

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR2649/09

In the matter between:

SOLIDARITY OBO CLEMENT EDGAR BOUWER

Applicant

and

ARIVIA (PTY) LTD TRADING AS ARIVIA.KOM

1st Respondent

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

2nd Respondent

COMMISSIONER TIMOTHY BOYCE

3rd Respondent

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JUDGMENT

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FRANCIS J

1. Solidarity on behalf of its member, Clement Edgar Bouwer - the applicant, referred an unfair dismissal dispute to the second respondent (the CCMA) for conciliation and arbitration, after the applicant was dismissed by the first respondent. The third respondent (the commissioner) found in an arbitration award that the applicant's dismissal was unfair because the first respondent did not prove that the reason for his dismissal was a fair reason related to his conduct. The third respondent was ordered to pay him compensation in the amount of R117 818.33 being the equivalent of 7 months remuneration, calculated at his net rate of remuneration being R16 831.19 per month on the date of his dismissal. The commissioner had also found he was employed by the first respondent for approximately six years.

2. The applicant applied to vary the arbitration award made by the commissioner in terms of section 144(b) of the Labour Relations Act 66 of 1995 (the Act) to reflect that he was employed by the first respondent for approximately 18 years and that the first respondent be ordered to pay him compensation in the amount of R206 777.90 being the equivalent of 7 months remuneration, calculated at his gross remuneration of R29 539.70 per month as opposed to net remuneration.
3. The commissioner in a variation ruling dated 17 September 2009 received by the applicant on 21 September 2009 corrected the applicant's length of service to read approximately 18 years as opposed to 6 years and said that it was an obvious error in terms of section 144(b) of the Act. As far as the calculation of compensation is concerned, the commissioner said that he had consciously used the applicant's net pay as a basis for calculating what he regarded as just and equitable compensation. He found that there was no obvious error and refused to vary the amount of compensation awarded in terms of section 144(b) of the Act.
4. The applicant felt aggrieved with the variation ruling and brought an application to review and set aside the variation ruling and in the alternative to review and set aside the arbitration award. The application was opposed by the first respondent on different grounds. It raised two points *in limine* namely that the application was filed outside the six-week period without an application for condonation and that the applicant had waived its right to review the award when he accepted the amount paid to him in terms of the award.

5. The first respondent's point *in limine* stands to be dismissed. It was contended by the first respondent's representative that the commissioner did not vary the award and the applicant was obliged to apply for condonation since the review application was filed late. I do not agree. In *JDG Trading (Pty) Ltd t/a Bradlows Furnishers v Laka NO & Others* [2001] 3 BLLR 294 (LAC) it was held that the appellant was bound by the first award as amended and therefore by one award which came into existence in its present form on the date of the second award. The Court said that it followed that the date of the award for the purposes of section 145(1)(a) of the Act was that of the second award and there was no need for the appellant to have applied for condonation. I do not agree that the commissioner did not issue a variation ruling. The commissioner has issued a ruling which he termed a variation ruling. In it he, varied the applicant's length of service to be 18 years but declined to vary the amount of compensation. There is therefore one award varied on 17 September 2009. There is therefore no need for the applicant to apply for condonation since the application was brought within the requisite six-week period of receipt of the variation ruling.
6. The first respondent did not persist with the second point *in limine*. It becomes unnecessary to deal with that.
7. The applicant had initially contended that had the commissioner considered the correct length of service of the applicant, he would have awarded him more than seven months compensation. However, the applicant did not persist with this argument for obvious reasons.
8. The crux of the dispute centres around whether the commissioner in awarding the applicant seven months compensation should have taken into account his net

remuneration or gross remuneration. It was contended on behalf of the first respondent that the commissioner is enjoined to award compensation that is just and equitable in terms of section 194(1) of the Act and that the commissioner in taking into account the applicant's net salary did not commit any reviewable irregularity and his decision is one that a reasonable decision maker would have arrived at. The award on compensation is in no way inappropriate. There is nothing in section 194 of the Act to suggest that a commissioner is bound to use gross salary to calculate compensation. The nett salary is still remuneration as defined in the Act.

9. Once a commissioner has found that an employee's dismissal was unfair, the commissioner may in terms of section 193(1)(c) of the Act order the employer to pay compensation to the employee. Section 194(1) of the Act provides as follows:

"The compensation awarded to an employee whose dismissal is found to be unfair must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal".

10. Section 213 defines remuneration to mean *'any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and.....'*
11. It is trite that a commissioner has a discretion to award compensation which must be just and equitable and must not exceed 12 months remuneration. In deciding what the amount of compensation is, he is required to calculate the employee's rate of remuneration on the date of his dismissal. He does not have any discretion about what

the remuneration is that the employee was earning. The only discretion that he has is whether he is going to award the employee a day's remuneration, or a week, two weeks a month but not more than twelve months remuneration.

12. The parties held at pre-arbitration meeting on 2 September 2008 where in paragraph 5.4 it was agreed that the applicant's remuneration at his date of dismissal was R354 476.41. The commissioner could therefore not have deviated from what the applicant's remuneration was. He had to award compensation based on the applicant's remuneration which was common cause. All that he could do was to decide whether he should grant him compensation and if so, calculate the compensation on the basis of his remuneration. The reference to remuneration in section 194 of the Act is the total salary that the applicant was receiving at the time of his dismissal. See also the unreported judgment of Ngcamu AJ in *Mda v CCMA and Another* J1500/99 delivered on 10 October 2000 at paragraph 16.
13. The commissioner's variation ruling or arbitration award in so far as it relates to the calculation of compensation cannot be said to be a decision that a reasonable decision maker would have made. As such, the application stands to be granted.
14. There is no reason why the first respondent should not pay the applicant's disbursements.
15. In the circumstances the following order is made:
 - 15.1 The applicant's application to vary the arbitration award dated 25 April 2009

under case number GA7387/02 in so far as it relates to compensation is granted.

15.2 Paragraph 5.1 of the arbitration award referred to above is reviewed and set aside and is replaced with the following order:

“The employer, Arivia (Pty) Ltd t/a Arivia.Kom is ordered to pay the employee, Clement Edgar Bouver, compensation in the amount of R206 777.90, being the equivalent of seven (7) months remuneration, calculated at the employee’s gross rate of remuneration (R29 539.70 per month) on the date of dismissal”.

15.3 The first respondent is to pay the applicant’s disbursements.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : EUGENE VAN NIEKERK
UNION OFFICIAL

FOR FIRST RESPONDENT : ATTORNEY G MOSHOANA

DATE OF HEARING : 15 APRIL 2010

DATE OF JUDGMENT : 23 APRIL 2010