



REPUBLIC OF SOUTH AFRICA

Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

Case no: P 585/10

In the matter between:

**SUSANNA MARIA ELIZABETHA
CHRISTIANE**

Applicant

and

**THE MEMBER OF THE EXECUTIVE
COUNCIL FOR THE DEPARTMENT OF
HEALTH (N.O.)**

First Respondent

**THE SUPERINTENDENT-GENERAL
FOR THE DEPARTMENT OF HEALTH
(N.O.)**

Second Respondent

Heard: 14 September 2012

Delivered: 30 April 2013

Summary: (Underpayment-unilateral reduction in sessional hours – s 9 of BCEA not superseding contract – Hours of work not subject to BCEA – employee earning more than BCEA earnings threshold - terms of contract binding on new employer after 197 transfer).

JUDGMENT

LAGRANGE, J

Introduction

- [1] The applicant, Dr S M E Christiane, claims that the respondent unlawfully reduced her salary between July 2010 to the date on which her contract expired on 31 March 2011. The parties agreed to deal with the matter on the basis of a stated case on common cause facts.

Common cause facts

- [2] The applicant was employed under a one year contract for a part-time medical practitioner commencing on 1 April 2010, concluded with the Dordrecht Provincially Aided Hospital ('the hospital'), her employer.
- [3] The contract provided amongst other things that the applicant was "awarded a maximum of 40 sessions per week" at a rate of R267-00 per session, whether actually worked or on call.
- [4] The hours stipulated were the hours worked by the applicant in terms of which her remuneration was calculated from 1 April 2010 to 1 August 2010, at which point the respondent informed her that she was only entitled to work a maximum of 20 sessions at the hospital.
- [5] The hospital and the Emalahleni Sub District Health Centre ('the centre'), where the applicant also worked at the time, were taken over as going concerns by the Department of Health (Eastern Cape) on 1 July 2010 in terms of section 197 of the Labour Relations Act, 66 of 1995 ('the LRA').
- [6] At the time of the transfer the applicant worked 40 sessions at the hospital and 20 at the centre. According to the respondent, the decision to reduce the applicant sessions, and correspondingly her remuneration, was motivated by the fact that she was working more than 40 sessions, taking into account the sessions at both the hospital and the centre. The motivation for the change was a policy which Sessional hours of part-time health professionals at 20 hours.

- [7] The applicant was asked to sacrifice her sessions at the centre and to devote 20 sessions to the hospital only, or accept full-time employment in the Department. When she refused to do so, her sessions at the hospital were unilaterally reduced to 20.

The issue to be determined

- [8] The parties agreed that the only issue to be determined by the Court is whether the respondents' breached the applicant's contract with the hospital by unilaterally reducing sessions she was entitled to perform there, and the consequential relief, if any, flowing therefrom.

Evaluation

- [9] There is no dispute that the applicant's contract of employment with the hospital was transferred unchanged to the Department when the 197 transfer took place. This follows from the provisions of section 197 (2) (a) of the LRA which provides that:

"The new employer is automatically substituted in the place of the old employer in respect of all contract of employment in existence immediately before the transfer."

- [10] The respondents' only defence to the applicant's claim is that if it allowed the applicant to continue to work those hours and her 20 sessions at the centre, a total working hours would amount to 60 hours a week which was contrary to section 9 of the Basic Conditions of Employment Act 75 of 1997 ('the BCEA'), which states:

"(1) Subject to this chapter, an employer may not permit an employee to work more than-

(a) 45 hours in any week; and

(b) nine hours in any day if the employee works for five days or fewer in a week; or

(c) eight hours in any day if the employee works on more than five days a week.

(2) An employee's ordinary hours of work in terms of subsection (1) made by agreement to be extended up to 15 minutes in a day but not more than 60 minutes in a week to enable an employee whose duties include serving members of the public to continue performing those duties after the completion of ordinary hours of work."

- [11] The applicant denies the validity of this defence because she was earning more than the threshold above which section 9 of the BCEA does not apply. The applicant's salary was R 45,924 per month, or R551,088 per year. On 14 March 2008, the Minister of Labour issued a notice in terms of Section 6(3) of the BCEA, determining that all employees earning in excess of R149 736 per annum be excluded from sections 9, 10, 11, 12, 14,15, 16, 17(2), 18(3) of the Act with effect from 1 March 2008. This threshold was applicable during the period of the applicant's contract.¹
- [12] In the light of the earnings' threshold being inapplicable, the applicant's weekly working hours were not limited by section 9 of the BCEA, and the respondents could not rely on it to enforce a unilateral reduction of the applicant's working hours at the hospital.
- [13] In the light of the above from July 2010 until her last payment in April 2011 the respondents were liable to pay the applicant for 40 hourly sessions per week in terms of her contract of employment with the hospital, which remained in force when the said hospital was transferred to the Department of Health (Eastern Cape) in 2010 under s 197 of the Labour Relations Act 66 of 1995.
- [14] Consequently, when the respondents reduced the applicant's sessions at the hospital to 20 per week, that amounted to an unlawful breach of her contract, and the respondents are liable to pay her the difference between the payments she received and what she ought to have received.

¹ While the retrospective effect of this notice for the period 1 to 14 March 2008 (R300, RGN 8853, GG 30872, 14/03/2008), which replaced an earlier notice (R 100, GG No.30720, 14/02/2008), may be doubtful, the determination was applicable during the period of the applicant's contract.

Value of the claim

[15] At the hearing of the matter, an actuary's certificate of value was submitted by the applicant in support of her claim, which was drawn up on the assumption that the applicant was owed money for underpayments after April 2011 as well. A revised certificate of value was issued by the actuary S Kroon and filed on 14 September 2012, but there was a slight discrepancy between his calculation of the applicant's monthly remuneration and the ordinary method of calculating the same. Thus he based his calculation on a monthly salary of R 45,994 as opposed to R 45,924, which is the figure the respondents' were prepared to accept as correct. The respondent's figure is derived from the normal calculation for monthly remuneration which is weekly remuneration multiplied by a factor of 4.3 weeks, which in this case can be expressed as: $(R\ 267 \times 40) \times 4.3 = R\ 45,924$. I have used this figure to calculate the quantum and reduced it by half to take account of the fact that the applicant was paid for 20 sessions per week. Moreover, I should mention that although the actuary's calculation for the payment due at the end of July 2010 indicates the applicant was paid for less than 20 sessions per week on that occasion, I have no evidence before me on which to assume that is correct, so I have applied the same shortfall to that month that would have been a result of the reduction of weekly sessions to twenty.

[16] The parties agreed that interest on any amounts owing was due *a tempore morae* and accordingly interest is due on each underpayment from the month end when payment fell due.

Costs

[17] It was argued that the respondents should pay the applicant's costs on a punitive scale but I am reluctant to make such an order, even though this matter should have been settled by the respondent, in circumstances where there was not clear written notice given to it in advance that the applicant would seek such an order because of the respondent's persistence in resisting the applicant's claim when its defence had no merit.

Order

[18] Accordingly -

18.1 The respondents breached the applicant's contract of employment when they unilaterally limited the applicant to work only 20 sessions per week at Dordrecht Provincially Aided Hospital during the period 1 July 2010 to 30 April 2011.

18.2 The respondents, in their official capacities as representatives of the Department of Health (Eastern Cape), are accordingly liable to the applicant for underpayment of her remuneration, and for interest calculated *a temporae mora*, in the amounts set out in the table below, amounting in the aggregate to R 314,161-05 (three hundred and fourteen thousand, one hundred and sixty one rands and five cents).

Due Date	Underpayment	Interest due on 30 April 2013
31-Jul-10	R 22 962.00	R 9 789.99
30-Aug-10	R 22 962.00	R 9 497.46
30-Sep-10	R 22 962.00	R 9 195.18
31-Oct-10	R 22 962.00	R 8 892.90
30-Nov-10	R 22 962.00	R 8 600.37
31-Dec-10	R 22 962.00	R 8 298.09
31-Jan-11	R 22 962.00	R 7 995.81
28-Feb-11	R 22 962.00	R 7 722.78
31-Mar-11	R 22 962.00	R 7 420.50
30-Apr-11	R 22 962.00	R 7 127.97
SUB-TOTALS	R 229 620.00	R 84 541.05
AGGREGATE AMOUNT DUE		R 314 161.05

18.3 The Department of Health (Eastern Cape) must pay the applicant the aggregate amount in paragraph 18.3 above within 30 calendar days of the date of judgment.

18.4 The Department of Health (Eastern Cape) must pay the applicant's costs including the costs of counsel and the applicant's reasonable disbursements incurred in attending the hearing on 14 September 2012.



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: J Grogan, SC instructed by Wheeldon, Rushmere
& Cole

FIRST RESPONDENT: M Simoyi instructed by the State Attorney, Port
Elizabeth