



PANELIST: ADVOCATE J P HANEKOM

CASE NO: PSCB216-14/15

AWARD DATE: 19 NOVEMBER 2014

In the matter between:

PSA obo VAN WYK

Applicant

and

DEPARTMENT OF EDUCATION – WESTERN CAPE

Respondent

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION:

1. This matter was initially set down for arbitration on 28 October 2014 concerning a dispute about the interpretation and/or application of a collective agreement (Resolution 2 of 2004, hereinafter referred to as the "Resolution"). G. Theunissen union official of PSA represented the Applicant. Ms. F. Khasibe represented the Respondent. The parties agreed and requested to argue the case on paper and to submit written argument by 5 November 2014. I would then issue my award on or before 19 November 2014.

ISSUE TO BE DECIDED:

2. I have to decide whether the Respondent correctly applied and/or interpreted the Resolution.

HISTORICAL BACKGROUND:

3. The Applicant is employed as a General Assistant at Elswood High School, Elsies River since 23 January 1992.
4. The Applicant and his wife rent a home from the City of Cape Town since 27 May 1986. During 19 May 2011 the Applicant entered into a written rental agreement with the City of Cape Town for an indefinite period and is currently paying rental in the amount of R670, 00 per month. According to the Applicant his spouse is not in the employ of the Public Service.
5. During 2012 the Applicant referred a similar dispute to the PSCBC in respect of his application for housing allowance made on 9 February 2012. In case PSCB183-12/13 Commissioner, Karin Kleinot issued an award in favour of the Applicant on 28 September 2012 in which she stated in paragraph 6.1 "*Mr. Van Wyk is entitled to the housing allowance as he has met the criteria in Resolution 2 of 2004 clause 7.1.3. The Department of Education is ordered to pay back the rental to the sum of R4 720, 00 to Mr. Van Wyk within 21 days of receipt of this award.*" The case was decided when Determination of July 2010 was still applicable of which clause 6 states "*in respect of other housing such rental may not be less than R800, 00 per month.*" The Commissioner's decision was based on the fact that the wording of paragraph 6.1

referred to above was not prescriptive and implied that if the rental for other housing is less than R800, 00 per month then the application for housing allowance may be considered and granted.

6. The Applicant now brings a new dispute in respect of a new housing allowance application for housing allowance submitted on or about 6 August 2013 that was declined. Currently Determination of 2012 (herein after referred to as "the Determination") is applicable and set the housing allowance at R900, 00 per month. It is the Applicant claim that he is entitled to the housing allowance backdated from 1 January 2005. The Respondent opposes the application.

EVIDENCE AND ARGUMENT BY THE APPLICANT:

7. I have decided to summarise the Applicant's argument as far as I consider relevant for the purpose of my award.

Applicant:

8. It was the Applicant's argument that he meets the criteria of clause 7.1.3 of the Resolution as he rents a home in South Africa together with his wife who is not in the employ of the Public Service. The Resolution does not exclude the Applicant from qualifying for the housing allowance.
9. It was further the Applicant's argument that the Determination is a mere guideline. The Determination must be in line with the Resolution when applying or interpreting the Resolution. Accordingly the Applicant claims that he is entitled to the housing allowance with effect from 1 January 2005.

ARGUMENT BY THE RESPONDENT:

10. Again I have again decided to summarise the Respondent's argument as far as I consider relevant.
11. The Respondent submitted that the Applicant's application for housing allowance cannot be backdated to 1 January 2005 as the Applicant only applied for the housing

allowance in August 2013. Further the Applicant's application for housing allowance was declined, because he did not qualify for a housing allowance as stated in Determination of July 2012. It was the Respondent's argument that the Applicant pays rental of R581, 27 per month and is therefore not eligible to qualify for a housing allowance as his rental is less than R900, 00. It was submitted that it was the intention of the parties to the Resolution that Government should assist his employees with housing/rental allowance where applicable and not to pay rental for its employees.

ANALYSIS OF THE EVIDENCE AND ARGUMENT:

12. I have decided only to focus on those issues I consider relevant.

13. The Applicant referred the dispute about the interpretation and/of application of the Resolution that came into effect on the date of achieving the majority signature in terms of clause 10 of the Resolution, which was 29 September 2004. Paragraph 10.2 of the Resolution states "*except for clause 7.1 that lapses on 1 January 2009, this agreement shall remain in force until 30 June 2007, unless otherwise agreed by resolution of the council.*" Several Determinations came into effect to increase housing allowance. In the instant case the Determination is applicable in terms of which the current housing allowance is R900,00 per month. The Determination covers *inter alia* the housing allowance as contained in clause 7.1 of the Resolution and clause 12 of PSCBC Resolution 1 of 2007 dealing with housing allowance. Clause 12 makes mention of the fact that the employer and organised labour agree to review the comprehensive housing allowance and that the review will be completed and recommendations be subject to negotiations by 31 July 2008. Further the purpose of the Determination is to give effect to the remainder of clause 7.1 of the Resolution with effect from 1 January 2005. The Determination in my view is subordinate legislation published in the Government Gazette and therefore cannot be lightly ignored. It is however trite law that a Determination should give effect to a collective agreement and should be in line with the intention of the parties to a collective agreement.

14. It is common cause that the Applicant met the requirements of clause 7.1.3 of the Resolution. The problem is that clause 7.1 dealing with housing allowance lapsed on 1 January 2009 in terms of clause 10.2 of Resolution. Clause 12 of Resolution 1

of 2007 referred to above did not extend the expiry date of clause 7.1 of the Resolution beyond 1 January 2009. I am not aware or it was not brought to my attention that there is a subsequent collective agreement negotiated after 1 January 2009 that deals with housing allowance. Further the Resolution only remained in force until 30 June 2007 as per clause 10.2 of the Resolution referred to above.

15. Therefore the only existing policy in respect of housing allowance is the Determination. There are different views as to the interpretation and application of the Determination and contradictory arbitration awards were issued as to when an employee qualifies for a housing allowance. Some examples that create uncertainty are for instance: Employees that won their own houses staying in State Housing and who are compelled or not to occupy State Housing; Employees renting Other Housing where the rental is less than R900, 00 per month. It is my respectful view that the Determination is not explicit as to whether or not such employees are entitled to the housing allowance or not. To my mind paragraph 5 and 6 of the Determination 7 only refers to the limits payable in respect rentals of State Housing and Other Housing. Some clarity exist in respect of employees would be compelled to occupy State Housing why they own their own houses somewhere else. In this regard paragraph 2 of the Determination is applicable where the occupancy requirement is waived and such employees may continue to receive the Housing allowance. Nothing is said about employees who rent property, whether they qualify or not if the rental is less than the housing allowance.
16. I therefore submit that if the parties to the Resolution had that in mind they would have mentioned it. That was not the case. In other words if the parties intended to further qualify eligibility they would have agreed to state in the Resolution that employees how pay rentals less than R900, 00 do not qualify for the housing allowance. In my view this uncertainty should be rectified by negotiations in the form of a new collective agreement.
17. Be it as it may, I do not have jurisdiction to interpret the Determination as such, but a collective agreement. In the instant case the Resolution has lapsed and therefore I cannot entertain the matter. I am therefore not in a position to interpret or apply the Resolution that no longer exists. A possible remedy to the Applicant would be to enforce the award issued by Commissioner Karen Kleinot on 28 September 2012.
18. Further in my view the Applicant cannot refer the same dispute more than once by bringing the same dispute in a new format (new application for housing allowance), if

the real dispute is about the interpretation and application of a collective agreement that was already decided in the case of the award that was issued by Commissioner Kleinot on 28 September 2012. Also in my view that the Applicant cannot claim back pay for the housing allowance as he will only receive the housing allowance once he submitted his application and necessary documentary proof. The Applicant is referred to paragraph 7.4 of the Determination in this regard.

AWARD:

19. In the premises I make the following award:

- (1) I find that the council cannot entertain the dispute as the Resolution lapsed in January 2009. Therefore the application is dismissed.



ADV J P HANEKOM

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