



## IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD IN CAPE TOWN

Case No PSES 281-06/07

In the matter between

NUE obo Carol Dhlamini

Applicant

and

Department of Education (Western Cape)

Respondent

ARBITRATOR: Bella Goldman

HEARD: 2 August 2007

DELIVERED: 11 October 2007

***SUMMARY: Regulations containing terms and Conditions of Employment of Educators – Regulation 13 –Wrongfully paid remuneration in form of overpayments to educator – Employer reclaiming such overpayments from educator in terms of regulation 13 by way of deductions in monthly instalments from his salary***

### ARBITRATION AWARD

#### DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing was held at the Cape Town offices of the respondent on 2 March 2007 and 2 August 2007. Ms Sandy Smart, Union Official represented the applicant. Mr Colin Arendse, Labour Relations Officer represented the respondent. The parties agreed that closing argument would be submitted in writing. The proceedings were recorded.

### **ISSUE TO BE DECIDED**

2. I have to decide whether the applicant was overpaid between the period 1 July 1997 to 31 October 2004 and if so whether the amount overpaid is required to be paid to the respondent by the applicant. If I find that there was no overpayment then I have to decide whether the applicant should be reimbursed in respect of the deductions made to date and if the applicant's salary level should be adjusted.

### **BACKGROUND TO THE DISPUTE**

3. The following facts are common cause:
4. The applicant has been employed as a post level 1 Educator from 1982 to date.
5. The applicant's relative education qualification value (REQV) at the time of her appointment was 12 (matric + 2) years.
6. The applicant obtained a National Diploma in Education and submitted the certificate relating to the qualification to the respondent in 1997. The respondent adjusted the applicant's REQV to 13 and her salary was adjusted from salary level 7.1 to 8.1. as from 1 July 1997.
7. The applicant subsequently obtained a National Higher Diploma in Education and submitted the certificate relating to this diploma in 2001. Her REQV was as a result adjusted to 14 but her salary was not increased and she received no cash bonus.
8. In December 2003 the applicant received a letter from the respondent informing her that her application for recognition of long service had been approved and the respondent was paid out her leave credits in terms of the relevant condition of service at the salary level 8.1
9. In November 2004 the applicant was informed by a letter from the respondent dated 17 November 2004 that she was appointed to the rank of Senior Educator with effect from 1 January 2004 and that she would qualify for a 1% notch increase.
10. The applicant's salary slip for November 2004 indicated that the applicant's salary had been decreased from R114, 498.00 per annum to R92, 190.00 per annum.

11. This was confirmed in a letter the applicant received from the respondent dated 22 November 2004 which stated that in 1997 her salary was erroneously adjusted from 7.1 to 8.1. It further stated that at that time she should have rather received a cash bonus and as result of this alleged mistake the applicant's salary was adjusted to R92, 190.00 per annum and that the overpayment would be recovered.
12. Per a letter from the respondent dated 15 June 2006 the applicant was informed that she owed R122, 963.23 for the overpaid salary for the period 1 July 1997 to 31 October 2004 and that a salary deduction of R5, 123.48 per month would be effected as from August 2006, subject to applicant requesting a revision of this amount.
13. In July 2006 as per the applicant's August 2006 salary slip the respondent deducted the sum of R5, 123.48 from the applicant's salary as part payment for the overpayment. The union and its legal advisors thereafter entered into correspondence with the respondent.
14. The applicant referred an unfair labour practice dispute to the council on 10 August 2006.
15. The applicant received a letter from the respondent dated 31 August 2006, which stated that the deduction would be reduced to R800.00 per month with effect from 1 September 2006 and the amount of R5123.48 would be refunded to her, this was duly affected.
16. To date the respondent is deducting the sum of R800.00 per month from the applicant's salary.
17. The dispute was set down for a hearing on 26 October 2006 at which the respondent argued that the council did not have the jurisdiction to arbitrate the dispute.
18. On 9 November 2006 I issued a ruling in terms of which I ruled that the council has the jurisdiction to arbitrate the dispute for the reasons set out in the ruling.
19. The applicant's case is that the deductions are illegal and further that her salary should be readjusted to what it was pre November 2004, taking into account the relevant increases.
20. The applicant is also requesting that she be paid the difference between what she was paid and what she should have been paid and that the deductions from her salary in respect of the alleged overpayment be refunded.
21. The respondent's case is that the applicant has been overpaid for the period in question and that the applicant should refund the respondent in respect of the overpayment in terms off the relevant statutory provisions.

## **SURVEY OF EVIDENCE AND ARGUMENT**

22. I have considered all the evidence and argument, but because the LRA (section 138(7)) requires an award to be issued with brief reasons for the findings, I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

### **Documentary Evidence**

23. The parties submitted bundles of documents which were agreed as being what they purported to be without agreeing the contents thereof. The applicant's bundle was marked 'A' and was numbered 1 to 103 and 83A to 99A. The respondent's bundles were marked 'B' 1 to 36 and 'C' 1 to 5.

### **Employee's evidence**

The applicant Carol Venetia Dhlamini gave evidence under oath. The following is a summary of her testimony:

24. The applicant confirmed the sequence of events set out above and added the following;
25. Shortly after the applicant's salary was increased in 1997 following the submission of the applicant's newly acquired qualifications the applicant asked a Mr Leon Bruce at the respondent's head office to verify her salary in terms of her newly acquired qualification,. Mr Bruce told her that he thought her salary was not correct but that the WCED would notify her if that were the case. The applicant heard nothing further from the respondent in this regard.
26. The applicant spoke to a Mr C Booyesen from the Department with regard to this matter in 1999 who again informed her that her salary could possibly be wrong but that she should wait for a letter from the Department to confirm this. The applicant heard nothing further from the respondent.
27. When the applicant submitted her Higher National Diploma certificate in January 2001 she was informed that she would not receive a cash bonus as she was already being overpaid.
28. The applicant thereafter sought further information; she spoke to Mrs Smit from the respondent's Directorate: Labour Relations, she in turn referred her to Mr Samsodien in Finance and he confirmed that she would be informed by in writing of my overpayments which was confirmed by Mr Bruce.

29. When the applicant received a letter dated 17 November 2004 from the respondent informing her that she had been elevated to the rank of Senior Teacher and that her salary was to be increased with effect from 1 January 2004 her fears were allayed regarding any alleged overpayments.
30. The applicant then received a letter date 22 November 2004 informing her that her salary had been erroneously adjusted to a higher notch with effect from 1 January 1997 when she should have been instead given a once only cash bonus and that this had resulted in an overpayment and that her salary was accordingly reduced from R114, 498.00 per annum to R92, 190 .00 per annum with effect from 1 November 2004. The applicant's November 2004 salary reflected this adjustment. The applicant was requested to contact Mr Wyngaard to negotiate suitable arrangements for the recovery of the overpayment.
31. The applicant then contacted her union for advice and the union entered into discussions with correspondence with the respondent with regard to the applicant's reduction in salary and the alleged overpayment.
32. Per a letter dated 15 June 2006 the applicant was informed that she had been overpaid by R122, 963.23 for the period 1 July 2007 to 31 October 2004 and that a salary deduction of R5, 123.48 had been effected from August 2006 with respect to the overpayment.
33. The union's legal representative then entered into discussions with the department in this regard and the respondent refunded the R5, 123.48 and replaced this with a deduction of R800.00. To date the R800.00 has been deducted on a monthly basis.

#### **Employer's evidence**

The respondent called one witness Clinton Booysen, Principal Personnel Officer in the Establishment Section who gave evidence under oath. The following is a summary of his testimony:

34. He referred to the Council's resolution 4 of 1997, clause 3.1.1 which states that:

*If an educator with REQV 11 or 12 on post level 1 to 4 (refer annexure C) improves her education qualifications, which has the effect that her REQV improves, such educator's salary will adjust to the lowest notch of the next applicable salary range*

35. Prior to submitting her qualifications the applicant was being paid on salary level 7.1 and thus in terms of the above mentioned resolution her salary was adjusted to salary level 8.1.

36. The witness referred to a circular dated 20 May 1998 which attempted to clarify the meaning of Resolution 4. The circular indicated that no person who was on salary level 7.1 and was in possession of an REQV12 and improved their qualification level could receive a salary increase. Such persons were only eligible to a cash bonus.
37. A diagram was attached as an aid to understanding the circular. The diagram indicated that educators who were being remunerated on salary level 7.1 who improved their qualification level in terms of resolution 4 would receive a cash bonus and would not qualify for a salary increase. The applicant's salary increased in 1997 and hence she was erroneously paid.

### Argument

38. The applicant's representative submitted written argument in support of her case which I will refer to where necessary in my analysis. I received no written argument from the respondent's representative.

### ANALYSIS OF EVIDENCE AND ARGUMENT

39. Section 35(1)(b) of the Basic Conditions of Employment Act No 75 of 1997 provides that an employer may not make any deduction from an employee's remuneration unless –

*“...the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award”*

40. Over the years, the Minister of Education has promulgated certain regulations in terms of the Employment of Educators Act 76 of 1998 containing terms and Conditions of Employment of Educators, which automatically form part of the contract of employment between educators and the state. Some of these regulations are contained in the “Regulations regarding the Terms and Conditions of Employment of Educators”. Regulation 13 is relevant to this case and reads as follows:

*13 (1) If an incorrect salary on appointment, transfer or promotion, or an incorrect advancement of salary was awarded or granted to an educator, or the correct salary was awarded or granted but at a time when or granted but at a time when or in circumstances under which it should not have been awarded or granted to him or her, the employer shall correct the educator's salary with effect from the date on which the incorrect salary or advancement commenced, notwithstanding that the educator concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary.*

*(2) If an educator referred to in sub regulation (1) has in respect of his or her salary, including any portion of any allowance or other remuneration or any other benefit calculated on his/her basic salary, or awarded to him by reason of his/her basic salary-*

*(a) been underpaid.....*

*(b) been overpaid or received any such other benefit not due to him or her:-*

*(i) an amount equal to the amount of the overpayment shall be recovered from him or her by way of deduction from his or her salary by way of instalments as may be determined by the employer, with due regard to the applicable Treasury Instruction by way of way of legal proceedings or partly in the former manner and partly in the latter manner;; and*

*(ii) that other benefit shall be discontinued or withdrawn as from a current date, but the educator concerned shall have the right to be compensated by the employer for any patrimonial loss which he or she has suffered or will suffer as a result of that discontinuation or will suffer as a result of that discontinuation or withdrawal..*

*(3) With the approval of the Treasury the amount of an overpayment to be recovered in terms of sub regulation (2) (b) may be remitted in whole or in part.*

41. Annexure C of Resolution 4 of 1997 placed Educators in post level 1 with REQV 12 in salary ranges 4 to 6. However educators at post level 1 with an REQV 12, who prior to the change in salary structure which took place on 1 July 1996, were paid in terms of the last two notches of category B were placed on level 7.1 and 7.2 respectively of the new salary scale The changes in salary scale were effected in terms of a collective agreement which was promulgated on 31 May 1996 and was confirmed in the Personnel Administration Measures (PAM) determined by the minister of Education in terms of the Educators' Employment Act, 1998 and the regulations made in terms of the Act (PAM, Chapter B clause 4.9).
42. Thus the applicant prior to submitting her National Diploma in 1997 was being remunerated on salary level 7.1. and was paid R50, 868.00 per annum.
43. Further to the applicant submitting her qualification certificate referred to in paragraph 42 above the applicant's salary level was changed to 8.1 and she was paid R63, 963.00.
44. The move was in terms of a collective agreement referred to as Resolution 4 of 1997, paragraph 3.1.1  
*If an educator with REQV 11 or 12 on post level 1 to 4 (refer annexure C) improves her education qualifications, which has the effect that her REQV improves, such educator's salary will adjust to the lowest notch of the next applicable salary range*

45. Resolution 4 of 1997 was also confirmed in the Personnel Administration Measures (PAM) determined by the Minister of Education in terms of the Educators' Employment Act, 1998 and the regulations made in terms of the act.
46. The respondent on 20 May 1998 received a letter from the National Department which purported to interpret resolution 4 and stated:

*that educators with REQV12 already being remunerated on salary position 7.1 or higher may only receive a cash bonus when they improve their qualification to a higher REQV rating.*

47. Circular no 141 / 1998 dated 24 November 1998 reinforced the **applicant's** interpretation of Resolution 4 and supports the view that the applicant's salary was correctly adjusted in July 1997 to salary level 8.1. The circular was signed by Mr B O' Connel and stated:

*If an educator with REQV 11 or 12 on post levels 1 to 4 improves his or her qualifications and consequently his or her REQV, such an educator's salary will be adjusted to the lowest notch of the next applicable salary range.*

The circular also attached an explanatory diagram.

48. The applicant pre the submission of her National Diploma certificate was in possession of qualifications which equated to REQV12. It should be noted that the diagram attached to the National Department's letter of 20 May 1998 did not reflect that there were educators with REQV 12 who were being remunerated on salary level 7.1 (as the applicant was prior to her improving her REQV) whilst that attached to Circular no 141 / 1998 reflected that there were educators with REQV 12 who were being remunerated on salary level 7.1.
49. Resolution 4 is a collective agreement, paragraph 5.3 of the resolution states  
*'in the event of conflict between the provisions of this resolution and another, the provisions of this resolution shall prevail*
50. The letter dated 20 May 1998 which the respondent relied on for its actions on is not a resolution or a collective agreement. It is trite that a letter cannot override a collective agreement or even attempt to interpret it. There is nothing to suggest that the collective agreement, Resolution 4, stated or inferred that educators on REQV 12 who were being remunerated on salary level 7.1 and who improved their qualifications would not as a result thereof be remunerated at salary level 8.1.



51. In terms of Resolution 4 which is a collective agreement the applicant's salary was correctly adjusted in 1997 from 7.1 to 8.1. There is nothing in the resolution to suggest that educators with an REQV of 12 could not be remunerated on REQV 12 or that those who were remunerated on salary level 7.1 could not or cannot move to salary level 8.1. when they improved their REQV.
52. Hence I find that the applicant was not overpaid and that all the deductions made from her salary are unlawful and that the respondent unlawfully reduced the applicant's salary in November 2004.
53. The applicant argued that even if the applicant was incorrectly moved from salary level 7.1 to salary level 8.1 the respondent should not be able to recover the overpayments based on the principal of estoppel. I do not have to consider this argument given my findings; however the applicant appears to have made a sound case for this principal to be applied. It should be noted that the respondent's actions in this case appear to have been extremely misleading and negligent resulting in the applicant suffering much undue stress. The respondent appeared to deal with the matter in a very haphazard and careless manner; the letter dated the 22 November 2004 stated that the applicant's salary was adjusted from 1 January 2007 when it is common cause that it was adjusted as from 1 July 1997.
54. The applicant is requesting the following:
55. That her salary be corrected to where it should be, had it not been reduced in November 2004, that is salary level 8.7 (R141 078.00 per annum), which takes into account the salary adjustments and grade progressions that the applicant should have had.
56. That all unauthorised deductions are stopped and that the money deducted from the applicant salary is paid back to her. Deductions of R800 per month have been made since 1 September 2006 =  $R800 \times 13 = \mathbf{R10\,400.00\ (net)}$  and that;
57. The cash bonus that the applicant did not receive when she completed her HDE in 2000, **R5 086.80 (net)**, be paid to her and that;
58. The respondent reimburses the applicant the amount of **R75, 199.50**. This sum is the difference between what her salary and bonuses should have been, and what they were after the reduction in November 2004 calculated as follows:

PERIOD	SALARY SHOULD HAVE BEEN	SALARY WAS	DIFFERENCE
1 NOVEMBER 2004 - 30 JUNE 2005	R 76,332.00	R 61,460.00	R 14,872.00
1 July 2005 - 30 June 2006	R 123,396.00	R 96,430.00	R 26,966.00
BONUS SEPT 2005	R 10,333.00	R 8,035.00	R 2,298.00
1 JULY 2006 - 30 JUNE 2007	R 131,235.00	R 102,561.00	R 28,674.00
BONUS SEPT 2006	R 10,936.25	R 8,546.75	R 2,389.50
TOTAL OWED			<b>R 75,199.50 (gross) *</b>

\*This does not take benefits such as pension which is linked to salary.

59. That all further under-payments in salary and bonus, from 1 July 2007 until the award is made, be added to the amounts above.
60. That this process be finalised **within one month** of the date of the award.
61. The respondent has chosen not to respond to the applicant's closing argument and hence I consider the applicant's submission regarding the monies that should be reimbursed to her and her submission that she should now be remunerated in terms of salary scale 8.7 as undisputed.
62. However to avoid any further disputes or delays I am going to give the respondent party an opportunity to challenge the computation of the monies claimed by the applicant.

### **AWARD**

63. The respondent is ordered to repay all the deductions made from the applicant's salary and to place her in such a position as if her salary had not been reduced in November 2004 and that she received the cash bonus she was entitled to on submission of her REQV14 qualification in 2001.
64. The respondent party may challenge the amounts of monies claimed by the applicant and or the notch of salary scale 8.7 which the applicant is asking to be remunerated in terms of, by submitting written argument to the respondent and myself within fourteen days of the date from which this award is faxed to the parties. The applicant will then be given fourteen days from the date that the respondent faxed the written argument, to reply to the respondent's argument by submitting the written reply to the respondent and myself.
65. Failing the respondent making written submissions within the time frames provided below.

66. The respondent, the Department of Education (Western Cape) is ordered to pay the applicant, Carol Venetia Dhlamini the sum of **R90, 660.03** (10, 400.00 + 5,060.80 + 75,199.50) plus the difference between her remuneration and the salary applicable to salary level 8.7 for the period 1 July 2007 to 30 November 2007 plus the difference as referred to above in respect of any bonus that was due to her in the period 1 July 2007 to 30 November 2007.
67. The respondent is ordered to deduct from the above amount the tax that the applicant would have paid had her salary not have been reduced in November 2004 and pay it over to SARS. The respondent is ordered to make up any difference in tax owing to SARS as a result of the applicant receiving the above amount at this point in time.
68. The respondent is ordered to remunerate the applicant at salary level 8.7.as from 1 December 2007.
69. The respondent is ordered to make up the necessary pension payments as if the applicant's salary was not adjusted as from 1 November 2004.
70. The respondent is ordered to pay the applicant the sum referred to in paragraph 55 by no later than 30 November 2007 after which interest will run at the prescribed rate.
71. There is no order as to costs.

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Conciliator/Arbitrator/Panellist: ELRC