

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 371/08

In the matter between:

LOVELACE ORA MDLULI (GININDZA)

APPLICANT

And

TEACHING SERVICE COMMISSION

1st RESPONDENT

MINISTRY OF PUBLIC SERVICE & INFORMATION

2nd RESPONDENT

MINISTRY OF EDUCATION

3rd RESPONDENT

CORAM:

NKOSINATHI NKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: L L. ZWANE

FOR RESPONDENTS: S. HLOPHE

JUDGEMENT 04.12.08

[1] The applicant was employed by the 1 respondent as a teacher in 1966. In 1991 she resigned on medical grounds. Her health however later improved and she decided to go back to the teaching profession. She was indeed re-employed by the 1st respondent on contract basis.

[2] The first contract was for three months from 10.04.02 to 30.06.02. The second contract was for six months from 01.07.02 to 31.12.02. She was thereafter engaged on yearly renewable contracts until December 2006. She was getting a bonus at the end of each year. After December 2006 the contract was not renewed. She then approached the 1st respondent and enquired about payment of her backpay, gratuity and benefits. The 1st respondent denied any liability and referred all further enquiries on this matter to the office of the Attorney-General.

[3] The applicant then reported a dispute to the Conciliation Mediation and Arbitration Commission ("CMAC"). The dispute was not resolved. The applicant has thus filed the notice of application to court for an order in the following terms;

"a. Directing and ordering the first respondent to pay the applicant her gratuity of E11 828.75, bonuses of E18 926.00 and back pay of E51 303.00 forthwith within fourteen days of the granting of such order.

b. Interest thereon at the rate of 9% per annum tempore morae calculated from date of judgment to date of final payment.

c. Awarding costs against the respondents jointly and severally each absolving the other at Attorney-client scale."

[4] GRATUITY:-

In terms of the applicant's founding affidavit, the claim for payment of the gratuity is for the period between 2002 and 2006. The

applicant claims that from 2002 to 2006 she worked for five years continually entitling her to payment of gratuity in terms of General Order B.600 (1) and (2). The applicant however had clearly not completed five years of continuous service when she stopped work in December 2006. She was first employed on contract basis on 10.04.02. Five years of continuous service would have been completed if she had worked until 10.04.07.

[5] BONUS AND BACKPAY

The applicant was clearly entitled to receive a bonus at the end of the year. This is in terms of Regulation 6A (d) of The Teaching Service (Amendment) Regulations, 2005. This regulation provides that; "**Local teachers**

6A. A local teacher employed on contract shall

- (a) be employed on contract terms not exceeding one year per contract which may be renewed or extended by the Commission;**
- (b) not be admitted into the permanent and pensionable establishment during the duration of the contract;**
- (c) be entitled to remuneration according to relevance of his qualifications to the teaching service, to be determined at the commencement of the contract;**
- (d) be entitled to a bonus equivalent to one month's salary at the end of the contract...."**

[6] The bonus pay that the applicant is claiming is for the years 2005 and 2006. The 1st respondent does not deny the liability to pay. It is only the amount that is in dispute. The dispute is as a result of circular 1 of 2007 which increased the salaries of civil servants with effect from 1st April 2005. The applicant is arguing that the bonus must be calculated in terms of the new salary scale and the 1st respondent is arguing that the old salary scale is applicable.

[7] The 1st respondent further argued that, as the applicant was employed on contract basis, the changes in the salary scale did not apply to her, but only to permanently employed civil servants. It was further argued that the applicant is excluded from the new salary scale by virtue of paragraph 7 of the circular which provides that;

"All officers who left the service after the effective date of this circular prior to receiving the prescribed salary adjustment may, on application, be paid up to the last day of service.

We do not agree with the 1st respondent's contention that the salary increment affected only those teachers that were employed on a permanent bSsis. There is nowhere in the circular where it says that. If such a position were to obtain, it would create an anomaly wherein teachers on the same grade and carrying out similar tasks are paid on different salary scales.

See: Patrick Simelane V The Teaching Service Commission and the Attorney- General case no. 564/07 (IC).

We also do not agree that paragraph 7 of the circular has the effect of precluding the applicant from benefitting from the salary adjustment. There was no dispute that the applicant indeed left the service prior to receiving the prescribed salary adjustment. The provisions of paragraph 7 are there precisely to cater for such a situation as the applicant found herself in. Such people as the applicant "may, on application, be paid up to the last day of service."

Indeed the applicant approached her employer, the 1st respondent. She did not get any answer from the officers of the

1st respondent including the 1st respondent's Executive Secretary Mr. M.V. Zungu. Instead Mr. Zungu wrote a letter dated 31 July 2007 and told the applicant to direct her queries to the office of the Attorney-General.

[11] On behalf of the 1st respondent it was further argued that the use of the word "may" implied that the 1st respondent had discretion to deny or grant the application. This argument was clearly misconceived. Once an employee has rendered his/her services, the employer has no discretion whether or not to pay for the services rendered. The employer has a legal obligation to pay for the services rendered by the employee. To argue that an employer has discretion to pay or not to pay the employee's salary after services have been rendered is to state manifest incongruity.

[12] The rationale of paragraph 7 is not hard to understand. The title thereof also does give an idea. The paragraph is titled: "*OFFICERS WHO HAVE LEFT THE SERVICE.*" It would be difficult for the employer, in this case, the 1st respondent to pay any amount to the applicant after she had left the service. The applicant was no longer an employee of the 1st respondent as she had left the service. Her bank details may have changed and her whereabouts unknown. All the more reason therefore that such a person be required to apply if he or she wants to be paid as he or she would no longer be in the employer's payroll. Whereas those officers who have not left the service would simply have their backpay deposited by the employer into their bank accounts together with their monthly salaries as they would still be in the employer's payroll. Furthermore, paragraph 7 of the circular is directed to all officers who left the service after the effective date of the circular. The effective date of the circular is 1st April 2005. The applicant left in December 2006, she is therefore clearly covered[^]by the provisions of this circular.

[13] Taking into account all the above observations and also all the circumstances of the case the court will make the following order;

a) The 1st respondent is to pay the applicant the sum of E18,926:00 as bonus for the years 2005 and 2006.

b) The 1st respondent is to pay the applicant the sum of E51,303:00 as backpay.

c) The 1st respondent is to pay interest thereon at the rate of 9% per annum a tempore morae calculated from date of judgement to date of final payment.

d) The 1st respondent is to pay the costs of the suit on the ordinary scale.

The members agree.

**NKOSINATHI NKONYANE
JUDGE OF THE INDUSTRIAL COURT**