner in which a discretion was exercised simply because they do not like the decision that was made:

> "The courts are, generally, wary and reluctant to interfere with the executive or other administrative decisions taken by executive organs of government or other public functionaries, who are statutorily vested with executive or administrative power to make such decisions, for the smooth and efficient running of their administrations or otherwise in the public interest. Indeed, the court should not be perceived as having assumed the role of a higher executive or administrative authority, to which all duly authorised executive or administrative decisions must always be referred for ratification prior to their implementation. Otherwise, the authority of the executive or other public functionaries, conferred on it by the law and/or the Constitution, would virtually become meaningless and irrelevant, and be undermined in the public eye. This would also cause undue disruptions in the state's administrative machinery." [30]

[42] As regard fairness, Smalberger JA in *Administrator, Transvaal v Theletsane*[31] remarked as follows:

> "Fairness is often an elusive concept; to determine its existence within a given set of circumstances is not always and easy task. No specific, all-encompassing test can be laid down for determining whether a hearing is fair – everything will depend on the circumstances of the particular case. There are however, at least two fundamental requirements that need to be satisfied before a hearing can be said to be fair : there must be notice of the contemplated action and a proper opportunity to be heard…**When all is said and done**, however, **the ultimate test** of whether the notice was adequate and the opportunity to be heard a

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[28] It is after all contained in the Code of Good Practice on Dismissals
[29] *Soobramoney v Minister of Health, Kwa-Zulu-Natal* 1998 (1) SA 765 (CC) par 29 per Chaskalson P
[30] *Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services* (2003) 24 ILJ 803 (LC) at 820C–F
[31] *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A)

proper one **is whether the overall proceedings, objectively considered, were fair in the circumstances"**[32] (emphasis added)

[43] Having considered all the circumstances and overall proceedings in this case, I am satisfied that objectively considered, applicant was treated fairly and that respondent's decision was rational and taken in good faith. The drafters of Resolution 7 of 2001 intended educators to be treated fairly, and the exact contents of such fair procedures were not important to them, provided only that such procedures were indeed fair.

[44] The procedure as provided for in PILLIR, although not containing the right to be provided with and rebut prejudicial information, is indeed a fair procedure and to this extent, the *audi alteram partem* rule has been modified through PILLIR. This is not in conflict with the spirit and intention of ELRC Resolution 7 of 2001.

The effect of my findings

[45] An employee who does not work, is not entitled to be paid in terms of the principle "no work, no pay", which developed out of the maxim *exceptio non adimpleti contractus*.[33]

[46] An exception to the "no work, no pay" rule, is to be found in clause 8(1) of ELRC Resolution 7 of 2001 which provides that every educator is entitled to 36 working days sick leave with full pay over a three –year cycle. It is common cause that applicant has exhausted the 36 days sick leave to which she was entitled as of right by 30 August 2006. Applicant had no right to any additional sick leave and whatever sick leave applicant took as from 31 August 2006, had to be either paid or unpaid temporary incapacity sick leave and fell entirely within respondent's discretion. Since respondent has refused applicant's application for paid temporary incapacity sick leave in respect of the period of 31 August 2006 until 5 December 2006, which decision I find to be fair and lawful, the leave in respect of that period can only be unpaid leave. In accordance with the maxim "no work, no pay", applicant is not entitled to any remuneration in respect of that period. Accordingly respondent is entitled[34] to recover from applicant in installments an amount equal to the

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[32] at 206C-F

[33] *3M SA (Pty) Ltd v SACCAWU & Others* [2001] 5 BLLR 483 (LAC); *Rycroft & Jordaan* A Guide to South African Labour Law (2nd ed) page 70; *Grogan* Workplace Law (8th ed) page 68 – 69; *Johannes Voet* Commentarius ad Pandectas 19.2.27

[34] in terms of Regulation 13 of The Regulations regarding the Terms and Conditions of Employment of Educators promulgated in terms of section 28, read with sections 1, 4(1), 5(1) and 9 of the Educators

remuneration paid to applicant in respect of that period in accordance with the procedures provided for in the regulations.

AWARD

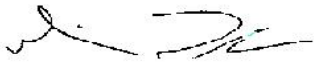
In the premises I make the following order:

1. I find that respondent has treated applicant fairly when it decided that applicant is not entitled to paid temporary incapacity sick leave in respect of the period between 31 August 2006 to 5 December 2006.

2. Respondent's decision is confirmed and applicant's claim is dismissed.

3. Respondent may proceed to recover from applicant the amount owing as an overpayment for salary paid in respect of the period of 31 August 2006 to 5 December 2006.

4. No order as to costs is made.



adv D P Van Tonder

Arbitrator/Panellist: ELRC

Employment Act, 1994, contained in G.N. 1743 of 1995 published in *Government Gazette* No. 16814 dated 13 November 1995, as amended from time to time