IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: C314/2005

In the matter between:

JOHNSON EDWARD JACOBUS HENRY Applicant

and

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL First Respondent

URSULA BULBRING Second Respondent

DEPARTMENT OF CORRECTIONAL SERVICES Third Respondent

JUDGMENT

REVELAS J

[1] The applicant obtained a monetary award in his favour, after he had referred a dispute about the interpretation of a collective agreement to the General Public Service Sectoral Bargaining Council ("the GPSSBC" or "the first respondent"). The applicant's case was that his employer (the third respondent or "the Department") had breached the collective agreement (Resolution 01 of 2002 which regulates the payment of acting allowances) by not paying him an allowance for acting in the position of Acting regional Co-ordinator ("ARC" or also Acting Deputy Director:

Communication). The arbitrator (or the second respondent) who arbitrated the dispute, held that the Department was indeed in breach of the agreement and directed compliance therewith, by making payment to the applicant of an acting allowance for the period 15 March 2004 – 30 November 2004, being R49 333, 50.

[2] The applicant seeks to review the aforesaid award on the basis that he was awarded too little. In this review application, the applicant argues that if the arbitrator had applied her mind to the evidence before her, she would have found that he had acted for a longer period, namely from March 2004 to May 2005, thus entitling him to the payment until March 2005. The applicant relied on the fact that after 30 November 2004, he continued to perform his duties within the broad framework of the National Communication forum and undertook such tasks as given to him from time to time. The applicant also relies on the fact that in January 2005 he was invited to attend a national communication strategy workshop in Pretoria in the capacity he had acted in. This fact was disputed in an unsuccessful application to vary the arbitrator's award. The applicant further relied on an e-mail from a certain Mr Mark Solomon, dated 4 May 2005, which the applicant interprets as proof of the fact that he had acted until he received this e-mail.

[3] At the arbitration hearing, the Department argued that the applicant was not entitled to any allowance whatsoever, notwithstanding that it was common cause that during March 2004 the applicant was appointed in the acting position, and that this acting appointment

was confirmed in writing and was for the period March to August 2004. It was further common cause that in September 2004 the applicant's acting tenure was extended (in writing) to 30 November 2004, and that the applicant acknowledged this appointment in writing on 22 September 2004. In both letters from the Department (appointing the applicant in the acting position and the one extending the duration of the acting position) the applicant was advised that he would not be paid an acting allowance since the post in question was "two ranks higher". The applicant did not confirm his acceptance of the appointment in writing, because he said he did not agree with the fact that he would not be paid. However, he did act as ACR. The Department's main argument was that since the applicant had not accepted the acting appointment in writing, he was not entitled to the allowance, since written acceptance of the appointment was a prerequisite therefore.

[4] The arbitrator correctly rejected the argument that written acceptance was a prerequisite for payment of the allowance. She considered Resolution 01 of 2002 which provides that an employee appointed in writing, to act in a higher post, by a person who is duly authorised, shall be paid an acting allowance provided that the post is vacant and funded, and that the period of acting is uninterrupted and longer than six weeks. She held that the applicant had met these requirements. She rejected the Department's proposition that payment could not be made if an acting appointment is more than one level higher than the level of the acting incumbent since there is no provision in the collective

agreement that supports such a proposition. The arbitrator termed the above arguments as "an attempt to contract out of the agreement" and a "unilateral [and unlawful] waiver" of the terms of the agreement.

[5] Insofar as the argument of the written acceptance is concerned, the arbitrator held that it was only necessary for "record purposes" and not a prerequisite for payment. This reasoning cannot be faulted. It would be absurd if an employer, who intended to appoint an employee in an acting position, does so, but escapes payment of the higher remuneration simply because of a technicality. It was never in dispute that the applicant had indeed performed the required duties. The arbitrator also pointed out that the Department could have removed the applicant from the acting position if the absence of a written acceptance letter meant that the applicant did not accept the position.

[6] The arbitrator held that the applicant was not entitled to payment of acting allowance after November 2004, since he was not appointed in writing by a duly authorised person to act after November 2004. There was no extention of the period in writing either.

[7] The applicant has not put before me any grounds or any concrete facts to persuade me to interfere with the arbitrator's reasoning. An acting appointment must be recorded in writing. Its existence cannot be inferred from perceptions and invitations to meetings. Not only ARC's attended the meetings in January 2005. Such facts

were not properly aired before the arbitrator. They may have been in the unsuccessful variation application before a different commissioner.

[8] The Department was quite clear about the dates until which the applicant had to act.

[9] The e-mail relied upon by the applicant in support of his case, takes the matter no further. It is written by the new Regional Co-ordinator: Communication Services (the position in which the applicant had acted). He states on 4 may 2005:

> "**Mr Johnson (the applicant) who was acting before will remain in the communication component but will revert to his post as SCC external communication services, but will still assist with the greater section of the workload".**

[10] One could infer that the applicant had been doing at least some of Mr Solomon's work up to the point the latter had sent the e-mail. However, Mr Solomon had been appointed in December 2004. There is also no formal written extention of the acting period by an authorised person. The aforesaid requirements in the collective agreement are pre-emptory. One can understand why. There has to be certainty and proof of the exact duration of the acting period. That can only be achieved by formal appointments in writing, in which the time period is unequivocally stipulated. In large governmental departments such a requirement is of great importance, precisely because there are often instances where employees would do the work of other employees, for various

reasons and due to certain circumstances. It would create administrative havoc if employees were able to claim allowances for work done in acting capacities of which no record is available.

[11] The applicant also relied on the fact that the Deputy Regional Commissioner of the Department took no steps to advise him that his acting had ceased since 4 November 2004 until he received the aforesaid e-mail. The Department did not have to. His acting appointment was extended to 30 November 2004, in writing. That means that in the absence of a further letter of extention, the acting appointment came to an end. The next month Mr Solomon was appointed. Both of the actual letters that confirmed the applicant's acting periods, were prompted by letters written by the applicant requesting them. No letter was written by the applicant in respect of the period between November 2004 and May 2005.

[12] In the circumstances, the review application is dismissed. I make no order as to costs against the applicant as he had to litigate for the allowance which he was in law entitled to. I also believe the Department should pay more attention to the provisions of the collective agreement and make an effort to carry out its terms, almost to the letter, so as to avoid creating expectations which cannot be met.

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Elna Revelas
Judge of the Labour Court

Date of hearing: 02 June 2006

Date of judgment: 05 September 2006

On behalf of the applicant

Adv. D Borgstrom

Instructed by Parker and Khan Inc.

On behalf of the third respondent

Adv. Taki Madima

Instructed by Attorney B Mantame