



ARBITRATION AWARD

Case No: **PSHS100-20/21**

Commissioner: **Mr Anand Dorasamy**

Date of award: **14 March 2021**

In the matter between:

NUPSAW OBO DLADLA DUDUZILE & 1225 OTHERS

(Union/ Applicant)

and

DEPARTMENT OF SOCIAL DEVELOPMENT-KWAZULU NATAL

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration proceedings commenced at 10H00 ON THE 21 October 2020 at the Department of Social Development KwaZulu Natal boardroom in Pietermaritzburg. After the evidence was completed on the 1 March 2021 the parties were to submit written closing arguments on the 8 March 2021. The applicant submitted its closing arguments on the 11 March 2021 and respondent on the same day. The applicant lodged a dispute in terms of section 198B of the Labour Relations Act (LRA) in respect of fixed term contracts with employees earning below the earning threshold.

ISSUE TO BE DECIDED

2. I am required to determine whether the Respondent (employer) had erred in employing the applicants in a fixed terms contract instead of an indefinite contract of employment. Should I find in favour of the applicants, I am to determine what relief should be granted to them.

BACKGROUND TO THE DISPUTE

3. The applicants' dispute is about working for the Department of Social Development in various parts of Kwa Zulu Natal for a long time as Expanded Public Works Programme (EPWP) workers. The applicants contend that the respondent does not have justifiable grounds to employ them in terms of the EPWP. They demand they be declared employee of the respondent as other employees doing the same or similar work as them.
4. The respondent contends that the applicants' relief is not possible and that the matter should be dismissed.

SUMMARY OF EVIDENCE

APPLICANTS' CASE

MHLENGI NCUBE

5. The salient aspects of the witness' testimony are recorded below.
6. He is working for the Department of Social Development as a Community Care Giver (CCG). His duty is to identify and refer, to do filing and to refer orphans and vulnerable children to the social workers from his office at Umbumbulu.
7. He reports to his supervisor at the Department of Social Development service office. He signed a three year contract and thereafter three or four contracts. The last time he signed a contract was in 2014. He did not have a break in service. He was employed by being given a Z83 form which he signed.
8. He did not get social grant. He is not aware of any submission by the Unions that EPWP employees must be rotated.
9. He is paid via his bank account.
10. He signed a contract of employment and being paid R2 100.00 as a stipend and nobody told him that he is permanent.
11. Under cross examination he stated as follows:
12. He referred people to the social work supervisor. He belongs to ward 96. He is not registered with the Council of Social Workers and is not a Social Auxiliary worker.

SIBONGISENI SYDNEY MKHIZE

13. The salient aspects of his testimony are recorded below.
14. He is employed by NUPSAW as a Provincial Organizer in Kwa Zulu Natal.

15. He attended a meeting in Pretoria on 25 February 2020 and the meeting was about CCGs and Resolution 1 of 2018 which stated that the Resolution is not extended to them but the Department of Health implemented it. The CCGs are not paid in terms of Resolution 1 of 2018.
16. At the meeting they were told that the matter would be referred to the Minister. They were not entitled to claim same benefits as Community Health Workers (CHW).
17. The CCGs are employed for various periods and for more than five years.
18. Under cross examination he stated as follows:
19. Resolution 1 of 2018 applies to CHWs employed by the Department of Health and not the Department of Social Development. NUPSAW was part of the Resolution and it binds the Unions.

RESPONDENT'S CASE

MPHILISENI TOBIAS MAZIBUKO

20. The salient aspects of his testimony are recorded below.
21. He is employed by the Department of Social Development and is a Director of Human Resources and is aware of the EPWP of the Department. The programme is nationwide.
22. There was a decision by the Provincial cabinet that employees working in NPO's be taken over by the Department of Social Development. Pages 1-8 is the employment contract for CCGs.
23. The dispute section 198D of the LRA talks to fixed term contracts that are not limited to three months and EPWP is an exclusion.
24. The EPWP workers have opportunities if there are vacant posts (entry level posts), advertised internally targeting employees on contract EPWP etc. The other opportunities created by the Department under the CCG programme, the Department introduced learnership programmes to study and qualify to be employed by the Department and be registered with the South African Council for Social Services, a professional body that regulates the social workers.
25. CCGs are not performing the work of Social workers. They prefer to work at the community level/ward based where they stay. They visit householders to form a link between the community and Social workers.

26. The Social Auxiliary Workers (SAW) have certain basic qualifications and register with the professional body. They assist social workers to compile reports and do other administrative work. A SAW is different to a CCG.

27. Under cross examination he stated as follows:

28. The CCGs are employed on a temporary basis and sign a bi-annual contract that is renewed.

CLOSING ARGUMENTS

29. The parties submitted written closing arguments that were considered when I made my determination.

ANALYSIS OF EVIDENCE AND ARGUMENT

30. This dispute relates to section 198B of the LRA relating to fixed term contracts with employees earning below the earning threshold.

31. The following are recorded to provide clarity to my determination of the matter:

25.1. This is recorded from **SPECIAL PUBLIC WORKS PROGRAMMES**

(Expanded Public Works Programme)

EMPLOYMENT CONTRACT FOR COMMUNITY CARE GIVERS

PART A

25.2. Page 3 of bundle "A" 4. PARTICULARS OF JOB OR POST

Job/Post Title Child and Youth Care Worker

Start Date

End Date

Remuneration R 2 100.00

PART B

25.3. 1. **DEFINITIONS**

1.5.7. "special public works programme"

Means a programme to provide public assets through a short-term, non-permanent, labour intensive programme initiated by government and funded from public resources;

3. APPOINTMENT ON TEMPORARY BASIS

It is recorded that-

3.1. The Employee is appointed on a temporary basis for a period mentioned in Part A, item 4 of this Contract

- 3.2. The appointment of the Employee under this Contract..... 1966);
- 3.3. This Agreement does not, and will not confer on the Employee any right, legitimate expectation or entitlement to permanent employment or employment in excess of the prescribed duration mentioned in Part A, item 4 of this Contract, nor does it confer any legitimate expectation for the renewal of the said period after the expiry of the Contract.
- 3.4. The provisions of the Ministerial Determination Number 3: Special Public Works Programmes (published in the Government Gazette No. 23045 of 25 January 2002) made by the Minister of Labour in terms of section 50 of the Basic Conditions of Employment Act, 1997, shall apply *mutatis mutandis* to the terms and conditions set out in this Contract.

Terms of Work

Workers on an EPWP are employed on a temporary basis or contract basis.

32. Section 198B is reproduced and includes only the relevant sections to this dispute:

(4) Without limiting the generality of subsection (3) the conclusion of a fixed term contract will be

justified, if the employee-

(a)- (e)

(g) is employed for the purpose of an official public works scheme or similar public job creation

Scheme

(h)

28. The applicants were given a fixed terms contract (which was in writing) and stated the reasons for fixing the contract.

33. The section 198B of the LRA commenced on 1 January 2015.

34. The Expanded Public Works Programme (EPWP) is one of governments short-to medium term programmes aimed to alleviating and reducing unemployment. The EPWP will achieve this aim through the provisions of work opportunities coupled with training. It is a national programme covering all spheres of government and state-owned enterprises (SOE's).

35. NUPSAW declared a dispute against the respondent for the interpretation and application of the Resolution and Commissioner K Khanyile under case number PSHS

697-18-19 ruled that the PHSDSBC has no jurisdiction to arbitrate the dispute initiated by the applicants.

36. Section 198B (4) (g) of the LRA lists examples of 'justifiable reasons' for employing someone for a fixed-terms period of longer than three months and records "An official public works scheme or similar public job creation scheme.
37. Arising from the above and taking into account that there are other employees under similar contracts but belonging to other unions that the applicants in this case were employed for the purpose of an official public works scheme and the conclusion of the fixed term contract cannot be deemed to be an indefinite contract.
38. As a consequence thereof the application is dismissed and the applicants are not entitled to any relief.

AWARD

39. The application is dismissed.
40. There is no order as to costs.

DONE AND SIGNED IN DURBAN ON THIS 14 DAY OF MARCH 2021.



Arbitrator: Anand Dorasamy