



ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy
Case No.: PSHS313-11/12
Date of Award: 21-Feb-2012

In the ARBITRATION between:

HOSPERSA O B O WESTWOOD R

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative

: MR S ADKINS

Union/Applicant's address

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Respondent's representative

: MR P D NYEMBE

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Details of hearing and representation:

1. The arbitration proceedings commenced at 10H00 on the 19 January 2012 at Natalia Building, 7th Floor, North Tower, Pietermaritzburg. Mr S Adkins of HOSPERSA represented the applicant and Mr P D Nyembe represented the respondent. After reverting to section 138 (3) of the Labour Relations Act the parties agreed on the following:

The parties confirmed that oral evidence would not be tendered and that submissions would be made in the form of Heads of Arguments to be forwarded to the arbitrator as follows:

The respondent (employer) will file its Heads of Arguments including its Points In Limine and address the merits of the applicant's claim on or before the 9 February 2012. The applicant (employee) will answer on the 13 February 2012 and the respondent will reply on the 13 February 2012. The applicant failed to submit its arguments as agreed.

Issues to be decided:

2. I am to decide whether the following: whether
 - 2.1. The acting allowance claimed by the applicant constituted a benefit in terms of Section 186(2)(a) of the LRA;
 - 2.2. The Bargaining Council had the requisite jurisdiction to arbitrate the dispute;
 - 2.3. Employer / respondent committed an unfair labour practice relating to the provision of benefits, viz an acting allowance to Mr Westwood.

Background to the issue:

3. The applicant seeks to be remunerated for acting in the higher post. The respondent opposed the application and raised a Point In Limine in respect of jurisdiction to entertain the matter.

Summary of evidence and arguments:

4. APPLICANT'S HEADS OF ARGUMENTS (EMPLOYER):

The salient aspects of the applicant's submission are recorded below:

The applicant declared a dispute regarding an alleged non-payment of the acting allowance. The respondent believes that the Council does not have the requisite jurisdiction to deal with such matters. It is the respondent's contention that payment or non-payment of acting allowance does not fall within the ambit of benefits envisaged in section 186(2)(a) of the LRA.

The respondent further submits that a claim for acting allowance is similar to a wage or salary and is not a claim for a benefit as such. This was held in *Hospersa & Another v Northern Cape Provincial Administration* 2000 (5) LLD 278 LAC.

It is further submitted that there is no entitlement to an acting allowance. Acting Allowance is paid as remuneration in return for services rendered and is classified under salary, wages and commission or overtime pay and is not a benefit. This stance was confirmed in *Schoeman & Another v Samsung Electronics SA* 1997 BLLR 1364 LC.

It is therefore the respondent's submission that the Council does not have the requisite jurisdiction to deal with the dispute and requires the matter to be dismissed.

5. RESPONDENT'S HEADS OF ARGUMENTS (EMPLOYEE)

The applicant did not make submissions as agreed.

Analysis of evidence and arguments:

SPECIAL NOTE

Although the applicant did not furnish arguments I decided to determine the matter for completeness.

6. The applicant declared a dispute in respect of not being paid an Acting Allowance and in terms of Section 186(2) (a) of the LRA viz Benefits.

6.1 The first issue to be determined is whether the acting allowance claimed by the applicant constituted a benefit in terms of Section 186(2)(a) of the LRA;

6.2 Secondly whether the Bargaining Council had the requisite jurisdiction to arbitrate the dispute;

6.3 Thirdly whether the Employer / respondent committed an unfair labour practice relating to the provision of benefits, viz an acting allowance to Mr Westwood.

7. In this dispute the applicant seeks the relief as contained in terms of section 186 (2)(a) of the Labour Relations Act and specifically in terms of benefits. In order to fully explore this matter as there are many cases to follow and related to the same issue that is whether an acting allowance falls under the definition of benefits. Therefore I am to deal with whether an acting allowance specifically falls within the definition of benefits. At the outset I intend to record the decided case that give direction in this regard before making a finding on the issue.

8. According to *Schoeman & Another v Samsung Electronics SA (Pty) Ltd* [1997] 10 BLLR 1364 (LC) the following was determined:

"An unfair labour practice means an unfair act or omission that arises between an employer and an employee, involving.....

The unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee.

According to The Concise Oxford Dictionary the meaning of the word "benefit" is defined as "Advantage or an allowance to which a person is entitled under insurance or social security (sickness, unemployment, supplementary, benefit) or as a member of benefit club or society."

Remuneration is different from “benefits”. A benefit is something extra, apart from remuneration. Remuneration is always a term and condition of the employment contract.

According to *Sithole v Nogwaza NO & Others* [1999] 12 BLLR 1348 (LC) benefit means material benefit such as pension, medical aid, housing and insurance subsidies, i.e must have monetary value for the employee and be a cost for the employer.

It is further recorded in this case that there can be no better exposition on the question of what constitutes a “benefit” that the one by Commissioner Hutchinson in *SA Chemical Workers Union v Longmile/ Unired* (1999) 20 ILJ 244 (CCMA) which has been cited with approval by the Court in *Northern Cape Provincial Administration v Hambidge NO & Others*.

Although opinions as to what constitutes a benefit (as opposed to remuneration) differ, the common thread running through all the decisions and the academic writings is that a “benefit” constitutes a material benefit such as pensions, medical aid, housing subsidies, insurance, social security or membership of a club or society. In other words, the benefit must have some monetary value for the recipient and be a cost to the employer. It is also something which arises out of a contract of employment.

According to *Northern Cape Provincial Administration v Hambidge NO & Others* [1999] 7 BLLR 696 (LC) benefit is supplementary advantage conferred on an employee for which no work is required. Employee’s claim to higher salary not amounting to claim for benefits, as defined. Claim for higher salary is a matter of mutual interest.

9. There is much confusion about the interpretation of remuneration and benefits. This should not be the case because remuneration/ salary are often misinterpreted. At the commencement of employment and over a period of time the employee becomes aware of the salary initially and thereafter the subsequent increments. This is clear from the salary advice that records salary as the basic component. This is allocated to that specific employee and is determinable. Thereafter other “benefits” are available to the employee for example, if he/she wants to access medical aid he/she contributes a portion and the employer contributes a portion and this is the same in housing subsidies, pension/ provident fund contributions. These benefits are available to all employees on application and for which no extra work is required.
10. The salary of an employee is determined by the hours worked and other factors determined by the employer. The access to benefits by an employee flows from the contract of employment and is available to all employees.
11. In respect of the matter at hand the acting position is not available to all employees. It is subject to certain requirements and those meeting the requirements are offered the position in effect an increase in their salary. The difference is that benefits are available to all employees but an acting position is

only available to employees who qualify or meet the minimum requirements and who are to undertake extra work.

12. In any event the offering of an acting post and acting allowance has the result that the employee's salary being increased and this process is regulated by a collective agreement. In this case the collective agreement has been regulated by agreement 1 of 2002.

In summary the applicant was aware that in terms of the agreement an employee will be paid an acting allowance in the following respect:

- 13.1 The post is a vacant and funded post
- 13.2 The acting period is longer than six weeks
- 13.3 The appointing authority is a level higher than the acting appointee
- 13.4 The employee must have accepted the acting appointing

There is no evidence of the periods in which the applicant was offered, accepted and acted in the post that he expects to be paid an allowance. There were no subsequent offers by the respondent and as such he may have assumed other responsibilities but they were not sanctioned or approved by the employer.

13. Arising from the definition of benefits as been explained above, the Council does not have jurisdiction to arbitrate the matter.
14. As a consequence thereof the application fails in that the applicant has not shown that the dispute falls within the definition of benefits and therefore the Council does not have the requisite jurisdiction to entertain the matter.
15. As a consequence of the above I determine that the applicant has failed to discharge the onus that an acting allowance falls within the parameters of section 186(2) (a) of the LRA or that the employer had failed or incorrectly interpreted and applied resolution 1 of 2002 and further determine that the applicant was not entitled to an acting allowance.

Award:

16. The Council does not have the requisite jurisdiction to entertain the matter.
17. The application is dismissed and the applicant is not entitled to any relief.
18. No order for costs is made.
19. This file should be closed.

DONE AND SIGNED IN DURBAN ON THIS 20 DAY OF FEBRUARY 2012.

Signature

A handwritten signature in black ink, appearing to read 'a S Dorasamy'. The signature is written in a cursive style with a large, looping 'S' and a distinct 'D'.

Arbitrator: Anand Dorasamy