



ARBITRATION AWARD

Commissioner: **Ncumisa Bantwini**

Case No: **PSHS498-22/23**

Date of award: **02 February 2023**

In the matter between:

Tenjiwe Nonhlanhla Dayimane

Applicant

and

Department of Health – Eastern Cape

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was part heard on 07 December 2022 and was finalized on 24 January 2023. It was heard in the offices of the respondent in Bhisho Hospital in Bhisho. It came before the PHSDSBC in terms of Section 186 (2) (a) of the Labour Relations Act, 66 of 1995, as amended (LRA) for non-payment of benefits relating to resettlement, sundry payment, transfer fees, relocation and travelling costs.
2. The applicant, Mrs. Tenjiwe Nonhlanhla Dayimani appeared in person and represented herself while Mr Sakhi Blayi appeared for the respondent.
3. The referring party started to lead evidence and no additional witness was called to testify. The respondent called 2 witnesses to testify. Parties agreed to submit written closing arguments on 27 January 2023. The proceedings were digitally and manually recorded.

ISSUE TO BE DECIDED

4. The issue to be decided is whether the applicant is entitled to be paid resettlement, sundry, travelling, transfer and relocation costs or not.

BACKGROUND TO THE DISPUTE

5. The applicant, Mrs. Tenjiwe Nonhlanhla Dayimani referred a dispute to the PHSDSBC when the respondent failed to pay her resettlement costs/benefit.
6. The dispute was conciliated and it remained unresolved. The applicant requested arbitration hence this arbitration award.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's case

7. According to Ms. Dayimani's opening statement, the respondent failed to pay her benefit relating to resettlement, sundry, transfer fees, relocation and travelling costs amounting to a total of R107 887.46 as a remedy sought by her.
8. The applicant testified as follows:
9. She works for the respondent as an Operational Manager. On 26 October 2020 she attended an interview at Bhisho Hospital for the advertised position of Operational Manager. As a result of the interview, she incurred travelling costs of 590km as she was using her own vehicle. When she was advised in September 2021 that she was successful for the position, she accepted the position, assumed duties and she travelled 590km from Pietermaritzburg to East London. On accepting the offer of employment, in Bhisho Hospital, she had to resettle from Pietermaritzburg to Eastern Cape and became eligible for a once off basic salary, furniture transportation in line with the Resettlement Policy of the respondent. The total amount owed to her is R107 887.46 and she seeks its payment as a remedy.
10. Under cross-examination, the applicant testified as follows:

11. She was transferred from KZNDOH to ECDOH Bhisho Hospital in line with the policy. Her explanation of transfer is an appointment of an employee or an employee discharged from another department. She was transferred by being appointed by the Eastern Department of Health.
12. When it was put to the applicant that she was never transferred but appointed as a new employee, her response was that paragraph 1 of her appointment letter confirms that she was transferred. Paragraph 1 reads:
13. *"I have pleasure in offering you employment in Bhisho Hospital. Your employment is of a permanent nature and is in terms of the Public Service Act, 1994. The date of effect will be the date of assumption of duty"* (page 35 of bundle B). The applicant stated that the above paragraph states that she was appointed and not transferred to Bhisho Hospital. The appointment letter would indicate that she was appointed even if she was transferred.
14. She applied for an advertised position and was appointed. When a question as to whether she would be subjected to an interview if she was transferred was posed, the applicant's response was that it would depend on the type of transfer. She referred to the Resettlement Policy of the respondent which describes transfer as follows;
15. "Transfer: This refers to either an appointed employee by the department or an employee that is discharged to another department" (pages 6 to 7 of bundle B). The applicant stated also that she is entitled to costs associated with transfer as stipulated in the Resettlement Policy as she was requested by the ECDOH as per her appointment letter. Her salary is paid at the end of the month instead of the 15th day of the month and her probation period is 2 years.
16. The applicant testified further that she resigned from the KZN Department of Health, served the notice period and was appointed by the Eastern Cape Department of Health on 01 November 2021. Her residential address is Berea, East London and the postal address is Pietermaritzburg.
17. In closing the applicant argued as follows:
18. She has shown that the respondent committed an unfair labour practice by acting contrary to clear provisions of its Resettlement Policy. The respondent's version must be rejected as it is against the legal phramework that regulates the public service which is the basis of the Resettlement Policy. Paragraph 15.1 of Resettlement Policy as well as her letter of appointment makes it clear that she qualifies for the benefit.

Her prayer is that the respondent's conduct be declared as unfair and be ordered to pay her an amount of R107 887.46 resettlement costs as well as 6 months salary as the remedy sought by her.

Respondent's case

19. According to Mr. Blayi's opening statement, the respondent did not commit an unfair labour practice. The applicant resigned from her previous job and applied for an advertised position of Operational Manager in Bhisho Hospital. The applicant's appointment was merely an offer by the respondent, the applicant was never transferred, her claim must be dismissed.

20. Ms. Phumla Mnyanda, the first respondent's witness testified as follows:

21. She works for the respondent as CEO of the hospital since June 2020. The applicant applied for an advertised position and was appointed. She requested the respondent to give her sometime so that she can resign from her previous job in KZNDOH. The respondent was looking for someone within the Buffalo City Metropolitan Municipality (East London/Bhisho area) as it does not have funds for candidates from outside the area. The employee's residential address in her CV is East London and she (the applicant) confirmed that her husband and kids are also residing in East London during the interview process. The respondent does not transfer someone if the position is advertised or if the particular candidate has resigned.

22. The employee was issued with an appointment letter which is different from a transfer letter (page 35 to page 40 bundle B). The applicant is also under 24 months' probation period hence she is also getting her salary on the last day of the month as reflected in her appointment letter (page 36 of bundle B). The witness was referred to clause 15.1 of the Resettlement Policy under costs associated with transfer which reads;

23. *"An employee who, at the request of the ECDOH, is transferred to a new place of work, will be assisted with the associated costs as provided below"*

24. The witness stated that the applicant was never requested by ECDOH to work in Bhisho Hospital and that she (the applicant) is not entitled for travel and subsistence expenses as well as expenses related to transfer. The applicant signed an acceptance and confirmation of assumption of duty (page 33 of bundle B). The application for employment form Z83 is only completed by people who are applying for positions and not transferred employees (page 25 bundle B).

25. Under cross examination, the witness testified as follows:

26. When the witness was referred to a definition of transfer as stipulated in the Resettlement Policy, the witness reiterated that the employee was never transferred but was a newly appointed employee by the ECDOH. She stated further that the applicant resigned and applied as a new employee at Bhisho Hospital.
27. When the applicant referred to Resettlement Expenditure clause as reflected in her appointment letter which provides-
28. *"A collective agreement makes provision to compensate a person who, in the interest of the State, is transferred or appointed or, owing to certain service requirements, is utilized at a place other than his or her headquarters, or on retirement or death, within the framework of the provisions and the measures and guidelines set out in the collective agreement, for the reasonable expenditure actually and necessarily incurred as a result thereof"* (page 30 bundle A).
29. The witness stated that the above paragraph does not apply to the applicant as she presented herself as someone who resides in East London as reflected in her CV and not from another province. The respondent only considered candidates from around Buffalo City Metropolitan Municipality due to budgetary constraints.
30. Under reexamination, the witness stated that the applicant presented herself as someone who resides in East London and not from another province, therefore she does not qualify for costs associated with transfer/resettlement.
31. The second witness, Ms. Thumeka Alwyn Qegu testified as follows:
32. She works for the respondent as Human Resources Practitioner since 2011. Her duties include recruitment and appointments as well as service benefits. The applicant is employed as Operational Manager. The respondent advertised a position in 2020, the applicant applied, she was shortlisted, interviewed and appointed to the position. She (the applicant) was never transferred.
33. The difference between appointment and transfer of an employee is that with regards to an appointment, an advertisement for a vacant position is issued by the respondent, and applicants are shortlisted and interviewed before they are appointed.
34. With regards to transfer, the person who is interested in being transferred would make a submission enquiring about the vacant position in another institution/ hospital. The letter would be submitted to the

supervisor of the institution and to the Human Resources section who would send a “no objection request to the employee’s institution and after it has been signed, the request is sent to the District office for approval.

35. The signed/approved request is sent to the institution where the employee is based, a release form is issued and the employee can be released. The transferred employee is then relocated from the original position to the other position so that the service is not broken.
36. The witness testified further that the applicant does not qualify for resettlement benefits as she resigned from her position and accepted a new position after she was appointed by the Eastern Cape Department of Health (ECDOH).
37. The respondent shortlisted the applicant based on the fact that her CV reflected her residential address as Berea East London and during the interview she (the applicant) also confirmed that she resides in East London. The witness was referred to clause 15.1 of Resettlement Policy under costs associated with transfer, which provides-
- *“An employee who, at the request of the ECDOH, is transferred to a new place of work, will be assisted with the associated costs as provided below,*
 - *However, if the distance or radius to be travelled by the employee from home to the new place of work remains the same or less, then he or she will not be entitled to resettlement benefits” (page 9 of bundle B).*
38. The witness stated further that the applicant was never transferred and was never requested by the respondent for a transfer, however even if she was transferred, based on the radius, she would not qualify for the benefit.
39. The applicant was issued with a letter of appointment, an acceptance of appointment and assumption of duty letters which are only issued to newly appointed employees (pages 26 to 34 of bundle A). The notch of a newly appointed employee is not downgraded as experience and qualifications are considered by the respondent when appointing employees. The salary of a newly appointed employee is paid at the end of the month and the employee is being subjected to a probationary period of 2 years and this applies to the applicant as stipulated in her appointment letter.
40. Under cross examination, the witness testified as follows:

41. The applicant was never transferred but responded to an advertisement of a vacant position. She applied, she was shortlisted, interviewed and was appointed to the position of Operational Manager. She does not qualify for the resettlement benefit. The pay date of a newly appointed employee is the end of the month while a transferred employee keeps his/her pay date which is the 15th day of each month. A newly appointed employee is issued with an appointment letter and this does not apply to a transferred employee.

42. The applicant referred the witness to a paragraph that appears in her appointment letter on Resettlement Expenditure which provides-

“A collective agreement makes provision to compensate a person who, in the interest of the State, is transferred or appointed or, owing to certain service requirements, is utilised at a place other than his or her headquarters, or on retirement or death, within the framework of the provisions and the measures and guidelines set out in the collective agreement, for the reasonable expenditure actually and necessarily incurred as a result thereof” (page 30 bundle A).

43. The witness, in response to the above paragraph was that an advertisement was open to everyone to apply and is not a request. “In the interest of the state”, refers to a situation whereby the respondent requests an employee to come and work for ECDOH. An advertisement is a notice of a vacant position which the applicant together with other people responded to.

44. One of the criteria set by the interview panel was to shortlist candidates who reside around Buffalo City Metropolitan Municipality hence the applicant was shortlisted.

45. Under reexamination, the witness stated that even if the applicant was transferred, she could not have qualified for resettlement benefits as she resides within the Buffalo City Metropolitan Municipality, specifically in East London.

46. Transferred or head hunted employees are not interviewed, only newly appointed employees are interviewed before they are appointed.

47. In closing, Mr Blayi argued as follows:

48. The applicant does not qualify for resettlement benefit as she was not head hunted, transferred either by straight or cross transfer. She was purely appointed to an advertised position and this means that she is a

new employee of the department. Her appointment was never initiated by the respondent and was never requested to apply for the position instead, she was appointed after she resigned from her previous position.

49. The applicant did not dispute that her residential address as reflected in her CV is Berea, East London and she also confirmed it even during the interview process. The respondent's representative finally argued that the respondent did not commit unfair labour practice relating to non-payment of resettlement, sundry, relocation and travelling benefits and that the applicant's application must be dismissed.

Analysis of evidence and arguments

50. It is common cause that the applicant is employed as Operational Manager and is based in Bhisho Hospital.

51. It is common cause also that the position was advertised and the applicant was appointed after she resigned from her previous position.

52. As a new employee, the applicant did not dispute that she is still under 24 months' probation period.

53. Although it is the applicant's case in her evidence in chief that she was transferred from Pietermaritzburg to Bhisho Hospital, she could not produce the transfer letter or any documents relating to her alleged transfer.

54. The applicant did not dispute the explanation of the difference between a transfer and an appointment given by Ms Qegu, the second respondent's witness.

55. Resettlement Policy under costs associated with transfer, which provides-

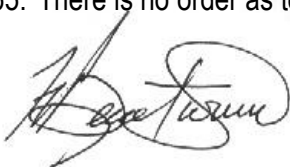
- *"An employee who, at the request of the ECDOH, is transferred to a new place of work, will be assisted with the associated costs as provided below,*
- *However, if the distance or radius to be travelled by the employee from home to the new place of work remains the same or less, then he or she will not be entitled to resettlement benefits"* (page 9 of bundle B).

56. It is undisputed respondent's evidence that the applicant was never requested by the ECDOH but applied for an advertised position.

57. It is also undisputed evidence that the applicant's residential address in her CV is Berea East London which is within Buffalo City Metropolitan Municipality.
58. It must be noted that the second witness evidence to the fact that even if the applicant was transferred, she could not have qualified for resettlement benefits or any costs associated with transfer because of the radius between her place of residence and Bhisho Hospital which is her place of work.
59. On the basis of the above evidence, it is my view that the applicant has failed to discharge the onus to prove the claim of unfair labour practice by the respondent based on benefits.
60. In *Tshishonga v Minister of Justice and Constitutional Development and Another* (2007) 28 ILJ 196 LC it was held that the failure to call a witness is reasonable in certain circumstances, such as when the opposition fails to make out a prima facie case. However, an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the fact as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or may even damage his case."
61. In the circumstances, I deem it reasonable to make the following award:

AWARD

62. The respondent cannot be compelled to pay the Resettlement benefit or any costs associated with transfer to the applicant and or compensate the applicant as she was not transferred but appointed as a new employee by the respondent.
63. The applicant is not entitled to any remedy sought.
64. The case is dismissed.
65. There is no order as to costs.



Ncumisa Bantwini