



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **N.Bantwini**

Case No: **PSHS1041-16/17**

Date of award: **23 July 2018**

In the matter between:

NEHAWU obo Vayimani Komani

(Union/ Applicant)

and

Department of Health- Eastern Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATIONS

1. This arbitration was heard on 06 July 2018 in the offices of the respondent in Bhisho. It came before the PHSDSBC in terms of Section 191 (5) (a) read with section 186 (2) (a) of the Labour Relations Act, 66 of 1995, as amended (LRA) for an alleged unfair labour practice dispute based on benefits in that the applicant alleges that the respondent refused to pay his resettlement/relocation benefit as regulated by Policy on Resettlement.
2. Mr. Lusindiso Mbutsi of NEHAWU appeared for the applicant, Mr. Vayimani Komani while Mr. Sibusiso Nxumalo appeared for the respondent, the Department of Health- Eastern Cape.

- Parties agreed to submit written closing arguments on 12 July 2018. Both arguments have been considered in the preparation of this award. The proceedings were electronically recorded.

ISSUE TO BE DECIDED

- I am required to decide whether the applicant is entitled to be paid resettlement/relocation benefit for the period 12 March 2012 to 11 June 2012 or not.

BACKGROUND TO THE DISPUTE

- The applicant, Mr. Vayimani Komani is employed by the respondent as a Forensic Pathology Officer since 03 July 2007. He was placed at Wood brook Pathology Services in East London until he was transferred on precautionary measures to Bhisho Hospital in Bhisho on 12 March 2012.
- He referred a dispute to the PHSDSBC through his union regarding refusal of the respondent to pay his resettlement/relocation benefit. The dispute was conciliated and it remained unresolved. The applicant, through his union requested arbitration.
- Issues of common cause which were compiled by parties are as follows;
 - He was appointed on 03 July 2007 as a Forensic Pathology Officer and was based in East London Wood brook Pathology Services.
 - He was suspended and dismissed on 31 May 2013 after a disciplinary hearing was conducted.
 - He appealed to the Executive Authority and the appeal failed.
 - He referred the dispute to the PHSDSBC and was reinstated in terms of the award dated 17 February 2014.
 - The award was reviewed by the respondent but the application was subsequently withdrawn by the respondent as per the Labour Court order on 27 August 2015.
 - The applicant was reinstated by the respondent on humanitarian grounds as per the letter dated 13 April 2015.
 - The applicant was placed at Bhisho Hospital which is a different work station.
 - The respondent prepared a memorandum regarding payment of resettlement benefit but it was disapproved on 10 January 2018 on the basis of the Chief Audit executive letter dated 19 December 2017.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's case

8. According to Mr Mbutsi's opening statement, the dispute relates to unfair labour practice based on non -payment of resettlement/relocation benefit. The Secretary General, issued a memorandum which is contrary to the reinstatement of the applicant as stipulated in the arbitration award. The Secretary General also relied upon the recommendations of the Internal audit Executive, Ms Kakaza which were misleading. The applicant seeks payment of the benefit as a remedy.
9. The applicant, Mr Vayimani Komani testified under oath as follows:
10. After receiving an arbitration award, which ordered the respondent to reinstate him at his East London base, he indeed reported for duty. At about 10h30 while he was in his office, police arrived and forced him to vacate the premises at Doctor Nogela's instruction. He sought a meeting with the Secretary General and during the meeting he was instructed to report in Bhisho Hospital and that if he does not follow that instruction, his salary will be frozen and will be dismissed.
11. The applicant stated further that he complied with the instruction and reported in Bhisho Hospital. His understanding of the arbitration award is that he was reinstated at Woodbrook office in East London and be paid for the period he was out of work. He was paid all his monies due in line with the arbitration award.
12. He refused to sign the letter written by Superintendent General setting out different conditions of reinstatement (pages 1 to 3 bundle A) as the arbitration award which reinstated him is a legal document. Although he signed the document, he made a comment which reads:

"I sign this subject to further engagements on paragraph 3.3.4.2 which is the decision of the court and was not part of a settlement discussion with the SG and Pubic Protector"
13. Under cross-examination, the applicant testified as follows:

14. The letter written by the Secretary General, Doctor T. Mbengashe does not speak to him as it does not supersede an arbitration award. The SG forced him to sign the letter and made a comment but he was never called for further engagement. The respondent reinstated him and was paid the monies due to him as per the arbitration award. According to the calculations made by the respondent's official Mr Bebula, the amount due to him is R27 250, 00 (page 7 to 9 bundle A).
15. Under re-examination, the applicant stated that he signed the document indicating conditions including that he will report to a different workplace, based on the fact that he was told to make comments which were never adhered to by the respondent. He seeks payment of resettlement benefit as a remedy.
16. In closing Mr Mbutsi argued as follows:
17. The applicant did not sign Annexure D of the resettlement policy at the time he was submitting his claim and he was not even advised to sign it by the respondent. The content in the annexure D is not relevant to Mr Komani and it is very clear that Annexure D talks to new appointees and the applicant was appointed in 2006. Therefore, Annexure D is not applicable to Mr Komani. In line with the recommendation of the respondent the applicant is entitled to resettlement benefit.
18. The reinstatement terms were not legal because it seeks to undermine the arbitration award and the court order. The applicant was forced with this transfer hence was threatened to stop the salary if not reporting to Bhishe Hospital. This made the transfer from East London to Bhishe hospital to be unfair and does not conform to the precepts of the law.
19. Delaying to pay the claim and after some time raise the issue of Prescription Act is also unfair and also undermines the spirit of the prescription Act. Mr Mbutsi finally argued that the respondent acted unfairly towards the applicant and as such must be ordered to pay the resettlement amount of R27 250.00 to the applicant.

Respondent's case

20. According to Mr Nxumalo's opening statement, the dispute relates to payment of resettlement benefit. On 04 April 2017 the respondent requested the matter to be

postponed sine die and the request was granted. The respondent submitted a memorandum to the Secretary General motivating payment of the applicant's resettlement benefit but it was declined based on the Chief Audit Executive's advice. The respondent is now bound by the Secretary General's decision.

21. In closing, **Mr Nxumalo** argued as follows:

22. Mr Komani signed the letter that was written by the Secretary General without prejudice. His transfer from East London to Bhishe Hospital has never been an issue and is out of the Commissioner's jurisdiction as it was never raised as a dispute. The issue of whether the respondent acted unfairly for non-payment of the applicant's resettlement benefit should be left to the Commissioner to decide.

ANALYSIS OF EVIDENCE AND ARGUMENTS

23. The fact that the applicant's resettlement benefit was not paid based on the fact that he might have signed Annexure D of the Resettlement policy is irrelevant. The applicant did not sign the annexure as it is applicable to new appointees.

24. The prescription Act does not apply in the applicant's case as highlighted in the Audit recommendations as the claim was only 2 years at the time and that the applicant pursued his claim after his transfer to Bhishe Hospital.

25. It must be noted that the respondent relied on the Superintendent General and Ms Kakaza's recommendations in advancing its case and that none of the officials were called to testify. I did not deal with the issue of allegations of unfair transfer as it does not form part of the dispute.

26. On the basis of the above evidence and arguments, it is evident that the applicant qualifies to be paid resettlement/relocation benefit in terms of subsistence and camping allowance policy. The applicant has discharged the onus to prove the claim of unfair labour practice based on benefits.

27. In the circumstances, I deem it reasonable to make the following award:

AWARD

28. The respondent's conduct constituted an unfair labour practice relating to benefits.

29. I order the respondent, Department of Health-Eastern Cape to pay relocation allowance amounting to R 27 250.00 to the applicant Mr. Vayimani Komani as per the calculations appearing on page 7 of bundle A which are as follows; the three months has been calculated as follows- from 12 March 2012 to 31 March 2012 (19 days x R286.00 =R5434.00 and from 01 April 2012 to 11 June 2012 = 72 days x R303.00 = R21 816.00, total amount is R27 250.00 on or before 31 August 2018.

30. There is no order as to costs



Signature

Ncumisa Bantwini