

**REPORTABLE
IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NO: C801/2001

In the matter between:

**THE UNIVERSITY OF THE WESTERN CAPE
ACADEMIC STAFF UNION
Applicant**

First

THE FURTHER APPLICANTS WHOSE NAMES

E “A” HERETO

2nd to 41st Applicants (the individual Applicants)

and

**THE UNIVERSITY OF THE WESTERN CAPE
Respondent**

JUDGMENT

PILLAY D, J

This is an application concerning the interpretation and application of a collective agreement that was made an order of court in settlement of a retrenchment dispute.

The term of the collective agreement that forms the subject of this dispute is the

following:

“1. All retrenched employees who are part of this agreement shall receive....

- (e) payment of accumulated leave up to a maximum of 365 days”

Submissions for the Applicants

The Applicants contended that this term, read together with the clause D7.2.1. of the University of the Western Cape Human Resource Policy Document (the Policy Document), entitled the individuals to “full pay” as leave.

The term “full pay” was normal pay, plus allowances and benefits. This was the equivalent of the cash value of the leave if they had taken it whilst in the employ of the Respondent. There was no dispute that if leave were taken whilst they were still in the employ of the Respondent they would have received the full pay i.e. basic pay plus benefits and allowances. This was the same basis on which pay during suspension was calculated.

The cash value of the leave should be the equivalent of the cost of labour to the employer. To the basic wages therefore, the costs of the Respondent's contribution to employee benefits must be added to determine the cash value of the leave. In this way the practical difficulties of determining the amount of benefits and allowances actually accrued to each employee could be avoided.

Clause 1.e of the collective agreement created a right which the Applicants did not previously have. As such, its meaning must be determined independently of anachronistic practices and policies. There was no consensus that the past practice would apply as the Applicants had no knowledge of what it was. The value of the entitlement should be determined solely by clause D7.2.1. of the Policy Document.

By applying the parol evidence rule to the collective agreement, no recourse should be had to extrinsic evidence, unless it was indicatory in nature or contextualised the background (*Johnstone v Leal* 1980 (3) SA 927 (A) @ 943E; *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) @ 184B; *Delmas Milling Co. Ltd v du Plessis* 1955 3 SA AD at 454.)

Reliance was also placed on European case law and cases relied upon by *Brassey* (in Employment law Volume 1 at E1:19-23 viz. *Liquidators of the Agriculture of the Supply Association Limited v Taylor* 1922 TPD 301; *Wallach's Printing and Publishing Co. v Wallach* 1932 AD 46) for the meaning of "full pay".

It was submitted belatedly in Supplementary Heads in the alternative to the foregoing, that the Applicants were entitled as a matter of law to the leave prescribed in the Basic Conditions of Employment Act No 75 of 1997 ("the BCEA") from 1 December 1998 when it became effective until their dismissal on 31 December 1997. The BCEA therefore trumped the collective agreement. That amounted to one day's leave for those dismissed on 31 December 1998 and eleven days for those dismissed on 30 June 1999.

The Respondent's submissions

The Respondent began by expatiating the approach to interpreting contracts. It resisted the Applicants' submissions on the basis that it was a tacit term of the collective agreement that the individual Applicants would be paid their accumulated leave according to the Respondent's practice and the Policy Document.

The relevant clause of the Policy Document was not clause D7.2.1 but D7.3.2.2 that should be considered when determining the calculation of the leave pay.

The Respondent's practice and the Policy Document distinguished between leave payable to those in employment and those who were not. Those whose services were terminated were entitled to leave based only on their basic salary only. That is what was already paid to the individual Applicants in this case.

Alternatively to the foregoing, "full pay" in the collective agreement must be defined by reference to the definitions of "pay" and "salary and wages" in the Policy Document. In that event, the individual Applicants would be entitled only to their basic pay plus any pensionable allowances and privileges in kind. The only pensionable allowances were the departmental head and the housing allowances.

The European and South African cases and the BCEA relied upon by the Applicants were irrelevant because "full pay" was already defined in the Policy Document. Furthermore, the European cases dealt with the application of laws different from our own law and decided in contexts that did not directly relate to the calculation of leave pay. The South African cases which had been decided in the early part of the last century, also did not assist in this regard.

Inclusion of the Respondent's contribution to allowances and benefits in the leave pay was inappropriate for several reasons. The benefits were payments due to third parties. The individual Applicants were not assured of receiving the whole of these contributions, which were payable in terms of the rules of such third parties, such as the pension and medical aid funds. In respect of certain allowances and benefits they merely had a *spes*. It could therefore not be assumed that the cost to the Respondent was equal to the value that the individual Applicants would receive.

The existence of the collective agreement in the context of the practice and the Policy Document also meant that the BCEA did not apply.

Analysis

Two scenarios present themselves against this background: either there was no consensus between the parties as to how leave pay would be calculated in which event the collective agreement about this issue did not come into existence. Or, there was tacit consensus in which case the collective agreement about leave pay did come into existence.

There is a common will between the parties to abide by the collective agreement. Their difficulty is in agreeing now what they each meant then when the collective agreement was concluded. In *Total South Africa v Bekker 1992 (1) SA 617 (A) 624G-625D* it was held that the court should make an effort to determine the common intention of the parties by way of linguistic treatment having regard to the textual and factual contexts. The first enquiry therefore is to establish whether there was a tacit term in the collective agreement about the calculation of the leave pay, and if so, what the term was.

The “golden rule” of interpretation is that the language of a document must be given its ordinary and grammatical meaning, unless this would lead to absurdity, repugnancy or inconsistency with the rest of the document.

After ascertaining the literal meaning of the term, regard must be had to the context in which it is used, including the nature and purpose of the contract, the background circumstances which explain the genesis and purpose of the contract, i.e. matters that the parties would probably have contemplated when they contracted; and to then apply extrinsic evidence about the surrounding circumstances (*Coopers & Lybrand v Bryant 1995(3) SA 761 A @ 767E-768E*).

Extrinsic evidence is not admissible unless it is identificatory. Evidence that is

identificatory may not be used for interpretation but to apply an agreement to the facts (*Delmas Milling Co, supra*).

Both parties presented arguable cases on the interpretation of clause 1.e of the collective agreement. That alone suggests that the wording of the collective agreement is ambiguous.

The ordinary meaning of clause 1.e is simply that the Respondent must pay the individual Applicants their accumulated leave standing to their credit at the time of dismissal. It is silent about how that pay is to be calculated.

I find that clause 1.e of the collective agreement is ambiguous and that the intention of the parties has to be determined by recourse to extraneous material.

It was common cause that the calculation of the leave pay was not discussed during the negotiations that preceded the conclusion of the collective agreement. Both sides also defer to the Policy Document i.e. to extraneous material to clarify and support their respective interpretations of clause 1.e of the collective agreement. However, they disagree about which clauses of the Policy Document apply and how they must be interpreted.

If regard is to be had to extrinsic evidence then all relevant and admissible evidence must be considered. The submission for the Applicants that only Clause D7.2.1. must be considered to determine the meaning of Clause 1.e. of the collective agreement, is rejected. There is also no reason to limit recourse to extrinsic evidence to the Policy Document only. The evidence of the practice is relevant and must be admitted.

Clause D7.2.1. of the Policy Document provides :

“Group A-

Rector, Vice-Rector and Teaching Staff

Persons temporarily employed in any such capacity are eligible for only one-half of the accumulative vacation leave and sick leave prescribed herein.

Accumulative vacation leave with full pay: 20 day per annum

.....

Sick leave....

Half pay 90 days”

Clause D7.2.1. does not assist in defining what “full pay” means. Nor does it say how accumulated leave pay should be calculated. However, it evidences that a distinction is made between “half-pay” in other circumstances mentioned later in that clause. The probabilities are therefore that the word “full” was used to emphasise the distinction.

Clause D7.3.2.2. provides :

“When an employee leaves the service of the University, s/he cannot claim payment of the cash value of any leave outstanding to his/her credit: provided that these provisions shall not preclude the payment of leave gratuities under conditions provided for in Chapter DVIII of the Civil Service Regulations.”

Regard may also be had to the Respondent’s past practice, which, as it happens, was substantially consistent with the Policy Document. The Applicants do not deny the existence of the practice. They claim that they were not aware of it.

In determining what the intention of the parties was the approach in *Standard Bank v Efroiken & Newman 1924 AD 171* which determined the intention of the parties as to the choice of law, provides a useful guide. What would the calculation of leave pay have been if the parties had applied their minds to this aspect during the negotiation?

Although the entitlement to accumulated leave on termination did not exist before

the collective agreement, the Respondent had a discretion to confer such entitlement in appropriate cases. The payment of leave pay on termination of employment was therefore not without precedent.

The practice was to apply the formula set out in the Chapter DVIII of the Civil Service Regulations which was also referred to in the Policy Document at clause D7.3.2.2. The Regulations provide that the payment must be based on “die basiese jaarlikse salaries van die beampte of werk nemer en die jaarlikse ekwivalent van alle pensioendraende toelaas wat aan hom betaalbaar is op die laaste dag van sy diens”

These Regulations read with the Policy Document provided that if the Respondent agreed to pay accumulated leave pay on termination of employment, the calculation must be based on the basic salary and pensionable allowances only. None of the allowances or benefits claimed by the Applicants were pensionable.

If the Applicants had a formulation different from the practice and the Policy Document they would have articulated it during the negotiations.

It does not assist the Applicants to rely on the European case law. These and some of the South African cases they cite deal *inter alia* with the right to leave pay as a principle and the fact that it is conceivable that benefits and allowances can be incorporated in the meaning of leave pay. What needs to be determined is whether in this case the parties had such or any other intention.

The approach under European law also differs substantially from the BCEA and Respondent's practice and policy. If the Applicants intended that or any other formulation to apply they would have expressed their intentions. As they were silent, there is a reasonable presumption that it was also the Applicants' intention that the Respondent's practice and policy would apply. They may not have been

aware of the practice was. But, they could not reasonably have believed that there was no practice at all. I find that they tacitly acquiesced in the application of the Policy Document to which the Applicants had access and the practice.

The Applicants' approach to calculating full pay, namely by taking the Respondent's contributions as the value of the benefits and adding them to the basic pay, is convenient for the reasons advanced by Mr Benjamin. Neither side could find authority in South African case law for this formulation. Whether it is consistent with our common law approach to compensation for contractual and delictual damages needs to be thoroughly investigated. It may require legislative intervention to achieve the effect that the Applicants claim.

However, I do not need to decide this issue as I have found that the parties intended to apply the established practice and the Policy Document.

Finally, I deal with the submission about the BCEA trumping the collective agreement. Section 5 of the BCEA provides :

"This Act or anything done under it takes precedence over any agreement, whether entered into before or after the commencement of this Act."

The clear purpose of this provision is to ensure that employers and employees enjoy the full protection of the BCEA. It could not have been the intention of the legislature to deprive parties of rights or better rights they may have acquired by collective bargaining or dispute resolution. (section 4 of the BCEA)

The collective agreement was a compromise to settle a dispute. It created a right which the Applicants did not previously have. In that sense it is distinguishable from agreements which disadvantage parties.

Furthermore, the right was for the payment of "full pay", not "remuneration" as defined in the BCEA. The BCEA prescribes that the calculation of leave pay be based on remuneration. Remuneration is defined to include payment in money or

kind or both. The parties deliberately chose the words “full pay” instead of “remuneration” which they used in clauses preceding clause 1.e of the collective agreement. The parties therefore tacitly elected not to render the collective agreement subject to the BCEA. That being so, and having regard to the primacy of collective bargaining and dispute resolution by consensus, the BCEA was, I find, excluded by tacit agreement by the parties.

The amount to be paid as leave pay therefore is in terms of the practice and the Policy Document, read with the Chapter VIII of the Civil Service Regulations, that is only the basic salary.

The application is dismissed with no order as to costs.

PILLAY D, J

DATE OF HEARING:	15 th MARCH 2002
DATE OF JUDGMENT:	25 March 2002
FOR THE APPLICANTS:	Mr Paul Benjamin
INSTRUCTED BY:	CHEADLE THOMPSON & HAYSON INC
FOR THE RESPONDENT:	Adv M W Janisch
INSTRUCTED BY:	E MOOSA, WAGLAY & PETERSEN