



**IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL
HELD IN DURBAN, KWAZULU-NATAL**

CASE NO: PSCB 213-16/17

PSA obo SC Nene

APPLICANT

and

Department of Health (KwaZulu-Natal)

RESPONDENT

ARBITRATION AWARD

Date of Award: 14 November 2016

Arbitrator: Saber Ahmed Jazbhay

DETAILS OF HEARING AND REPRESENTATION

1. The dispute relates to the application of PSCBC Resolution 3 of 1999 in respect resettlement allowance.
2. The award therefore follows upon the arbitration, relating to that dispute that took place at the VIP Lounge (Doctors Lounge) of the Department of Health, in Umbilo Road in Durban on the 10th November 2016.
3. The applicant was represented by Cynthia Mbali of the Public Servants Association whilst the respondent was represented by Mr Thembakani Zulu.
4. On the 9th May 2016, the applicant applied for and was subsequently declined the fore mentioned allowance resulting in a grievance being lodged on the 26th May 2016.
5. The outcome of that grievance being unsuccessful, on the 23rd of June 2016. The applicant referred a dispute to the PSCBC relating to the interpretation/application of PSCBC Resolution 3 of 1999 (declined the resettlement allowance).
6. The dispute was scheduled for conciliation on the 1st August 2016 but as the respondent failed to attend, a Certificate on Non-Resolution was issued.
7. The matter was scheduled for arbitration and heard on the 10th November 2016.
8. The matter was electronically recorded.

ISSUES TO BE DECIDED

9. The crisp issue I am to decide is whether the Applicant was entitled to resettlement costs and if I decide in the affirmative, I must direct the amount of such costs.

BACKGROUND AND SURVEY OF EVIDENCE: FACTS THAT ARE COMMON CAUSE AND THEREFORE NOT IN DISPUTE.

10. Prior to his appointment as an Assistant Manager Labour Relations on the 1st July 2014 at the Mahatma Gandhi Hospital in Phoenix, Durban, geographically located in the Ethekwini Metropolitan District, the applicant was based at the Ekuhlenigeni Psychiatric Hospital in Umbogwintwini, Durban also in the Ethekwini Metropolitan District.
11. He was obliged to relocate his residence from Umlazi to Phoenix and he incurred travelling, transport and storage costs.
12. On the 9th May 2016, long after he had relocated, he applied for the resettlement costs, which is a once off costs that the applicant claimed entitlement to in terms of Section XV (Resettlement) of the Resolution 3 of 1999.
13. Both the applicant and the respondent are signatories thereto.
14. For the sake of context, para 1 thereof provides at 1.1 that “The employer ***shall generally meet***, within reason, the actual resettlement costs within the country,

incurred by an employee and her or his immediate family as a result of official duties.....”

15. Section 4¹ (**Privileges for new appointees**) which the respondent strongly relied on provides as follows

“4.1 The employer **may** pay the reasonable actual costs of relocation of a newly appointed public servant to her or his place of work. These expenditures may include reasonable actual costs of;

- (a) travel by the employee and her or his immediate family, and
- (b) transport, insurance and one month’s storage for personal and household goods.”

- 4.2 The employee shall agree in writing to repay the employer’s expenditure for relocation if she or he should leave the public service in a year or less.”

16. Essentially the applicant claims that in terms of the forementioned para 4 of the Collective Agreement PSCBC RESOLUTION 3 OF 1999, he is entitled to the costs actually incurred (a) as a result of him having to relocate or alternatively (b) to be reimbursed for any costs he incurred associated with such relocation, and/or, alternatively to (c) to be paid, a once off allowance equivalent to his monthly salary which is R 22,245.00.

APPLICANT’S SUBMISSION

17. Applicant believes that he is entitled to a resettlement allowance, being the reasonable costs he incurred as a result of him having to relocate at his own expense, in terms of the Collective Agreement PSCBC RESOLUTION 3 OF 1999.
18. It is argued that in full compliance all documents were duly submitted and he was requested to provide a motivation as to why he was entitled to the allowance and it was not disputed that he complied.²

¹ Applicant quotes Paragraph 4 as follows

“ **Privileges for new appointees,**

“4.1 The employer **may** pay the reasonable actual costs of relocation of a newly appointed public servant to her or his place of work. These expenditures **may** include reasonable actual costs of:

- (a) Travel by the employee and her or his immediate family, and
- (b) Transport, insurance and one month’s storage for personal and household goods.

4.2 The employee shall agree in writing to repay the employer’s expenditure for relocation if she or he should leave the public service in a year or less.

4.3 If an employee is recruited from abroad her or his executing authority may provide a once off sum to assist her or him with initial expenses before she or he receives her or his first salary payment.”

² The fact that he gave that undertaking referred to in 4.2 supra supports his contention. See page 32 of applicant’s bundle.

19. His representative argues that it is common cause that the respondent is aware of its obligations³ in terms of the Collective Agreement PSCBC RESOLUTION 3 OF 1999 which remains in force and has not been amended.
20. He goes on to argue, through his representative that by its refusal to, alternatively by its failure to, reimburse him the equivalence of a month's salary (R 22,245.00) the respondent was in breach of the provision relied upon, namely para 4 of the Collective Agreement PSCBC RESOLUTION 3 OF 1999.

RESPONDENT'S SUBMISSION

21. In its submissions the respondent admits that it is aware of the Collective Agreement PSCBC RESOLUTION 3 OF 1999. It disputes that the applicant is entitled to the resettlement allowance or costs as claimed.
22. The thrust of its argument is that para 4.1 postulates that the employer may and not must or by inference, shall reimburse *newly appointed public servants*⁴. This means that such reimbursement is not peremptory but discretionary and in view of financial constraints⁵ it faces during this current financial year, it was not possible to so reimburse him
23. It admitted that it had set a precedent by acceding to another employee's application for resettlement costs. It disputes, however, that the applicant is a 'newly appointed public servant'.
24. Its argument is premised on its reliance that the applicant was not a 'new appointee' and that it was a privilege as opposed to a right that had to be discretionarily applied and that he had applied only in May 2016 long after he had relocated and after he had resigned from his position at Mahatma Gandhi. Accordingly, it argued that the applicant was not entitled thereto.
25. Inferentially therefore it seems to argue that when it "invited" the applicant to make a submission why he was entitled thereto, it impliedly mentioned that "the institution"⁶ was not necessarily going to pay the allowance⁷.
26. It acquiesced that there are procedures that employees in the position of the applicant had to follow and that the applicant had followed the procedures.⁸

³ Which it does not dispute

⁴ What does this phrase mean was not argued but on a plain meaning it means someone newly appointed to a position.

⁵ A point repeatedly made

⁶ This is critical because, it is the State and not "the institution" which is his employer.

⁷ Which is not what he is claiming? What he is claiming is to be reimbursed for the reasonable costs (which is actually a once off resettlement allowance) he incurred (and this was undisputed by the respondent) to relocate from East London to Pietermaritzburg. This is, therefore, different from what the Respondent is arguing.

ANALYSIS OF EVIDENCE AND ARGUMENT

27. This matter relates to resettlement allowance in terms of the Collective Agreement PSCBC RESOLUTION 3 OF 1999.

Applicable legal Principles

28. Section 138(9) provides that “The Commissioner may make any appropriate award in terms of this Act, including , but not limited to, an award-
- (a) That gives effect to any *collective agreement*;
 - (b) That gives effect to the provisions and primary objects of *this* Act;
 - (c) That includes, or is in the form of, a declaratory award.”
29. Therefore I have the power to give effect to collective agreements in terms of the aforementioned provision. It is then open to me to order the Respondent to accede to Applicant’s application if, based on the conspectus of evidence and arguments before me, I am persuaded that this is appropriate.
30. The relevance of section 24 of the Labour Relations Act vis-à-vis to the interpretation and application of a collective agreement has been luminously resolved by the Labour Appeal Court in **Hospersa SA obo Tshambi v Department of Health, KwaZulu-Natal**, [2016] ZALAC 10. It held that the phrase “interpretation or application”, is not to be read disjunctively. Enforcement of a collective agreement is a process which follows on the positive finding about ‘application’ and not ‘a facet of application’.
31. When interpreting a collective agreement, such as PSCB Resolution 3 of 1999, I must follow the judgment of the LAC in **East Cape Forests v SAAPAWU and Others**⁹. In that case it has been held that a collective agreement is not an ordinary contract and the context within which a collective agreement operates under the LRA is vastly different from a commercial contract. Froneman DJP, as he then was, indicated that the primary objects of the Act would be better served by a ‘practical approach to the interpretation and application of collective agreements rather than by reference to *purely contractual principles*.” The operable words are “practical approach”

⁸ There is no evidence, supported by documents, that the Respondent communicated this requirement to the Applicant.

⁹ (2) 1997 (18) ILJ 971 (LAC)

32. I have to ask whether the interpretation yielded by these principles accord with the objectives of the Act. This judgment reminds me that a collective agreement, such as PSCB Resolution 3 of 1999, is “a written memorandum which is meant to reflect the terms and conditions to which the parties *have agreed at the time they concluded the agreement.*”
33. In other words I must strive to give effect to that intention.
34. I now analyze the evidence and the arguments submitted by the parties.
- (a) Paragraph 4 of the Collective Agreement PSCBC RESOLUTION 3 OF 1999 relied upon by the Applicant, which has to be read conjunctively with Personnel Circular No 77 of 2000¹⁰ which refers to that Collective Agreement
 - (b) Even though it is ancillary to the PSCBC RESOLUTION 3 OF 1999, it was relied upon by the Applicant for it is dated the 28th July 2000 and reflects an agreement between the respondent which has not been rescinded or amended.
 - (c) Personnel Circular No 77 of 2000¹¹ which is relevant and very germane for the purposes of this award as it ***pertinently reinforces its commitment to the Collective agreement.***¹²
 - (d) I have difficulty in understanding the respondent’s argument that the allocation of a once off resettlement allowance is discretionary and in view of ‘financial constraints and an application made so late, it is not obliged to pay that allowance.
 - (e) I also have great difficult in wrapping my understanding around the point that the resettlement allowance refers to new appointees as argued by the respondent. There is no merit to this argument if one refers to paragraphs (g) and (h) hereunder for the Collective Agreement 3 of 1999 does not refer to “new appointees” but rather to employees who incur actual resettlement costs.
 - (f) One must bear in mind that this is a once off payment and not a monthly recurrence which will have a serious impact on the operational budget of the respondent and therefore I find no merit in that argument.
 - (g) Even though the Personnel Circular, as couched¹³, is an ancillary document in status to the Collective Agreement Resolution 3 of 1999, it supports the

¹⁰ Which the applicant’s representative omitted to refer me to

¹¹ Page 7-11 of the Applicant’s bundle

¹² Para 8.9

argument that the relevant provision is part of “a written memorandum which is meant to reflect the terms and conditions to which the parties *have agreed at the time they concluded the agreement.*” referred to in the ***East Cape Forests v SAAPAWU and Others*** judgment¹⁴.

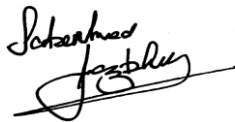
- (h) The purpose of a resettlement allowance is to offset the reasonable costs incurred by new appointees who have to relocate. There was no dispute about this on the part of the respondent.
- (i) Moreover, the Collective Agreement , does not refer to ‘new appointees’ but rather to “employees”¹⁵
- (j) Furthermore, considering the argument that the applicant applied for the allowance long after he had relocated, if one has regard to the entire Collective Agreement, there is no time limit within which the applicant has to claim.
- (k) The argument by the respondent, that the applicant had applied long after he had relocated and only in May 2016, in my opinion that argument holds no water.
- (l) Indeed the offering of an allowance is not a right but at the discretion of the respondent. However, once the applicant was accepted at Mahatma Gandhi Hospital that allowance became due and payable and therefore the applicant was entitled thereto.

AWARD

35. The Respondent must pay the Applicant, a once off allowance equivalent to his monthly salary which is R22, 245.00 less any deduction permissible under any law on or before the 31st December 2016.

36. There is no order as to costs.

DONE AND SIGNED IN DURBAN ON THE 14th November 2016.



Commissioner: Saber Ahmed Jazbhay

(Award PSCB 213-16/17 (PSA obo SC Nene))

¹³ Note “*shall pay.....one (1) month*”

¹⁴ (2) 1997 (18) ILJ 971 (LAC)

¹⁵ See section XV at 1.1