



ARBITRATION AWARD

Commissioner: Joseph Williams
Case No.: WECT 2804-22
Date of Ruling: 11 July 2022

In the matter between:

UCTEU obo members
(Union / Applicant)

and

University of Cape Town
(Respondent)

Union/Applicant's representative: Mr. I Haffegge (Haffegge Roskam Savage Attorneys)

APPROVED
Respondent's representative: Graham Lesley, Senior Council
(Instructed by Mcaciso Stansfield Inc)

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for arbitration on 30 June 2022 at the offices of the Commission for Conciliation Mediation and Arbitration (CCMA) in Cape Town. The applicant UCTEU (University of Cape Town Employees Union) was represented at the hearing by Mr. Haffegge of Roskam Savage Attorneys. The respondent UCT (University of Cape Town) was represented at the hearing by Mr. Graham Lesley, SC instructed by Mcaciso Stansfield Inc.
2. The arbitration hearing was conducted in English and the proceedings were digitally recorded.

BACKGROUND TO THE DISPUTE

3. The parties to the dispute agreed to a pre-arbitration minute signed 30 June 2022 and the facts agreed by the parties are as follows: (i) the applicant and the respondent concluded a collective agreement on 10 December 2021 regarding pay increases for 2022 herein referred to as the EU Agreement; and (ii) the parties agreed to a pay increase of 5% for 2022.
4. The agreement includes the following provision that the increases will be affected in the January 2022 pay run. In the event of further adjustment been applied to other staff bodies, the Employees' Union will be aligned accordingly and will not be compromised.
5. The University concluded a collective agreement with the Academics' Union referred to as the AU on 21 December 2021 and agreed to a pay increase of 5,2% for 2022.
6. 3 February 2022 the University concluded a collective agreement with NEHAWU, UAWU, SALIPSWU and DETAWU (Coalition Unions) on the pay increases for 2022. The University and the Coalition Unions (CU) agreed to a pay increase of 5,2% and a once off lump sum payment of R 2 100.
7. The CU Agreement makes provision for a once off Ex Gracia lump sum payment for Lower Pay Classes which will be paid in February 2022 payroll and not to be extended outside of the Coalition of Unions.
8. The EU is part of the CU but did not take part in the Coalition negotiations with the other unions because it and the University concluded a collective agreement for pay increases on 10 December 2021. The Employees' Union is not a party to the Coalition Agreement.

9. The University aligned the EU Agreement with an extra 0,2% increase to a 5,2% extended to the EU members after concluding the 5,2% increase with the AU for academic salaries on 21 December 2021.
10. The University has refused /failed to pay the lump sum payment of R 2 100 to the EU members and employees in pay classes other than pay class 2 to pay class 6 covered in the Coalition Agreement.

ISSUE TO BE DECIDED

11. The applicant referred a dispute Section 24(2) [24(5)] collective agreement the interpretation or the application thereof clause 2.1 pay increases in the collective agreement signed UCT and the EU. Determining and making a finding whether the relevant clause obliges the University to pay the Union's members in pay classes 7 to 12 a once off payment of R 2 100.
12. I must apply my mind to determine the relief that the applicant seeks based on submissions of the parties before me in the arbitration hearing.
13. The parties have further agreed to the relevance of case law applicable when determining the dispute as found in *Capitec v Coral Lagoon* 2022(1) SA 100 (SCA) para 48 "the court's aversion to receive evidence of the parties' prior negotiations and what they intended (outside cases of rectification) or understood the contract to mean should remain an important limitation on what may be said to be relevant to the context or purpose of the contract."
14. In the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 para 18 offer guidance in how to approach the interpretation of the words used in a document. "It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the context expressed by the words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. Endumeni emphasizes, citing from case law "[t]he inevitable point of departure is the language of the provision itself".

SUMMARY OF EVIDENCE AND ARGUMENT

15. In terms of section 138(7)(a) of the Labour Relations Act 66 of 1995 I am required to issue an award with 'brief reasons'. I do not propose to offer an exhaustive survey of all the evidence and argument led at the arbitration hearing.
16. The applicant's representative made the following submissions in the hearing that the collective agreements UCT concluded with the other unions are relevant and the commissioner must consider the evidence to interpret the EU Agreement, the dispute is not about the interpretation or application of collective agreements between UCT and other unions.
17. The applicant's representative submitted that the University must comply with the relevant clause and pay its members in pay classes 7 to 12 the once of lump sum of R 2 100 which it has paid to employees in pay classes 2 to 6 in terms of the CU Agreement.
18. The applicant's representative submitted that the University was of the view that the once off lump sum payment does not amount to a percentage increase re-occurring in salary and/or a further adjustment as stated under clause 2.1 of the EU Agreement.
19. The applicant's representative submitted that they rejected the University argument that CPI affected the lower pay classes more as per their argument and its failure to discuss these concerns at the time or even later with the EU amounts to bad faith bargaining.
20. The applicant's representative submitted that it ought to engage the EU when it signed the Agreement, or even later, it could have possibly renegotiated the EU Agreement.
21. The applicant's representative submitted that the collective agreements operate within the framework of the LRA and must interpret ambiguous provisions by striking a balance of fairness between the parties.
22. The applicant's representative submitted that as per the collective agreement signed between the University and the EU stating that in the event of a further adjustment being applied to other staff bodies, the Employees Union will be aligned accordingly and will not be compromised.
23. The applicant's representative submitted that the once off ex gratia lump sum payment to the CU is a feeble attempt to disguise the more favorable or further adjustment to circumvent the relevant clause in the EU Agreement.

24. The applicant's representative submitted that that the relevant clause in the agreement to mean that the University must pay the employees in pay classes 7 to 12 the once off lump sum of R 2 100.
25. The respondent's representative submitted that pay increases as per the collective agreement clause 2.1 provides for the cost of employment increases to each pay class 7 to 12 effected in the January 2022 pay run. The agreement further states in the event of a further adjustment being applied to other staff bodies, the Employees Union will be aligned accordingly and will not be compromised.
26. The respondent's representative submitted that the University signed an agreement with the AU on 21 December 2021 providing a 5,2% increase to academic salaries. The EU Agreement was adjusted by 0.2% from 5% to 5,2% in line with the AU Agreement.
27. The respondent's representative submitted that the University and the CU concluded an agreement on 3 February 2022 for pay class 2 to 6 for a 5,2% increase and a further amount of R 2 100 would be paid. The amount was a once off lump sum Ex Gracia Payment which would not be extended outside of the Coalition Unions.
28. The respondent's representative submitted Wallis JA in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA) in para 25 to 26 dealt with the interrelationship between the three interpretational factors (language, context and the purpose) when interpreting agreements. Wallis JA points out in the judgement "in solving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to correct the interpretation."
29. The respondent's representative submitted that "a further adjustment" in clause 2.1 headed pay increases in the collective agreement were intended to refer to the salary increase only and does not suggest an entitlement of to a once off payment.
30. The respondent's representative submitted that the EU Agreement signed 10 December 2021 was aligned with clause 3 in the AU Agreement signed 21 December 2021 to adjust its members salary to 5,2% increase agreed with any other staff body(ies) it will be applied to academic staff and this agreement will adjust accordingly.
31. The respondent's representative submitted that the once of payment of the salary increase was not intended to be extended to the other unions members as per clause 2.1.3 in the agreement. The agreement was made in mitigating the substantial pay disparity between pay classes 2 to 6 and those represented by the EU class 7 to 12 and that inflationary pressures adversely affected lower earners.

The once of payment were specific to the lower paid classes and did not apply to the EU's membership.

32. The respondent's representative submitted that the variance for pay class 7 in the 2021 Annual Salary Benchmarking PASS was at 43% identified in differentials between pay class rank which have an impact on negotiations at the University in dealing with inflationary pressure.
33. The respondent's representative concluded its submission that in interpreting the EU Agreement as per clause 2.1 the lump sum payment did not apply.

ANALYSIS OF THE EVIDENCE

34. In applying my mind to the submissions made by the parties, including copies of the various collective agreement, which was submitted in evidence, I am mindful of the provisions of section 23(1)(a) of the Labour Relations Act 66 of 1995 which makes provision for the binding nature of the collective agreement where parties have entered into the collective agreement.
35. Section 24(2) and section 24(5) makes provision that if a dispute around a collective agreement is referred to the CCMA and if it remains unresolved, that the dispute may be referred to the CCMA for arbitration in order to determine the dispute including the appropriate order.
36. The applicant wants an order to compel the respondent as per clause 2.1 pay increases in the collective agreement, in the event of a further adjustment being applied to other staff bodies, the Employees Union will be aligned and will not be compromised. The applicant wants the once off ex gratia lump sum of R 2 100 to be extended to its members.
37. In applying the relevance of case law applicable as per clause 14 and 15 above when determining the dispute as found in *Capitec v Coral Lagoon* 2022(1) SA 100 (SCA) and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593. When dealing with the interrelationship between the three interpretational factors (language, context and the purpose) when interpreting agreements. Wallis JA points out in the judgement "in solving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to correct the interpretation."
38. In applying myself to the wording and intention of the parties as per clause 2.1 in the collective agreement the applicant has not convinced me that they are entitled the once off ex gratia payment of R 2 100, the University concluded with Coalition Union.

39. The agreement specifically states it is once off which will be paid in the February 2022 payroll and not be extended outside of the Coalition of Unions. If one interprets this clause, the R 2 100 is payable only in the February 2022 payroll and only to those covered by the scope of this agreement. A once off payment cannot be regarded as a salary increase.
40. When the payroll department adjusted the increases in each pay class 7 to 12 the cost of employment was increased by percentage adjusted from 5 % to 5,2% in line with the academic salary increase. This adjustment was in accordance with the pay increase as provided in clause 2.1 in the agreement. The Oxford dictionary defines a salary as a fixed regular payment, typically paid on a monthly basis but often expressed as an annual sum, made by an employer to an employee, especially a professional or white-collar worker. Salary adjustments also mean an increase (or decrease) in salary or salary adjustment which could be as a result of collective bargaining.
41. The pay class structure 7 to 12 or any other pay structure in the collective agreements can be argued provides a logically designed framework within which equitable, fair, consistent and transparent pay policies can be implemented. They enable the organisation to determine levels of pay for jobs and people and are the basis upon which the effective management of relativities and of the process of monitoring and controlling the implementation of pay practices can take place. The pay structure is also a medium through which the organization can communicate the pay opportunities available to employees. (Michael Armstrong A Handbook of Human Resources Management Practice).
42. The University has settled on an increase of 5,2% across all pay classes covered by its collective agreements with its Unions during the annual negotiations.
43. The Coalition of Trade Unions were the last to sign a collective agreement, the parties agreed on a 5,2 % pay increase and a once off ex gracia lump sum R 2 100 not the be extended outside of the Coalition of Unions.
44. Parties engaged in negotiations applies the BATNA as a dispute/deadlock breaking mechanism. BATNA is an acronym that stands for Best Alternative To a Negotiated Agreement. It is defined as the most advantages alternative that a negotiating party can take if negotiations fail, and an agreement cannot be made. In other words, a party's BATNA is what a party's alternative is if negotiations are unsuccessful. It provides an alternative if negotiations fall through. It provides negotiating power, and it determines the parties' reservation point (the worst price you are willing to accept) (Roger Fisher and William Ury publication, Getting to Yes: Negotiations Without Giving In).

45. The ex gratia payment would fall in the "realm" of BATNA where the University was not prepared to compromise on the 5,2% increase to all classes of employees at the University and the Coalition of Unions was prepared to concede and accepted 5,2% increase and an additional once of payment of R 2 100 to the employees covered by the agreement as to mitigate effects of inflation. BATNA plays a pivotal part in the resolution of disputes whether an amount is offered to employees to return to work after a long-protected strike or a once off "sweetener" to settle a wage dispute.

46. The UCTEU has not convinced me in their arguments and submissions as outlined above inclusive of applying applicable case law in interpreting the Collective Agreement of the UCTEU that the pay increase in clause 2.1 would include an ex gratia payment of R 2 100. The adjustment salary was applied to the cost of employment in the 5,2% increase to the UCTEU and academic staff and the ex gratia payment is only applicable to the Coalition of Unions constituency.

AWARD

47. The applicant UCTEU is unsuccessful in its dispute referral to the CCMA and its application is dismissed.



Williams

APPROVED

CCMA Commissioner: Joseph Williams