

CONCILIATION, MEDIATION AND ARBITRATION COMMISSION(CMAC)

HELD AT MANZINI SWMZ 260/08

In the arbitration matter between:-

NONTOBEKO SIMELANE & 11 OTHERS Applicant

AND

MATSAPHA KNITWEAR (PTY) LTD Respondent

ARBITRATION AWARD

DATE OF ARBITRATION: 12th March 2009

CORAM:

ARBITRATOR : Commissioner B.Ngcamphalala
FOR APPLICANT : Mr. Tom Simelane
FOR RESPONDENT : Ms. Sbaliwe Masuku

1. DETAILS OF PARTIES AND REPRESENTATION

1.1 The Applicants in this dispute are Nontobeko Simelane and 11 others: I shall refer to them as the Applicants.

1.2 The Respondent is Matsapha Knitwear (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Kingdom of Swaziland and having its principal place of business at Matsapha in the region of Manzini. I shall refer to the Respondent as the Respondent or the Employer or the Company.

2. REPRESENTATION

2.1 During the Arbitration hearing the Applicant were represented by Mr.Tom Simelane. The Respondent was represented by Ms. Sbaliwe Masuku the Respondent's Personnel Officer.

3. BACKGROUND OF DISPUTE

3.1 On or about September 2008, the Applicant reported a dispute at the Commission's offices in Manzini. The dispute was subsequently conciliated upon under the auspices of the Commission, but the parties were not able to resolve the matter. Hence a Certificate of Unresolved Dispute was issued on the 6th November 2008.

3.2 Subsequently the parties by consent referred the matter to arbitration for the determination of the dispute. I was then appointed to arbitrate over the matter. On the 15th January 2009 a pre- arbitration conference was scheduled to be heard, however the Respondent was not present on the said day. The matter was subsequently rescheduled for the 12th February 2009, wherein both parties were present.

3.3 The main purpose for the pre-arbitration conference was to, enable the parties to familiarize themselves with the arbitration process, remind parties to exercise their right to representation, agree on the exchange of documents, and lastly to narrow down the issues and agree on a date for the arbitration hearing.

3.4 The hearing was subsequently scheduled for the 12th March 2009, on which date the hearing proceeded. The parties had no objection to my appointment as arbitrator.

4. ISSUE TO DETERMINE

4.1 The issue that I am required to determine is whether the 30 days to which the Applicant alleges it is entitled to as maternity leave in terms of section 12 of The Wages Regulation Order of 2004 (Textile Industry) refers to 30 calendar days or whether it refers to 30 working days. This will then determine whether or not the Applicants were correctly paid for their maternity by the Respondent?

5. SUBMISSION BY BOTH PARTIES

OPPENING SUBMISSIONS

5.1 The Applicants representative in his opening submissions stated that the Applicants were employed by the Respondent, some as Mechanists and others as Inspectors, the dates of employment of the Applicants was as appeared on Annexure "A", a CMAC Form listing the Applicants which is attached to the dispute form. It was submitted that each of the Applicants had taken maternity leave on different days, and that the Respondent had paid them between 20-21 days salary instead of 30 days during their maternity leave, as stipulated by the Wages Order.

5.2 The Respondent's Director was questioned on the shortfalls by the Applicants but repeatedly advised them that he would look into the matter. This continued until such time the Respondent's Director advised them that he had consulted the Department of Labour and had been advised that he was not required to pay the Applicants more than he had already paid them.

5.3 The Applicants representative stated that the action of the Respondent amounted to an unfair labour practice, in that it was failing to comply with the law being the Wages Order. He further submitted that several attempts were made by themselves as a union to discuss the matter with the Respondent but no consensus could be reached.

5.4 The Respondent's representative in her opening submissions stated that the submission made by Mr. Simelane were true. That indeed the Applicants were paid between 20-21 days during their maternity leave in compliance with the law in particular section 13 of Legal Notice No.5, 2008 Wages Order (Manufacturing and Processing Industry). Her evidence was that this section states;

"An employee who has completed the probation period shall be entitled to 30 days maternity leave with full pay"

5.5 It was her submission that the 30 days mean one months salary, hence the payment of a months salary to the Applicants. This was equivalent to between 20-21 days, as the Applicants do not work on Saturday and Sunday. Since the Applicants do not work on these days they believed the Company was not obligated to pay them for these days.

5.6 It was her submission that if Government had intended that they pay the Applicants 30 calendar days it would have stated so in The Wages Order.

6. APPLICANT'S CASE

6.1 The Applicants called one Applicant to give evidence on behalf of the 11 other Employees. This was agreed upon by the parties during the pre-arbitration conference, as it is common cause that all the Applicants are employed by the Respondent. Further that they had all gone on maternity leave and had been paid between 20-21 days pay during such leave.

6.2 The main Applicant in the proceedings, Nontobeko Simelane gave evidence on behalf of the other Applicants. She testified under oath that she was employed by the Respondent in January 1997, as an Inspector. It was her evidence that she went on maternity leave from the 20th March 2007 and returned to work on the 2nd May 2007. She testified that during her maternity leave she was only paid 22 days salary instead of 30 days, which she was advised, she was entitled to.

6.3 She submitted that Respondent owed her 8 days salary, and several attempts were made by herself to discuss the matter with the Respondent, but they could not reach a consensus. The matter was eventually forwarded to the Union which in turn wrote a letter to the Respondent. The letter

addressed to the Respondent was dated the 18th July 2007, and this letter requested the Respondent to pay the Applicants the shortfalls claimed.

6.4 The Employer however stood his ground, stating that it had paid the Applicants according to the Wages Order. The letter written by the Union was submitted as evidence and marked "Annexure A". It was the evidence of this Applicant that they wanted the Respondent to pay them the shortfalls as per the Certificate of Unresolved Dispute.

6.5 The Respondent's representative under cross examination posed a few questions to the Applicant. The Applicant was questioned on the number of days worked by her per month. In response she submitted that, she was not sure but did not work on Saturday and Sunday. Another question posed to the Applicant was what was the response given by the Respondent in respect of their claim for the shortfalls? The Applicant testified that it was explained to them that the 30 days did not include Saturdays and Sundays.

7. RESPONDENT'S CASE

7.1 The Respondent's representative stated that she would be submitting on behalf of the Respondent, and that her evidence in chief was exactly as her opening submissions. She stated that the submission made by herself during the opening submission on behalf of the Respondent formed the rest of the Respondent's case. She then submitted Legal Notice No.5, 2008 Wages Order (Manufacturing and Processing Industry), and a Default Judgment award as part of her evidence, the documents were marked "Annexure B and C" respectively.

It was the Respondent's contention that the Applicants had been correctly paid. The Applicant's representative then proceeded to cross examine the witness on the evidence adduced by the Respondent's representative.

7.2 Under cross examination when it was put to her that the section in question referred to 30 days, why was Respondent's contention that the Applicant were not entitled to payment of 30 days with full pay. It was her submission that the 30 days did not include Saturdays and Sundays. The Applicants did not work on these days thus they were not entitled to be paid these days.

7.3 She was then referred to section 12 of "Annexure B" which was submitted by the Respondent, the section refers to Compassionate leave. It specifically states that those days refer to working days. It was put to Applicant whether she could see the difference between section 12 and 13, she responded to the affirmative.

7.4 It was put to her why she was thus interpreting the 2 sections in the same way yet she acknowledged they were worded differently. However, she insisted that according to the Wages Order the Applicants were entitled to the amounts paid to them. In summary that was the evidence of the Respondent.

8. ANALYSIS OF THE EVIDENCE AND LAW

8.1 Maternity leave is defined in The Employment Act 1980 (as amended) as follows,

"maternity leave" means leave granted to an employee arising from, or in contemplation of her confinement."

8.2 Section 102 of the same Act goes on to state that;

- 1) "Every female employee whether married or unmarried, who has been in continuous employment of her employer for 12 months or more shall be entitled to maternity leave with at least 2 weeks full pay upon delivering to her employer....."

8.3 Section 103 goes on to stipulate the duration of maternity leave that each employee in law is entitled to, unless there is an agreement to the contrary with more favourable term i.e. Collective Agreement.

8.4 I will not go into detail and attempt to explain these sections, but I will deal mainly with the section referred to in the Wages Order. The Certificate of Unresolved Dispute refers to The Wages Order 2004 (textile Industry) section 12, whilst in their evidence both parties referred to the Wages Order, 2008 (Manufacturing and Processing) section 13. The two sections are worded in the same manner and address the issue of the maternity leave, therefore any one of the two may be used interchangeably.

8.5 Both parties have referred to these Wages Orders and I have no reason to believe that it was not agreed between the parties that issues of maternity would be governed by the Wages Order.

8.6 Section 13 of The Wages Order, 2008 (Manufacturing and processing) to which both parties relied on reads as follows;

"An employee who has completed the probation period shall be entitled to 30 days maternity leave with full pay."

8.7 The dispute between the parties relates to whether 30 Days herein refers to working days or calendar days. In the case of Master Garments (Pty) Ltd v Swaziland Manufacturing and Allied Workers Union 561/06

Judge President P.R Dunseith stated that;

"If an employee does not normally work Saturday and Sunday then these days cannot be regarded as leave days"

8.8 This stand point was confirmed by the nominated members of the Court, who also confirmed that normal practice at the workplace in Swaziland is that leave expressed in days refers to working days

8.9 The Court also noted by way of comparison that The Regulation of Wages of Pre- Schools and Daycare Centres Order, 2006 provided for 6 weeks maternity leave on full pay. 6 weeks is equivalent 30 working days, and one may expect the consistency in The Wages Order for Manufacturing and Processing both industries mainly consisting of women.

8.10 The Employment Act only obligates employees to grant 2 weeks maternity leave on full pay. The question arises whether a Wages Regulation Order may override the provision of the Act to the advantage of the employee. As stipulated earlier I will not examine the issue as it is evident that the parties from their evidence relied on the Wages Order, therefore are in agreement that same shall be relied on when deciding on issues of maternity leave between the parties.

8.11 In the case of Master Garments v Swaziland Manufacturing and Allied Workers Union cited above, the same sentiments were shared by Judge the President, that when the parties have agreed to rely on the more favourable maternity leave provision of the Wages Order, they are entitled to do so.

8.12 I accordingly find that the 30 days in terms of the Wages Order relied on by the parties, refers to working days. The Respondents argued that the 30 days referred to working days, however I fail to understand why they proceeded to pay the Applicants maternity leave, between 20-22 days having correctly interpreted the law. The Respondent should have rightly paid the Applicant maternity leave equivalent to 30 working days as per The Wages Order.

9. AWARD

9.1 Having regard to the aforementioned and all the evidence and factors of this case, I make an award in favour of the Applicants and against the Respondent. I award that all the Applicants be paid their shortfalls as follows;

a) Nontobeko Simelane	8 days = E544.80
b) Hlalsile Thobela	9 days = E465.30
c) Futhie Thobela	9 days = E484.20

d) Delsile Mkhonta	9 days = E484.20
e) Zodwa Shongwe	8 days = E376.00
f) Ruth Khumalo	8 days = E430.40
g) Irene Motsa	8 days = E413.60
h) Hlobsile Mkhabela	10 days = E538.00
i) Candrino Mabuza	8 days = E430.40
j) Nqobile Tfwala	8 days = E376.00
k) Winile Dlamini	9 days = E430.30
l) Thuli Motsa	8 days = E430.40

The Respondent is ordered to pay the Applicants these amounts within 30 days from date of receipt hereof.

DATED AT MANZINI ON THIS THE 27th DAY OF APRIL, 2009.

COMMISSIONER BANELE NGCAPHALALA

(CMAC) ARBITRATOR