

Seethal / SGMH Cartridge Supplies (Pty) Ltd

(2022) 31 CCMA 6.7.11

Reported in (Butterworths)	[2022] 9 BALR 955 (CCMA)
Case No.	GAEK2136-22
Award Date	10/05/2022
Jurisdiction	Commission for Conciliation, Mediation and Arbitration
Commissioner	D Phokela
Subject	Grievance/(Residual) - Unfair labour practice Remuneration

Keywords

Grievance/(Residual) - Unfair labour practice - Remuneration - Deductions from - Employer failing to pay employee full salary during Covid-19 pandemic without consulting her or obtaining her consent - Salary due in full, but not commission, until resignation.

Mini Summary:

The applicant was employed as a sales representative on a five-day week of 8 hours a day on a salary of R12 000 a month plus commission of 10% for each sale. She claimed that her salary had been cut without prior consultation and claimed the balance due to her, plus commission. The respondent said it had decided to cut all salaries by 25% due to the impact of the Covid-19 lockdowns on its sales and that the applicant had resigned and was given the option of returning to work at a salary of R6 000 a month, to which she had agreed.

The Commissioner accepted that Covid-19 constituted an unforeseen circumstance which justified employer's attempts to reduce expenditure. Where employees were put out of work or placed on short time, they could apply for subsidies from the TERS scheme. However, before reducing salaries, employers are required to consult employees and obtain their consent. The employee had neither been consulted nor agreed to a salary reduction before her resignation. However, she had accepted a salary of R6 000 after the respondent had allowed her to retract her resignation. Moreover, the applicant had failed to prove that she was entitled to commission.

The respondent was ordered to pay the applicant the full basic salary due to her for eight months.

Award

Details of hearing and representation

- [1] This is an award in relation to section 73A of the Basic Conditions of Employment Act 75 of 1997 as amended ("the BCEA") - Claims for failure to pay any amount owing. The arbitration process was scheduled for 28 April 2022 at 9am.
- [2] The employee is Ronell Seethal and the employer is SGMH Cartridge Supplies (Pty) Ltd. The employee appeared in person whilst the employer was represented by the manager (Mr Nolan Nayager). The proceedings were digitally recorded and I also took hand written notes which are not verbatim.

Background to the issue/s

- [3] The employee was employed by the employer from 1 March 2010. She earned R12 000 per month plus 10% commission per sale. The employee was employed as a Sales Representative. The working hours were 8:30am to 4:30pm from Monday to Friday. The employer deals with the supply of cartridge and toners with plus minus six (6) employees. The employer is based in Sebenza, Edenvale.
- [4] The employee referred the dispute to the CCMA on 1 March 2022 and alleged that the dispute arose at the end of March 2020 up to end of February 2022. A claim for the TERS funding for the period April, May and June 2020 which was excluded from the dispute. The matter was set-down for Con/Arb and conducted under the auspices of the CCMA in the Benoni offices on 28 March 2022 at 12h00 and remained partly-heard. The employee submitted bundle "A" whilst the employer submitted bundle "R".

Issue/s to be decided

- [5] I have to decide whether any payment is due to the employee.
- [6] Should I find that the money is due, I have to determine the appropriate relief.
- [7] The employee sought outstanding salary and commission as relief.

Survey of evidence and argument

Employee's version

Ms Ronell Seethal (the employee) testified under oath as follows

- [8] The employee testified that she went on maternity leave around the period August, September and October 2020 to which she received UIF maternity benefits. The employer cut her salary and owed her R3 000 for the period November 2020 to July 2021 as there was no consultation or notice given regarding same as reflected in page 1 of "A". On 3 August 2021 the employee testified that she had resigned and subsequently asked for her job back which she resumed on 11 August 2021. The employer had stated further intentions of cutting the employee's salary subsequent to the retraction of the resignation to R6 000 which she did not agree to and was claiming R3 000 from August 2021 to February 2022. The employee stated that the employer owed her a commission of R1 450.
- [9] Under cross-examination the employee confirmed that the employer had already deducted money for days in which she was absent and was only claiming R3 000 for each month. She was privy to two payslips issued for the month of February regarding the commission due to her as shown by her Manager (Ivan). She was only told randomly about the Commission and the requirement to reach a target from February 2022.

Second witness: Mr Wesley Seethal (employee's husband) testified under oath as follows

- [10] The employee observed a shortage to her salary and subsequently called the Manager who in turn told her to do whatever she wanted thereafter blocked her calls. She later spoke to Ivan (Mr Naidoo, Sales Manager-Manager's cousin) who advised her to call the Manager about her query. He denied showing the employee two payslips.
- [11] Under cross-examination the witness confirmed that the Manager had blocked the employee as he did not want to pay the employee's salary. The employee has been receiving warnings since she opened a case at the CCMA.

Employer's version

First witness: Mr Nolan Nayager (Manager) testified under oath as follows

- [12] The witness testified that a 25% pay cut was implemented in the month of August for all the employees of the company, including the employee and notice was given to that effect due to Covid-19. In November 2020, the employee worked for 10 days as per page 5 of "R". There were no leave days outstanding for the employee in December 2020. In January 2021, the employee was paid the new basic in full including commission as per page 44 of "R" as well as page 45 in the month of February 2021 up to July 2021. On 11 August 2021 a meeting was held wherein the employee was advised of the new salary of R6 000 and was advised to resume duties if she agreed to the amount, to which she did. The new salary was paid as per page 51 of "R" from August 2021 to January 2022. The employee was then called in February 2022 to discuss the target in order to qualify for commission. Page 2 and 23 shows that the employee was paid in cash and e-wallet.
- [13] Under cross-examination the witness confirmed that in August 2020, the employee was paid for the three days worked towards the end of July 2020.

Second witness: Mr Logen Theran Naidoo ("Ivan") (Sales Manager) testified under oath as follows

- [14] The witness testified that the employee was not around when the other employees were notified of the 25% salary cut in July 2020. The salaries were cut due to lack of productivity and Covid-19. He further stated that the employee's resignation was accepted and retracted at her request to which she accepted the new salary cut.
- [15] Under cross-examination he confirmed that the employee was called and notified about the salary cut, he however could not recall the date. He could not recall showing the employee two payslips but was confident that he gave her the right payslip.

Analysis of evidence and argument

- [16] In terms of section 73A of the BCEA as amended: (1) Despite section 77, any employee or worker as defined in section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning any failure to pay any amount owing to that person in terms of the BCEA, the National Minimum Wage Act, 2018, a contract of employment, a sectoral determination or a collective agreement. The employee is claiming outstanding salary and Commission.
- [17] In *Independent Commercial Hospitality and Allied Workers Union and others v CCMA and others* [reported at [2015] 9 BLLR 958 (LC) - Ed], the Court considered whether the introduction of short time constitutes a change in terms and conditions of employment. Such a change cannot be implemented unilaterally. An employer wishing to institute short time must first try to obtain the employees' consent to such a change. If the employees will not agree to such a change it may be necessary to embark on a retrenchment procedure and offer short time as an alternative to retrenchment. Alternatively, the employer may seek to obtain such consent by utilising a lockout. It is common cause that a salary constitutes a term and condition of employment which in its very nature may not be implemented without consultation, notification or consent to that effect.
- [18] In *National Education Health and Allied Workers Union v Minister of Public Service and others and related matters*

[2022] ZACC 6 [reported at [2022] 5 BLLR 407 (CC) - Ed], the Court held in paragraph 104, the evidence establishes that none of the Covid-19 consequences were foreseen or reasonably foreseeable when the collective agreement was concluded. Not even the adverse fiscal developments pre-dating the Covid-19 pandemic were foreseen. Instead, all the parties involved in the collective bargaining process knew that the budgetary deficit in the collective agreement was proposed to be reduced by way of cost-cutting measures. It is also common cause that most companies and their employees were affected by Covid-19. In the present matter, the employer has advanced a reason for the implementation of a salary cut due to financial difficulties experienced as a result of Covid-19. I am alive to the fact that Covid-19 was an unforeseen circumstance which led to most companies closing their doors or having to implement short time, salary reductions, retrenchments and other measures as a result of same.

- [19] In the above matter of *NEHAWU*, the key issue addressed by the Court was that Covid-19 was an unforeseen circumstance which would qualify as a supervening impossibility hence the court ruled in favour of the State. In the event an employer was unable to pay full salaries, TERS was implemented to assist employers with same. In the present matter, what was required of the employer was to consult or notify the affected employees in order to obtain their consent. Section 189 of the Labour Relations Act 66 of 1995 recognises other measures short of dismissal as alternatives to avoid retrenchment. This is however subject to consultation as envisaged in section 189(1) read with section 189(3) of the LRA including the *Independent Commercial Hospitality and Allied Workers Union and others* judgment. I appreciate the employer's reason for implementing the salary cut due to financial constraints as a result of Covid-19. The manager has also confirmed that other employees were consulted which may as well meet the requirements as per section 189 however this was done in the absence of the employee. The manager (Mr Nayager) had claimed that the employee was consulted which is contrary to what the sales manager had attested to and corroborated the employee's version that she was not consulted.
- [20] There are essentially two key issues herein, firstly whether the employee was consulted regarding the salary cut. Secondly, whether the employee consented to the salary cut.
- [21] In dealing with the **first question**, the sales manager of his own volition confirmed that at the time the employees were advised about the salary cut, the employee was not at work. It is the employee's contention that she never consented to the salary cut whilst the employer's witness was not sure about when the employee was advised. There are essentially two conflicting versions in this regard. The employee's witness testified that the employee called the sales manager to enquire about the salary cut as she was not aware of same and was taken from pillar to post. There is no evidence to substantiate the employer's argument that the employee was consulted as it was common cause that the employee was going for maternity leave. The testimony led by the sales manager was that at the time the consultation took place, the employee was not present. This confirmation supports the employee's version that she was not consulted. There are inconsistencies in the version of the sales manager which places doubt in his credibility as a witness.
- [22] In arriving at my decision, I have taken cognisance of the fact that there was no evidence to prove that the employee was indeed consulted about the salary cut for November 2020 to July 2021. The evidence regarding the resignation of the employee was corroborated by both the employee and the employer and in this regard, I am of the view that the employer's version of events in that the employee accepted the new salary of R6 000 is more probable. An assessment of acceptance may be done tacitly or verbally. In the present matter, the employee confirmed the employer's version that she advised of the new salary in that if she accepted she could resume her duties and if she declined she was welcome to act accordingly . . . The employee opted to stay and resume her duties. This in my view amounts to a tacit (action taken) confirmation [*sic*].
- [23] I am convinced that the employer failed to consult with the employee regarding the salary cut for November 2020 to July 2021. The employee and the employer's witness confirmed that a meeting regarding targets set in order to obtain commission took place; I believe that the employee has not established grounds that she was owed commission but has on a balance of probabilities established that she was owed a salary. It is also common cause that the employer has made the necessary deductions as per the payslips submitted from the R9 000 salary. I, therefore, conclude that the employee is not entitled to the payment of commission or any amount from August 2021 to February 2022 but is however entitled to amounts owing from November 2020 to July 2021.
- [24] I, therefore, order the employer to compensate the employee as follows: November 2020 to July 2021= 9 months (R3 000 x 9 months) = R27 000 (twenty-seven thousand rand only).

Award

- [25] The employee was not paid her salary.
- [26] The employer, SGMH Cartridge Supplies (Pty) Ltd is ordered to pay to the employee, Ronell Seethal an amount of R27 000 (twenty-seven thousand rand only) by no later than 30 May 2022.
- [27] The amount herewith accumulates interest in the event of non-payment.