



ARBITRATION AWARD

Panellist/s: Karen Kleinot _____
Case No.: PSCB166-14/15 _____
Date of Award: 20th of October 2014 _____

In the ARBITRATION between:

Nehawu obo Mr. Shiraan Watson _____
(Union / Applicant)

and

Department of Environmental Affairs -National _____
(Respondent)

Union/Applicant's representative: Mr. F. Frantz _____
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DETAILS OF THE HEARING

1 The matter was heard on 8 October 2014 at the Department of Environmental Affairs (DEA). Both parties appeared, Mr. Frantz a trade union official appeared on behalf of Mr. Watson, Mr. Esitang the Labour Relations Officer appeared on behalf of the Department. The matter was recorded. Two bundles of documents were submitted and constitute part of the record. The parties agreed to hand in closing arguments by close of business on 15 October 2014. Closing arguments were tendered by the Applicant but not the Respondent.

ISSUE IN DISPUTE

2 To determine the interpretation and application of resolution 3 of 1999 as it pertains to clause 3.2 “From the date an expedition leaves Cape Town until it returns to Cape Town, the employer shall pay: (a) an employee who visits a base to assist with maintenance, stocking or additional research, including the Chief Scientist on the ship, an allowance equal to 15 percent of the average minimum salaries in salary range 5 and salary range 6;”

BACKGROUND TO THE DISPUTE

3 Mr. Watson has submitted a claim for this allowance. The allowance has allegedly been incorrectly worked out and this is what gave rise to the dispute. In the event that Mr. Watson’s claim is successful he is seeking payment of this allowance.

SURVEY OF THE EVIDENCE

Applicant’s version

4 Mr S. Watson testified in essence as follows:

As a DCO (Departmental Co-ordinating Officer) he goes on expeditions to Marion and Gough islands and the Antarctic. He has been on these expeditions 15 or 16 times. The last voyage that he undertook was in 2013. Normally Ms Vosloo handled the claims for such an expedition relating to allowances. Ms Vosloo worked out that he was entitled to a daily allowance of R178,00. The financial officer then recalculated the amount and arrived at the sum of R52,00 per day. This was the first time that such an issue was raised and the task of calculating the allowance was then handed over to the financial

manager. Mr. Watson disagreed with the amount R178,00 and R52,00. Both amounts were incorrectly calculated as they addressed a daily rate for the allowance which is not mentioned in clause 3.2.

5 When he went on expeditions in the past he would receive a lump sum based on the salary level as specified in the resolution, minimum of level 5 and minimum of level 6 and the average of the two multiplied by 15%. Mr. Watson stated that the sum was given irrespective of the days spent on the expedition. Mr. Watson referred to a letter written by the director that agrees with his approach.

6 Mr. Watson disagreed with this sum in that it was incorrectly worked out and that clause 3.2 was incorrectly applied. There was no communication from the DEA about how or why the allowance was decreased. There were no amendments to the Collective Agreement.

7 According to Mr. Watson clause 3.2 does not talk to the daily rate or daily allowance. It specifies a minimum average and is thus a fixed sum. Mr. Watson disagreed that clause 3.2 inferred that the allowance was limited to the duration of days that the person was on the expedition for. The calculation of a daily rate is unnecessary. Mr. Watson agreed that clause 3.2 mentioned the date the expedition left and when it returned but this did not mean that a daily rate had to be calculated. The total allowance that is due is R19016, 78. Mr. Watson confirmed that his allowance claim was in abeyance until the outcome of the arbitration.

Respondent's version

8 Ms Vosloo and Mr. Wessels testified in essence as follows:

9 Ms Vosloo the Human Resources Officer was involved in calculating the allowances from 2005. The formula was applied as follows: minimum of salary level 5 and the minimum of salary level 6 were added together and divided by two to arrive at an average. Fifteen percent of the average was then worked out. This amount was then divided by 100 to get to the daily rate. Ms Vosloo could not explain where this 100 figure came from or what justification there was to use it. Under cross examination Ms Vosloo explained that this was the number that she was instructed to use. The allowance for attending a conference for example within SA was R100 per day. It did not sound fair to give a lesser daily rate of R52 when staff within the country got a greater allowance. The formula was to divide the 15% by 100 which gave an allowance. Currently the allowances are processed by the Finance department in Pretoria.

10 At the time that Ms Vosloo was dealing with the calculations she was unaware that she had committed an error. Ms Vosloo did not agree that a lump sum would be paid but that clause 3.2 spoke of a limited time period and thus a daily rate had to be calculated.

11 Expeditions take anything from two weeks to three months. Ms Vosloo stated that even when she went on a two week expedition she was paid a daily allowance and not the sum of R17839,35. Ms Vosloo also explained that no staff member was ever paid this amount for an expedition.

12 The new daily rate of R52,00 appeared to be correct. When working out the allowance Ms Vosloo stated that the daily rate was always worked out.

13 Mr. Wessels the Financial Manager, stated that it was part of his duties to ensure that the audit was unqualified. He queried Ms Vosloo's formula as it did not make sense. Mr. Wessels agreed that the amount was derived from the average yearly salary of minimum level five and minimum level 6. The average obtained is a year figure. Mr. Wessels stated that clause 3.2 mentioned that the allowance was for the period that the staff member was on the expedition from the date that they left until the vessel returned. The number of days then determines the amount the person is due out of the yearly average.

14 The use of the figure 365 was explained as follows: if a person was on the expedition for 365 days then the full amount, the average over a year would be due. The number of days that the expedition took as reflected in the register is divided by 365 days per year and gives a daily rate. The daily rate is multiplied by the number of days on the expedition, thus giving the allowance. This number 365 days was obtained after consulting with the Department of Public Service and Administration (DPSA) in terms of the rules and regulations in which days are specified as a year, 365 days. During cross examination Mr. Wessels agreed that he did not have anything in writing confirming the use of the number 365 but indicated that he did consult and speak to the DPSA. He conceded that there was no document that confirmed his view but that he had meetings with Human Capital. Mr. Wessels indicated that he was not aware that the allowance was paid in the past based on the incorrect formula. He clarified that this was the first payment that had come to his attention. He stated that he was uncertain as to whether his interpretation was correct as he was not the author of the document containing clause 3.2 but that his interpretation was justifiable and reasonable.

15 Mr. Wessels disagreed that clause 3.2 did not speak to days and further that it did not make sense that a lump sum of R17839,35, the percentage of a yearly average, was due. This did not make sense in that a person who spent less time on an expedition would earn the same as a person who spent longer on an expedition. Mr. Wessels added that in terms of an audit the manner in which he applied the formula was reasonable and justifiable as opposed to Ms Vosloo's calculation which could not be justified. This was how it was done in the past but he did not know what previous time frame had been used.

16 There was no deviation issued by the minister. If there was overpayment this could be recovered and if there was underpayment this would be paid to the staff member.

SURVEY OF ARGUMENT

17 Mr. Frantz argued that clause 3.2 did not make mention of a daily allowance and that the phrase "from the date the expedition leaves Cape Town until it returns to Cape Town" refers to the length of the expedition which evidence reflects is not less than 30 days. The evidence of a special expedition as mentioned by Ms Vosloo did not apply to maintenance, stock taking or additional research as listed in clause 3.2 or resolution 3 of 1999. Thus an allowance equal to 15% of the average of the minimum salaries in the salary range 5 and 6 should be paid to members. There was no rationale provided for how the amount had been calculated in the past. Mr. Wessels could not substantiate how he arrived at his formula and this evidence stands to be rejected. It was argued that the DEA has demonstrated that it has inconsistently applied Resolution 3 of 1999. Accordingly it was argued that the arbitrary interpretation applied by Mr. Wessels without any documentary support from the DPSA should be rejected and the full allowance paid to members.

18 Mr. Esitang did not tender closing arguments.

ANALYSIS OF EVIDENCE AND ARGUMENT

19 The issue that falls to be determined is the interpretation and application of clause 3.2 of the Collective Agreement which states as follows: "From the date an expedition leaves Cape Town until it returns to Cape Town, the employer shall pay: (a) an employee who visits a base to assist with maintenance, stocking or additional research, including the Chief Scientist on the ship, an allowance equal to 15 percent of the average minimum salaries in salary range 5 and salary range 6;"

20 The question is whether this payment is limited to a discrete time period or whether payment of the percentage of the yearly average is due. Collective Agreements are statutory contracts and in terms of agreements concluded in bargaining councils and might be considered a form of subordinate legislation. They are the product of the parties' consensus but are underpinned by various provisions in Labour Relations Act. Thus, when it comes to interpreting collective agreements the principles conventionally applicable to the interpretation of contracts should be utilized. These are applied in terms of the purposes and objectives of the Labour Relations Act as amended.

21 In North East Cape Forests v SA Agricultural Plantation & Allied Workers Union & others(1997) 18 ILJ 971 (LAC), the court held " It is in my view quite clear that the primary objects of the Act are better served by the practical approach to the interpretation and application of the collective agreement as set out in the judgment of Myburgh JP, rather than by reference to purely contractual principles. On the particular facts of the case the object of orderly collective bargaining and effective expression of the fundamental right to strike will be frustrated by the latter approach". In SA Municipal Workers Union v SA Local Government Bargaining Council & others (2012) 33 ILJ353 (LAC) the court held as follows:" I am satisfied therefore that the commissioner properly applied his mind to the issues before him, that he considered all the material before him and adopted an approach that gave effect to the purpose of the collective agreement in a manner that achieved equity and fairness amongst eThekweni's employees. If one interprets the collective agreement within the context of shift workers, considering the purposes of the LRA which is to promote fair labour practices, then without doubt the commissioner's approach of fairness cannot be said to be unreasonable".

22 In National Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) the court pointed out that "the present state of law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in light of these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The investable point of departure is the language of the provision itself, read in

context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

23 The clause 3.2 appears in a document pertaining to allowances and benefits. This clause falls under the heading “XXVII The Antarctic and Gough and Marion Islands”, the stated aim is to compensate the employee for the hardships of work in the Antarctic and Gough and Marion islands. The agreement goes on to specify that an expedition is an expedition to the Antarctic, Gough or Marion islands. The words of clause 3.2 “From the date an expedition leaves Cape Town until it returns to Cape Town, the employer shall pay” are contentious.

24 It is important to note that the preceding clause 3.1, talks to the fact that while an employee is on a base to perform maintenance he or she is entitled to free living quarters, rations and repayment of reasonable expenditure on mess fees whilst on board and on the base, thus dealing with living allowances or benefits whilst away on the expedition. In the next clause 3.2, the words “From the date and expedition leaves Cape Town until it returns to Cape Town”, reflect a discrete time period. Although the time periods of the expeditions are not determined it is clear from the document that these are for limited periods of time, from the time the expedition leaves until it returns. This makes sense in that there are other allowances for housing and travel that can be claimed when the employee returns to South Africa. The rest of clause 3.2 talks to bonuses and specifies figures for such.

25 It is common cause that the Respondent must pay an amount. The issue is whether this is a daily allowance or a lump sum percentage of the annual average figure. It is the view and evidence of Mr. Watson that this clause makes provision for a lump sum payment of the yearly percentage which is derived from the average of the two amounts (minimum salary level 5 and 6). Although Mr. Watson stated that he had been paid the full amounts in the past, no documents were submitted to substantiate this contention. This stands in stark contrast to Ms Vosloo’s evidence that in the past when she worked out the totals no staff member ever received the full yearly percentage, this was not challenged and stands. In fact Ms Vosloo’s evidence is that in the past this amount was calculated based on the minimum salary level 5 and 6 and the average was then worked out. Thereafter 15% of this total was worked out. The 15% was then divided by the figure 100 to obtain a daily allowance. Mr. Wessel’s evidence was that a daily allowance was correct but the manner in which that amount was obtained was incorrect. The evidence reflects Mr. Wessels worked out the daily allowance by dividing the 15% yearly amount by the number of days in a year, 365 days. The only thing that has changed is the amount by which the 15% figure is divided by.

26 Thus although the agreement is silent on whether it is a daily rate or a lump sum that is to be paid, the words reflect a discrete period and as such a reasonable inference is that the allowance is based on the amount of time that the employee spends from the date the expedition leaves until the date the expedition returns. Therefore it is necessary to calculate a daily rate for the allowance. Further if some expeditions are longer and others shorter then each employee will be paid for the time that she/he was away. The evidence presented is that each staff member irrespective of time spent should receive the same amount; this does not make business sense in that irrespective of the time spent away each employee would receive the same amount. There would be thus no rationale for placing a time frame around the expedition which provides a limit to the allowance. It would lead to patent unfairness in that those who are on longer voyages would receive the same as those on shorter voyages. It is more logical that those employees away for greater time periods receive a larger amount of the yearly percentage than those employees who are away for shorter periods given that they experience the hardships for a longer period.

27 The question that arises is whether the number used to divide the yearly percentage is fair. The evidence is that Mr. Wessels contacted the DPISA which advised him of such a number to work out the daily rate. Although there was no documentary proof to substantiate Mr. Wessel's claim, his experience in financial administration is taken into account. I therefore accept that the figure of 365 is reasonable to use in order to calculate a daily rate.

28 In summary I find that clause 3.2 contains a discrete time period in that it is envisioned that the expedition will leave and return. It is this period that the employee must be compensated for. As this is a determinable period which differs from expedition to expedition it is necessary to calculate a daily rate. As the employee is given a daily allowance it does not matter whether these are working days or rest days and as such each day from Monday to Sunday is counted.

AWARD

29 Clause 3.2 applies to a discrete, time period which can be calculated, thus making it necessary to calculate a daily allowance by using the figure 356 days in a year.



Karen Kleinot (Commissioner)