



ARBITRATION AWARD

Case No: **PSHS669-23/24**

Commissioner: **Ntombekhaya Sesani**

Date of ruling: **24 March 2024**

In the matter between:

PSA obo Nicole Flemmer

Applicant

and

Department of Health - Eastern Cape

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The above matter was set down for arbitration on 12 March 2024. The Applicant was represented by Mr Anthony Killian from PSA and Mr Deon May, who is working as the Labour Relations Practitioner in the employ of the Respondent, appeared on its behalf. The proceedings were conducted virtually.

ISSUE TO BE DECIDED

2. I am required to decide whether the Respondent's conduct constituted unfair labour practice or not.

BACKGORUND

3. This matter was previously set down for arbitration in Jansenville on 24 November 2023. The Applicant was represented by Mr B Benson from PSA and the Mr D May, who is working as the Labour Relations Practitioner in its employ.
4. Such proceedings were postponed at the behest of the Respondent. This was because the Respondent's first witness, Mrs January, who was the hospital CEO, was on sick leave. Mrs January was going to testify on the reasons why the Applicant was not paid the money she was claiming from the Respondent.
5. The second witness, Mr Thami Marenene, who was going to testify on the calculations of the monies paid to the Applicant, was attending training at Dora Nginza Hospital in Port Elizabeth.
6. Mr May indicated that without these witnesses, he would not be able to present the Respondent's case and prayed that the proceedings be postponed.
7. Mr Benson did not object to the application made and the proceedings were subsequently postponed.
8. At the beginning of the proceedings set down on 12 March 2024, Mr May again indicated that the Respondent's key witnesses were not available. Both the Respondent's witnesses, Mrs January, who was the hospital CEO, as well as Thami Marenene, the institution's administrative officer, were attending the Change Management Consultation Process, hosted by the Provincial Office in Port Elizabeth.
9. They were aware of the proceedings but indicated that they were not going to attend same, as they were attending the session in Port Elizabeth.
10. Based on the above, he requested that the proceedings be postponed, as he would not be able to present the Respondent's case without such witnesses.
11. Mr Killian objected to the application made. He indicated that the matter was previously postponed at the behest of the Respondent. Postponing same would be to the prejudice of the Applicant.

12. Having listened to the submissions made by the parties, I refused the postponement application for the following reasons –
- 12.1 This matter has been previously postponed for a similar reason raised at the current proceedings;
 - 12.2 The notice of set down was sent to both parties on 19 January 2024, which allowed them enough opportunity to manage their diaries;
 - 12.3 Mr May could not explain to me as to when the Respondent's witnesses became aware of the session in Port Elizabeth, which left me with no option but to accept that they had sufficient opportunity to plan accordingly;
 - 12.4 Also, by simply indicating that they will not be attending these proceedings showed total disregard on their part of these proceedings;
 - 12.5 Postponing this matter again would be in direct contravention of the objective of the Labour Relations Act 66 of 1995, as amended (LRA), which is to speedily resolve labour related disputes; and finally
 - 12.6 The reason advanced in support of such application did not justify postponement of this matter.

SURVEY OF EVIDENCE AND ARGUMENTS

Applicant's case

13. Mr Killian called the Applicant to testify. She was sworn in and testified that –
- 13.1 She started working for the Respondent from 01 January until 31 December 2023. She was working as a community service doctor at SAWAS Hospital in Jansenville, earning R43 109.68 a month.
 - 13.2 Her dispute was three pronged, firstly, it related to resettlement costs, secondly, contributions by the Respondent towards her accommodation, and thirdly, incorrect payment of overtime.
 - 13.3 On the first issue, she relocated her family from Ballito in KwaZulu Natal to the Eastern Cape. In terms of her employment contract, as well as the Respondent's Resettlement Policy, the Respondent was responsible to cover her relocation costs. Such costs included relocation, packing, unpacking, as well as insurance.
 - 13.4 She secured three quotes, as required by the Respondent's policy and the cheapest service provider was appointed to move her furniture.

- 13.5 The appointed service provider failed to arrive on the agreed upon date and she ended up using her own transportation.
 - 13.6 Having advised HR of the above, she was advised to submit the necessary documentation so she could be reimbursed for the expenses she incurred. She did as advised.
 - 13.7 The total cost was R17 709.00. However, the Respondent only paid her R6 890.29. The outstanding amount is R10 905.12. There was no explanation by the Respondent on the short payment.
 - 13.8 On the second issue, the Respondent does not have doctor's quarters to accommodate the community service doctors. She was subsequently instructed to get quotations for accommodation and the cheapest property was approved. Rental was R6 850.00 a month, which translated to R82 200.00 for the twelve months she was contracted to work at SAWAS Hospital.
 - 13.9 On a monthly basis, she submitted to HR an invoice, proof of payment, as well as cash receipt, as required. However, the Respondent failed to pay for her rental for the entire period.
 - 13.10 Mrs Janaury subsequently requested funds from the department for accommodation, as well as furniture relocation for the four community service doctors at the institution, including herself.
 - 13.11 Such request was approved on 20 April 2022. Despite such approval, her accommodation costs were not covered by the Respondent.
 - 13.12 On the last issue, Clause 9.1 Resolution 1 of 2007 states that all overtime would be paid without the option of time off.
 - 13.13 In terms of the Regulations, she was expected to work 80 hours a month, however, the Respondent also paid for overtime worked beyond the 80 hours.
 - 13.14 In May 2023, she was short paid by R2 581.16, which was overtime worked for 8.3 hours. In June 2023, she was short paid by R1 074.50, which was overtime worked for 3.45 hours. In July 2023, she was short paid by R3 643.19, which was overtime worked for 11.68 hours. In October 2023, she was short paid by R2 222.84, which was overtime worked for 6.7 hours.
 - 13.15 The total amount due to her for overtime is R9 521.69.
 - 13.16 She was financially burdened by the Respondent's failure to pay the monies due to her. She was severely prejudiced by such non-payment.
14. Mr Killian submitted the Applicant's first claim was in terms of Clause 15.1 (a) of the Resettlement Policy. The outstanding amount for her resettlement costs is R10 905.05.

15. Also, the Respondent failed to pay the Applicant R82 200.00 for her accommodation costs, which is one of her benefits. The fact that Mrs January's request to cover such costs was approved by the department, was an indication that such monies were due to the Applicant.
16. Further, the overtime claimed by the Applicant was in terms of Clause 9.1 of Resolution 1 of 2007. The total amount is R9 521.69.
17. Based on the above, he submitted that the Respondent's failure to pay the Applicant the above mentioned monies constituted unfair labour practice. He prayed that the Respondent be ordered to pay such monies. He also prayed that the Applicant be paid compensation in terms of section 194 and 195 of the Labour Relations Act 66 of 1995, as amended.

Respondent's case

18. The Respondent did not call any witnesses to testify. Also, there was no submissions made in support of its case.

ANALYSIS OF EVIDENCE AND SUBMISSIONS

19. The Applicant referred an unfair labour practice dispute which basically meant that she had an onus to prove that the Respondent's constituted unfair labour practice.
20. The Applicant's testimony on the monies due to her was in detail. Such monies were part of her benefits. She also submitted documentation in support of the monies due to her.
21. The monies owe to her relating to her resettlement was part of her contract, as well as the policy in place. It was a benefit due to her. In light of the fact that there was no evidence from the Respondent as to why it failed to pay such monies, it is my finding that such failure constituted unfair labour practice.
22. Same applies to the Respondent's failure to cover costs for the Applicant's accommodation.
23. The claim for overtime worked and not paid was in terms of Resolution 1 of 2007. The Applicant submitted documentation in support of her claim for such monies.

24. I do appreciate the Applicant's evidence in this regards, however, monies claimed by an employee in respect of overtime worked forms part of that employee's remuneration, not a benefit, as set out in terms of section 186 (2)(a) of the LRA.
25. This therefore means that the Applicant's claim for outstanding overtime monies does not fall within the ambit of the above section.
26. Having considered the Applicant's evidence and submissions, it is my finding that the Respondent's failure to pay the Applicant accommodation and resettlement costs, constituted unfair labour practice and as such cannot be condoned.
27. Also, I need to state that with the Applicant's evidence not challenged nor disputed, I have no reason not to believe same. Consequently, I made the following award:

AWARD

28. The Respondent, The Department of Health – Eastern Cape, is ordered to pay the Applicant, Dr. Nicole Flemmer, an amount of R93 105,12 (Ninety three thousand, one hundred and five rand twelve cents), claulated as follows –
R10 905.12 – Outstanding resettlement costs
R82 200.00 – Accommodation costs
29. The above money must be paid on/before 08 April 2024.



Ntombekhaya Sesani