

ARBITRATION AWARD

Case Number: PSCBC196-22/23

Commissioner: Kelvin Kayster

Date of Award: 16 January 2023

In the **ARBITRATION** between

NUPSAW obo Dzeliwe Fakude

(Union/Applicant)

And

Department of Health & 1 Other (DPSA)

(Respondent)

Union/Applicant's representative: **Mr. M. Lubisi (NUPSAW)**

Union/Applicant's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

Respondents' representatives: **Mr. K. Msiya (DoH) & Ms. S. Motaung (DPSA)**

Respondent's address: _____

Telephone: _____

Telefax: _____

E-mail: _____

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing in this dispute took place on 08 December 2022 on the Zoom virtual platform.
2. The Applicant is Ms. Dzeliwe Fakude, an employee in the respondent's service. She was represented by Mr. M. Lubisi of NUPSAW.
3. The First Respondent is the Department of Health, and was represented by Mr. Kenneth Msiya. The Second Respondent, the Department of Public Service and Administration was represented by Mrs. Salome Motaung.
4. The matter was referred to the PSCBC as a dispute related to the interpretation/application of PSCBC Resolution 7 of 2015. The Applicant contends that the Respondent interprets and applies the said collective agreement incorrectly in that it failed to pay to her a housing allowance.

BACKGROUND AND SUBMISSIONS:

5. The parties agreed that the background of the dispute is common cause. They agreed to exchange and submit written closing arguments. In short, the Applicant was appointed in May 2018, after PSCBC Resolution 7 of 2015 came into operation. At the time of her appointment, she did not apply/enroll with Government Employees Housing Scheme (GEHS). She owns a house since 15 July 2020, after which she was paid the homeowners allowance. She contends that the Respondent failed to advise her properly about her right to be paid a housing allowance. The Respondent was obliged to "enroll, counsel, advice and educate" her on her right to the allowance. She further contends that in terms of clause 4.5.5.2 of Resolution 7 of 2015 she had been eligible to have her housing allowance diverted and accumulated into the individual linked savings facility (ILS). She argues that there was no need for her to apply to have the housing allowance diverted to the ILS, but that the Respondent should have done that automatically. She accordingly claims outstanding housing allowance for the 49 months since her appointment until she was eventually paid the housing allowance.
6. The Respondent argued that clause 4.1.4 of the Resolution requires new employees to enroll with the GEHS in order to access the benefit. The DPSA Ministerial directive requires such employees to complete the application and hand it to the Human Resources (HR) division. The employee will then start receiving the allowance in the month that s/he submits the application. Her appointment letter encouraged her to contact HR for further details on how to access her benefits. The allowance is not implemented automatically.

7. The parties submitted that they are in disagreement about the interpretation of the clauses relating to eligibility for the allowance. The dispute therefore turns on an interpretation of the relevant clauses relating to the requirements for eligibility to the housing allowance.

ANALYSIS:

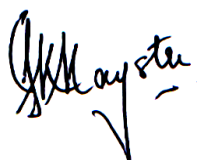
8. This dispute relates to the interpretation of PSCBC Resolution 7 of 2015 (Framework Agreement for the Establishment of a Government Employees Housing Scheme - A collective agreement concluded under the auspices of the PSCBC). The Applicant referred the dispute to the PSCBC after the Respondent failed and/or refused to pay her housing allowance for the period since her appointment until she became a homeowner in July 2020.
9. The parties disagree about the meaning of the relevant clauses of Resolution 7 of 2015. The Applicant contends that she is eligible to be paid the allowance for the specified period, because the Respondent failed to educate and advise her properly about her right to be paid the allowance. She also argued that she should have been paid the allowance and there was no need to apply for it. Conversely, the Respondent argued that in order to qualify for the allowance, she should have enrolled and applied for it, but failed to do so. She did not submit the appropriate documentation, and is as such not eligible for the allowance.
10. Clause 4.1.4 of Resolution 7/2015 provides that employees who wish to use the services offered through the GEHS shall be required to enroll/apply for it. Clause 4.5.5.2 provides that new employees appointed after the signature of Resolution 7/2015 become eligible to receive the full housing allowance to be diverted and accumulated into the individual linked savings facility if they do not own a house. The Respondent therefore concluded that since the Applicant did not submit an application upon her appointment, she did not immediately become eligible for the housing allowance to be paid into an individual linked savings facility. The application/enrollment process is outlined in the Determination and Directive on Housing Allowance for Employees in the Public Service. It expressly requires employees to enroll to become eligible for the benefit.
11. If all employees were required to enroll with GEHS in order to use its services, it speaks for itself that the required supporting documents should be submitted with such enrollment. She became a homeowner in November 2020. There is no proof that the Applicant applied for the housing allowance before then, or submitted any documentation in support of her quest.
12. Clause 4.1.2.1 of Resolution 7/2015 indeed places an obligation on the Respondent to educate employees on the benefits and advantages of home ownership, and to advise employees on available housing options. The Applicant's argument is that the Respondent failed in its duties, and should therefore be

compelled to pay to her the allowance retrospectively. In other words, the Applicant wants to enforce the provisions of Resolution 7/2015. In *HOSPERSA obo Tshambi v Department of Health, Kwazulu-Natal* (2016) 37 ILJ 1839 (LAC) the Labour Appeal Court reiterated that an arbitrator is required to determine the true dispute between the parties. The LAC cautioned that section 24 of the LRA must not be used to remedy unfair labour practices under the pretext that a term of a collective agreement has been breached. Housing allowance is a benefit arising from the collective agreement. The LAC further explained that a dispute over the interpretation of a collective agreement exists when the parties disagree over the meaning of a particular provision; a dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to a particular set of facts or circumstances. The Labour Appeal Court has held that a dispute over the interpretation and application of a collective agreement can exist only where the parties disagree over the meaning and application of a clause in the agreement. Dispute referrals under s 24(5) cannot therefore be used **merely to enforce collective agreements**.

13. There is a difference between interpretation/application on the one hand, and enforcement of a collective agreement on the other hand. In this case, there is no dispute about the meaning of any clause in the collective agreement, and whether it is applicable. The real dispute is that the Respondent allegedly failed to comply with the provisions of the collective agreement. There is a difference between compliance on the one hand, and interpretation/application on the other hand. The Applicant only derives the right from the collective agreement. The enforcement of that right falls under the unfair labour practice jurisdiction.
14. Most recently, in *MEC for Economic Development, Environment and Tourism, Limpopo v Leboho* (case number 87/2021 – handed down on 06 October 2022) the Supreme Court of Appeal (SCA) again drew a distinction between interpretation/application of a collective agreement as opposed to enforcement thereof. The SCA quoted with approval the principles explained in the *HOSPERSA*-judgment, and reaffirmed that disputes about the enforcement of the provisions of a collective agreement do not fall under the ambit of section 24 of the LRA as interpretation/application disputes. It is an unfair labour practice dispute that should be referred to the relevant sectoral bargaining council. It is therefore my finding that the true nature of the dispute is about an unfair labour practice related to the provision of a benefit, as envisaged in section 186(2) of the LRA.

AWARD:

15. The dispute does not fall within the ambit of section 24 of the Labour Relations Act 66 of 1995.

A handwritten signature in black ink, appearing to read 'Kelvin Kayster', positioned above a horizontal line.

Signature: _____

PSCBC Panelist: **Kelvin Kayster**