IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

Of Interest

D356/03

HEARD ON 2004/09/02

Date of judgment 2004/09/02

In the matter between

GRUPO ANTOLIN (PTY) LTD Applicant

and

NUMSA Respondents

JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 2 SEPTEMBER 2004

Mr. M.B. Pitman

Deneys Reitz

Mr. B. Purdon

Brett Purdon Attorneys

PILLAY J

[1] This is an application to review and set aside the award of the third respondent commissioner. The issue in dispute was whether the applicant had to pay the members of the first respondent four or two weeks' severance pay.

[2] First respondent had led evidence and made submissions at the arbitration that the applicant had to pay four weeks because:

(1) AECI, the previous employer and owner of the business which was transferred to the applicant, had informed the employees when they were employed that on retrenchment AECI would pay them four weeks' severance pay per year of service or *pro rata* a part of a year.

(2) AECI had, in fact, paid severance pay at the rate of four weeks per year to employees previously retrenched.

(3) AECI had assured the first respondent's members that, on transfer to the applicant, the following applied:

"Current employee benefits will remain in place for the employees concern. There will be no severance pay (retrenchment benefit) unless the employees are retrenched."

And:

"Should the need arise for employees to be retrenched, the company retrenchment policy will be followed."

3) Mr Piero Rossi, the Managing Director of the applicant, had assured the first respondent's members that, in the event of retrenchment, the AECI's policy will apply.

(4) The first respondent's organizer testified that four weeks' severance pay per year of service would have been negotiated at national level and become part of the terms and conditions of

employment.

[3] The first respondent's members who were retrenched were paid retrenchment pay at the rate of two weeks per year of service according to the bargaining council agreement.

[4] The applicant led no evidence at the arbitration, despite indicating to the arbitrator its intention to call Mr Rossi to testify. It is submitted therefore that it was the policy and the practice of AECI to pay four weeks' severance pay per year of service, which policy, on transfer of the business to the applicant, was assumed by the latter.

[5] The review is brought on the ground that the commissioner did not apply her mind properly to the material before her. The award is accordingly unjustifiable, it was submitted. In order to succeed in their claim, the first respondent had to prove that its members had a right arising from contract or any other cause.

[6] Based on the only evidence before her, the commissioner found that the payment of four weeks was a term and condition of the applicant's employment for the three reasons set out in her award. These reasons are based on the unchallenged evidence of the first respondent summarised above.

It was submitted that the commissioner ignored the evidence that it was the policy of the applicant to pay severance pay and failed to draw a distinction between policy and contract. The arbitrator dealt with this issue as follows:

"Whilst I am alive to Mr van Niekerk's argument that the applicants' witnesses made reference to 'policy', I am not of the view that this is fatal to their case. I am required to make a determination based on the

evidence as a whole and I do not consider myself confined by the terminology used by the witnesses herein."

[7] It is clear from this extract that the commissioner not only applied her mind to the distinction but also elected to deal with the dispute substantively without being distracted by terminology. As it was not disputed that it was AECI's and later the applicant's policy to pay four weeks per year of service as severance pay, the applicant had accepted such an obligation.

[8] By presenting its policy thus, the first respondent and its members were entitled to rely on the representation and to expect that the applicant would act in terms of that policy. If that were not the case, then the first respondent should have been told so that it could negotiate rates that were acceptable to it, if necessary.

[9] The commissioner misrecorded what Witness Pillay testified was said by Mr Rossi. Pillay had testified that Rossi had said that the AECI policy would apply. Rossi had not made specific reference to severance pay of four weeks. However, the misrecording is not fatal to the award.

[10] Although Malinga's evidence about the negotiations at national level did not read well from the transcript, his evidence that the national agreement became part of the terms and conditions of employment is unmistakable. Besides, the commissioner had the benefit of observing him to understand him better.

[11] The award is not flawless. However, it is not reviewable, for the reasons stated above. Because it is not flawless, the Court declines to make any special order of costs.

[12] The order that I grant therefore is to dismiss the application with costs.

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Pillay D, J