



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

~~Reportable~~/Not Reportable

Case no: JR 1175/2013

In the matter between:

DEPARTMENT OF EDUCATION, FREE STATE PROVINCE

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

COMMISSIONER SHIRAZ MOHAMED OSMAN

Second Respondent

N P CLOETE

Third Respondent

Heard: 30 June 2015

Delivered: 13 November 2015

Summary: Review – arbitration award. Public Service – dispute regarding correct calculation of acting allowance for official of Provincial Department of Education. Award reasonable and rational –no defect in proceedings. Calculation error corrected, but review application dismissed.

JUDGMENT

Bank AJ;

- [1] This is an application for the review of an arbitration award issued by the Second Respondent (“the Commissioner”) under case number GPBC 4041/2012 dated 26 March 2013. At the heart of this dispute is the question of whether the Third Respondent (“Cloete”) was paid the correct acting allowance by his employer, the Applicant (“the Department”) for the period 6 February 2012 until 31 July 2012 and the manner in which this acting allowance was to be calculated.
- [2] Noteworthy is the fact that, by agreement between the parties, no witnesses were called to testify during the arbitration proceedings; rather, the matter was determined by way of exchange of written arguments placed before the Commissioner. The respective written arguments form part of the record in this matter.
- [3] There has never been any dispute that Cloete was indeed entitled to be paid an acting allowance for the period in question; the only dispute is whether that acting allowance had to be paid on salary level 11 or salary level 12 and the exact calculation of that amount.
- [4] The relevant legislation providing the framework against which this dispute was determined by the Commissioner is as follows:

4.1. Clause 3.3.1(a) and (b) of the General Public Service Sector Bargaining Council (“GPSSBC”) Resolution 1 of 2002;

- 4.2. Circular 2 of 2005 issued in terms of the Public Service Act, 1994 - in which a "*Flexible Remuneration Package System*" was introduced;
- 4.3. Clause 3.6.3.2 of Public Service Co-ordinating Bargaining Council ("PSCBC") Resolution 3 of 2009;
- 4.4. Clause 18.1 of PSCBC Resolution 1 of 2012, which amended the abovementioned clause 3.6.3.2 of PSCBC Resolution 3 of 2009 to allow employees whose posts were, graded on salary levels 10 and 12 to be appointed on salary levels 10 and 12 respectively.

[5] The arbitration award which is the subject of this review details the respective written submissions made on behalf of both the Applicant ("the Department") and Cloete. It shows that the Commissioner considered the Department's submissions to the effect that:

- 5.1. the correct acting allowance had already been paid to Cloete and, in particular, the Department had no choice but to remunerate Cloete at salary level 11 because the Applicant could not have been appointed on salary level 12¹;
- 5.2. PSCBC Resolution 1 of 2012 only came into operation on 31 July 2012, at the end of Cloete's acting period and could therefore not be applicable to his situation.²

[6] By the same token, the Commissioner considered the submissions made on behalf of Cloete to the effect that:

- 6.1. Cloete had previously been remunerated at salary level 12 in being awarded an earlier acting allowance;
- 6.2. the post of Deputy-Director had also been advertised as carrying a level 12 salary;

¹ Award, para 16

² Award, para 17

6.3. the two previous incumbents in the position were remunerated at level 12; and

6.4. the present incumbent appointed on 01 August 2012 was on a level 12 salary.³

[7] It is apparent that the Commissioner spent the greater part of his arbitration award in analysing these submissions before coming to the decision that Cloete indeed had to be paid his acting allowance according to salary level 12. In paragraphs [22] to [25] of his award, he considers the various methods of calculation of this acting allowance and notes the fact that it is a non-pensionable allowance which must be calculated at 60% of the total cost to employer, which would include pension and other benefits.

[8] I note that, in paragraph [28] of the award, he interprets clause 18 of PSCBC Resolution 1 of 2012 to mean that Cloete would be entitled to be paid the difference between his normal salary and that of the graded position (at salary level 12) and does not take into account the actual commencement date of that amendment, being 31 July 2012. Even if he was mistaken in this regard (and I am not convinced that he was), such an error cannot be deemed to be so gross and material that it has led to an unreasonable outcome which no reasonable arbitrator could reach.

[9] Added to this is the fact that the Commissioner found that *'...it is also not disputed that the previous two incumbents in the position as well as the present Deputy Director are being paid at level 12'*.⁴ This finding was never used to support a further ground of review in the Department's application. This in turn has the implication that I cannot find that the Commissioner acted unreasonably in taking this fact into account. I say this despite noting that, in oral argument before me, it was argued on behalf of the Department that it did in fact dispute that this was indeed the case.

³ Award, para 7

⁴ Award, para 29

[10] In oral argument it was submitted to me on behalf of Cloete, that even though the award was not reviewable (in that the Commissioner had correctly found that the acting allowance payable to Cloete was to be calculated at salary level 12) the Commissioner had in fact still made an arithmetical error in finding that the amount of the acting allowance still payable to Cloete at level 12 was the amount of R49 08, 53 (less statutory deductions). This figure ought rather to have been calculated in accordance with annexure "E2".⁵ I was handed clearer copies of these spreadsheet calculations during the course of argument.

[11] According to "E2", the calculation of the acting allowance had to be split into two periods: the first period prior to the increase of 1 May 2012 (covering the months of February through April 2012) and the period after such increase (covering the months of May through July 2012). This calculation must be contrasted with the spreadsheet calculation found as annexure "E1"⁶ in which a similar calculation has been performed at salary level 11. Regardless of which salary level is used, the actual amount of R54 244, 47 paid as acting allowance to Cloete for the period 1 February to 30 July 2012 must of course be deducted from the total calculation of acting allowance that ought to have been paid to him. According to annexure "E2" this difference reflects an amount of R88 022, 28 still owing to Cloete whereas, according to annexure "E1", that difference was R49 081, 53. It is this latter amount which the Commissioner in fact ordered payable.

[12] I am in agreement with the submissions made on behalf of Cloete that there was a clear (but understandable) arithmetical error and that the Commissioner must clearly have intended to refer to annexure "E2" in making his award rather than annexure "E1". Such an error is easily corrected by this Court.

[13] In the circumstances, I cannot find any defect in the arbitration proceedings or in the arbitration award handed down by the Commissioner amounting to a gross irregularity as contemplated by section 145(2) (a)(ii) of the Labour Relations Act, 66 of 1995, based on all the material that was before the

⁵ Bundle, p58

⁶ Bundle p 57

Commissioner. Even if it be argued that the Commissioner made a material error of fact with regard to the implementation date of the abovementioned 2012 resolution, this is not in itself sufficient for a review and setting aside of the arbitration award. I do not find this to be erroneous, let alone materially so. In any event, the outcome of the award can never be said to be unreasonable.

[14] Consequently, and in the result, I find that there are no grounds for reviewing and setting aside the arbitration award as there is simply no material irregularity or defect in this award. The review application falls to be dismissed. I do, however, find that the arbitration award ought to be varied by the correction of the amount of the acting allowance payable to Cloete to accord with the amount shown in annexure "E2" in that paragraph [34] of the award must have the correct amount inserted therein as discussed above.

[15] As to costs, I find this an appropriate matter in which each party ought to bear their own costs.

[16] In the result, I make the following order:

1. The review application is dismissed.
2. The arbitration award dated 26 March 2013 is varied and corrected as follows:

2.1 by the replacement of paragraph [34] thereof with the following:

'The respondent, the Department of Education - Free State is ordered to pay the applicant Mr M Cloete the outstanding acting allowance based on salary level 12 in the amount of R88 022,28 (eighty-eight thousand, twenty-two rand and twenty-eight cents) only less statutory deductions'.

3. Each party is to bear their own costs.

Bank AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate TL Manye.

Instructed by: State Attorney

For the Respondent: Advocate LA Roux

Instructed by: Messrs Adrie Hechter Attorneys