



ARBITRATION AWARD

Case No: **PSHS96-20/21**

Commissioner: **Raymond Jonathan**

Date of award: **17 September 2020**

In the matter between:

PSA obo Jill Roman

(Union/ Applicant)

and

Department of Health – Eastern Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. An unfair labour practice dispute was scheduled for arbitration terms of section 191(2) of the Labour Relations Act No 66 of 1995, as amended (herein referred to as the “LRA”). The hearing was concluded at the boardroom of the Port Elizabeth Hospital Complex in Port Elizabeth on 1 September 2020. The proceedings were digitally recorded. The Applicant, Dr Jill Roman was represented by Mr. A Kilian a fulltime shop steward of the Public Service Association. The respondent, Department of Health – Eastern Cape was represented by Mr. N Qilingele an Industrial Manager in the employ of the respondent.
2. The parties agreed to submit written arguments in support of their evidence. The parties agreed to submit their arguments on or before 8 September 2020. The parties submitted on their arguments on the agreed date.

ISSUE TO BE DECIDED

3. I am required to determine whether the respondent has committed an unfair labour practice by only paying a portion of the applicant's resettlement claim which she argues she is entitled to.

SURVEY OF EVIDENCE AND ARGUMENTS

4. At the commencement of the proceedings the applicant representative submitted bundle of documents marked (A1 to A44) and the respondent submitted a bundle of documents which is marked (B1 to B21) of which content was agreed what they purport to be. The following were also agreed as common cause facts:

- 4.1 The applicant was appointed by the Department of Health-Western Cape on 1 January 2008. She was appointed as a Forensic Pathologist on fixed term contracts from 2014 until 31 December 2019.
- 4.2 The applicant was head hunted by the respondent and was requested to apply for the one of the vacant positions which existed in Port Elizabeth. She was shortlisted and offered the position which she applied for. She accepted the offer of appointment with the respondent.
- 4.3 Applicant's fixed term contract was terminated on 31 December 2019 by the Department of Health – Western Cape and she commenced duties with the respondent on 1 January 2020.
- 4.4 The applicant applied for resettlement cost which amounted to R97553.06 based on item 15.1 (a) to (g) of the respondent's Policy on Resettlement. She was paid R62 500.06 in terms of item 15.1(h) of the aforementioned policy.
- 4.5 the respondent conceded that the applicant was a public servant from 2008 when she was appointed in the Western Cape Department of Health and remained a public servant when she commenced services on 1 January 2020 with the respondent.

THE APPLICANT'S CLAIM OF UNFAIR LABOUR PRACTICE

5. The applicant submitted that the respondents committed an unfair labour practice when she was classified as an external appointee which resulted in her qualifying for one month's resettlement accommodation and no school fees reimbursement for her children when she relocated. She submitted that the incorrect provision of the resettlement was applied to her resettlement. She submitted that she was a public servant for all intent and purposes when she was employed in the Western Cape Department of Health and had no break in service when she was appointed and transferred to the respondent.

EVIDENCE AND ARGUMENT FOR THE APPLICANT

6. The applicant testified that she was employed by the Western Cape Department of Health since 2008. She was employed on continuous fixed term contracts by the aforementioned department but was never unemployed. She applied for the position of Forensic Pathologist in the Eastern Cape Department of Health and was interviewed and appointed on 25 November 2019. She had to work a month's notice at the Western Cape Department of Health based on the position which she occupied and the terms of her employment. She accepted the position in the Eastern Cape since it was a permanent position. She therefore had to resettle from the Western Cape to the Eastern Cape.
7. She was in constant communication with Mr. Jonathan Jenniker, the Regional Manager: Forensic Pathology regarding her relocation. He assured her that funds are available for her relocation and that she qualifies for three months rental, removal of furniture cost, cost of petrol and change of school for her children. When it eventually came time to relocate, he informed her that the funds for relocation was not available yet and that she should carry her own cost in the meantime. She had to make a personal loan in order to carry the cost of relocation.
8. In January 2020 Mr. Jonathan Jenniker assisted her in calculating her relocation cost and it amounted to R97 503,96. These calculations were made based on the resettlement policy of the respondent. She wanted the money to be paid since the personal loan has placed her in a very difficult financial position. She however was not paid until she

submitted a grievance on 5 March 2020 for the non-payment of the benefit which she qualified for. The respondent arranged a grievance meeting and it was held on 6 and 7 May 2020. The respondent explained that the reason why her claim was not paid was based on the fact that she claimed the incorrect amount since it was based on the incorrect provision of the policy. They alleged that she only qualified for R62 506-06. She accepted for the amount to be paid out but reserved her right to make a referral to the Council since she was of the view that the incorrect provision of the policy was utilized.

9. She is of the view that the respondent was misinterpreting the resettlement policy. She was a public servant when she applied for the position, interviewed for the position and when the position was offered to her. She would have continued working in the Western Cape if she knew that she would be affected financially as she is currently affected.
10. She is still financially compromised by the position the respondent has placed her in since she had to make a loan. She is of the view that she should not just be awarded the shortfall of her entitlement but that she should also be awarded compensation for the unfair labour practice which she was subjected to by the respondent.

EVIDENCE FOR THE RESPONDENT

11. The respondent's witness, Mr. Jonathan Jenniker testified that the applicant indicated that she was on a fixed term contract in the Western Cape and the position which she applied for in the Eastern Cape was for a permanent appointment. There is no dispute that the applicant was a public servant when she was employed in the Western Cape but of a fixed term contract. The applicant commenced employment in the Eastern Cape on 1 January 2020 and there was no break in service when she commences employment in the Eastern Cape. The respondent however treated her as a reemployment.
12. He assisted her in completing her resettlement claim form and they arrived at an amount of R92 506-06. After they submitted the claim form, he was informed by pre-audit that the applicant only qualifies for one month's resettlement cost. The applicant's services were terminated by the Western Cape Department of Health when the respondent appointed her. She was therefore terminated and reappointed. The intention of the respondent was never to disadvantage the applicant. The respondent appreciates the fact that the

applicant accepted her appointment. She applicant according to the Human Resource department was not transferred but re-employed as indicated on her Persal report. If she was transferred than she would have qualified for the amount which was initially calculated.

ANALYSIS OF EVIDENCE AND ARGUMENT

13. The dispute before me is an unfair labour practice: benefits. The applicants alleged that the respondent committed an unfair labour practice against her by not applying the correct provision of the Resettlement policy of the respondent and therefore prejudiced her financially. The applicant made the allegation and therefore the onus is on her to establish the alleged unfair labour practice.

14. The issue which I need to decide on is whether the applicant is entitled to the benefits of an employed public servant or of an employee who was employed from outside the public service. This implies that I should establish whether the applicant qualified for the benefits in terms of item 15.1 (a) to (g) or only item (h) of the respondent's Resettlement policy. In the event that it is found that she qualifies for the benefits in terms of item 15.1(a) to (g) then she would be entitled to an additional R35 053-06. In the event that it is found that she qualifies for the benefit in terms of item 15.1(h) of the aforementioned policy than it would be the end of the matter since she was already paid the benefit.

15. The background of the applicant's "appointment" by the respondent is common cause. The applicant was an employee of the Western Cape Department of Health when she was appointed by the respondent. It is common cause that the applicant was employed on a fixed term contract while in the Western Cape. The question which the respondent's officials are struggling with is whether the applicant was a public servant at the time of her appointment. This question was answered by Mr. Jonathan Jenniker in that he submitted that she was a public servant. The fact that she was on a fixed term contract does not diminish the fact that she was an employee of government. It is trite that the employer of public servants is the South African Government or the State. This is evident in that the conditions of service of public servants are negotiate, determined and administered by the Department of Public Service and Administration.

16. The applicant testified that she was employed on rolling fixed term contracts by the Western Cape Department of Health for approximately 12 years when she was appointed by the respondent. She did not have any break in service and that she was always employed over the aforementioned period as a public servant. She also does not have any break of service. The applicant therefore argued that she is entitled to the benefits in terms of items 15.1(a) to (g) which would entitle her to an additional R35 560.06.
17. The respondent on the other hand argued that the applicant's employment was terminated (annexure B5) by the Western Cape Department of Health on 31 December 2019 since she was on a fixed term contract and was re-appointed by the respondent. The respondent therefore argued that since the applicant was re-appointed on 1 January 2020, she only qualifies for the benefits in terms of item 15.1(h) of the respondent's Resettlement policy. The respondent however also conceded that there was no break in service between her termination and re-appointment and that she was always a public servant when she moved between the two provinces.
18. I have considered both arguments and the outcome of this matter will turn of the fact of whether the applicant was appointed from outside the public service or whether she was already a public servant when she was appointed by the respondent. The respondent therefore argued that the applicant was not transferred but appointed by the respondent. This is not a difficult issue to decide when we consider the provisions of the respondent's Resettlement policy. The definition of a transfer in terms of the respondent's Resettlement policy reads as follow: "This refers to either an appointed employee by the department or an employee that is discharged to another department". This implies whether an employee who is appointed from outside the public service or moved between departments that he/she would qualify for benefits for resettlement.
19. The respondent argues that the applicant was re-appointed and therefore only qualifies for the benefits as set out in item 15.1 (h) of the resettlement policy. When you consider the aforementioned provision, it is clear that this provision is applicable to employees who are appointed from outside the Public Service. The heading of item 15.1(h) reads as follow: "Resettlement benefits for employees from outside the Public Service and other circumstance".

20. The respondent conceded that the applicant was a Public Servant when she was appointed by the respondent. The respondent also conceded that there was no break in service in the applicant's employment record. This is supported by her Persal record in annexure B5. Her term of service came to an end in the Western Cape Department of Health on 31 December 2019 and she commenced employment on 1 January 2020 with the respondent. The applicant was therefore appointed from 'inside' or while she was in the public service and therefore item 15.1(h) of the resettlement policy is not applicable to her appointment but item 15.1 (a) to (g). She is therefore entitled to all benefits which includes three months' accommodation and school administration fees.
21. I therefore find that the applicant has established that the respondent has committed an unfair labour practice in terms of benefits against her in that the incorrect provision of the benefits was applied to her transfer. She is therefore entitled to the additional R35 053.06 in benefits as conceded to by the respondent in the event it is found in favour of the applicant.
22. The applicant argued during her testimony that she would be entitled to be awarded compensation in terms of the Labour Relations Act should she establish that the respondent committed an unfair labour practice against her since she was prejudiced financially by the conduct of the respondent. She submitted during her closing arguments that she should be awarded compensation equivalent to six months of her salary. The applicant is earning R938 964.00 per year which translates to R78 247.00 per month. The applicant therefore argued that she should be awarded compensation of R469 482.00. The respondent argued that in the event that compensation is awarded that it should be fair and equitable.
23. I have considered both parties arguments and that fact that matter should never have reached this stage of dispute resolution. The interpretation of the policy provision by Mr. Jonathan Jenniker was correct and his calculations of entitlement cannot be criticised. It is clear from Mr. Jonathan Jenniker's initial calculations that he was agreement with the applicant interpretation regarding her entitlement of benefits. It would have been insightful for the official who has done the pre-audit to have testify in the arbitration proceedings in order for me to get an understanding why he/she arrived at the conclusion that the applicant was from outside the Public Service.

24. It is undisputed that the applicant had to take out a personal loan to cover the cost of her transfer whereas it should have been paid by the respondent. It is also undisputed that this prejudiced her financially since it affected her financial position. It is concerning that the respondent handled the transfer of the applicant in such a haphazard manner since she had to be headhunted by the respondent from another province to fill a critical position in the Eastern Cape. I am of the view that the applicant should be awarded compensation but it would not be fair and equitable to award her six months' compensation.

25. Section 194 of the LRA provide that compensation awarded for an unfair labour practice must be just and equitable in all circumstances but not more than 12 months compensation. I have considered the circumstances surrounding this dispute. As I already mentioned that this dispute should have been resolved internally since the provisions of the applicable policy is clear and does not need much interpretation. In the event that the applicant was represented by a legal representative, I would have seriously considered awarding cost against the respondent in the event it was requested. The applicant was however represented by a fulltime shop steward of her trade union whose salary are paid by the employer in another department. I am of the view that compensation of R78 247.00 is fair and equitable given the circumstances of the applicant and the conduct of the respondent. I am of the view that the level of the applicant remuneration does not justify more compensation.

AWARD

27. I hereby find that the applicant has established that the respondent has committed an unfair labour practice against her relating to the provisions of benefits. She has established that she is entitled to an additional R35 053.06 as a benefit for resettlement cost from the Western Cape to the Eastern Cape.

28. The respondent is hereby ordered to pay the applicant her full benefit of R35 053.06 to which she is entitled to on or before 30 September 2020.

29. In addition, the applicant is also awarded compensation of R78 247.00 as a result of the unfair labour practice: benefits which was perpetrated against her by the respondent. The respondent is hereby order to pay the applicant compensation of R78 247.00 on or before 30 September 2020.



Raymond Jonathan