

IN THE EDUCATION LABOUR RELATIONS COUNCIL

CASE NUMBER PSES 253-05/06

DATE 25 AUGUST 2006

C.A. PERSENCE

APPLICANT

WESTERN CAPE EDUCATION DEPARTMENT

RESPONDENT

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

The arbitration took place at the offices of the Western Cape Education Department in Cape Town on 21 October 2005, 25 November 2005, 24 February 2006, 21 April 2006, 25 May 2006 and 13 July 2006.

The applicant, Mr. C. Persence was represented by Mr. G. Nortje, a practising attorney. The respondent, the Department of Education Western Cape, was represented by Mr. C. Miller, a labour relations officer in the employ of the respondent.

THE ISSUE IN DISPUTE

The applicant alleges an unfair labour practice regarding the failure of the respondent to pay settlement costs.

THE BACKGROUND TO THE DISPUTE

Persence is in the employ of the respondent as a psychologist and earns a salary of R135198 p.a. as at December 2004. In January 2005 he took up a position with the respondent when he was transferred from the department of education in Mpumalanga. The transfer was into the same position and is referred to hereinafter as a horizontal transfer.

SUMMARY OF EVIDENCE AND ARGUMENT

The following extract from the applicant's closing arguments was common cause between the parties:

1. A short summary of the evidence provided by the Applicant is as follows:
2. He was transferred from the Mpumalanga Education Department on a horizontal transfer, to the respondent into the post of School Psychologist.
3. He was appointed into this post by the Respondent on 4 November 2004, with effect from 1 January 2005. (Page 15 of the bundle of documents).
4. In accordance with procedure to be followed, he terminated his service with the former department on or about 29 November 2005 and took up his post on 1 January 2005.
5. On 25 November 2005 he made application to be paid his resettlement costs. (Pages 20-21)

6. On 25 November 2004 he received a fax from the Respondent advising that in terms of Circular 90/98 he does not qualify for payment of the resettlement costs, annexing copies of regulation 90 and Circular 90/98. (Page 26).
7. He was also telephonically advised herein, by a certain Ms H. Truter of Respondent.
8. He did not accept this and she referred him to her supervisor, Mr Galant. (Page 26)
9. He discussed the matter telephonically with Mr Galant, indicating that he was not satisfied with the response by them.
10. Mr Galant referred him to Mr Norman Daniels
11. He contacted Mr Daniels telephonically and voiced his dissatisfaction.
12. Mr Daniels advised him that he could make representations to the Respondent regarding this. The Respondent in cross-examination of the Applicant never disputed this and in fact conceded that Daniels did advise the Applicant to make representation, but that this fact did not mean that it would be considered favourably.
13. On 26 November 2004, Applicant duly made his representations to the Respondent, for attention of Mr Daniels (pages 28 – 30. On 26 November 2004, Applicant also made representations to the MEC of Education in the Western Cape regarding the same issues.(pages 32- 38)
14. No formal response was received from Respondent on the Applicant's representations.
15. On 29 November 2004, the MEC sent Applicant an interim response advising that the matter is receiving attention (page 40)
16. On 5 April 2005, the MEC provided Applicant with a formal response on his representations, advising that "... the Provincial Policy as well as Regulation 9.1.. do not make provision for the payment of resettlement costs to educators who are transferred on the same post level...." (page 41)
17. It is pointed out that this was the only formal response the Applicant received on his formal representations.
18. This response by the MEC was made to the Applicant on 5 April 2005, i.e. 3 months and 5 days after the Applicant has already taken up his post.
19. The Applicant was dissatisfied with the response by the MEC
20. On 16 May 2005 the Applicant lodged a Grievance, inter alia, in this respect. (Pages 43-45).
21. On 23 May 2005 the Respondent addressed an interim response to the Applicant in respect of his Grievance, advising, inter alia, that it has been referred to Mr Daniels and for investigation and finalisation.
22. No further response was received from the Respondent in respect of the Grievance.
23. Accordingly, on 27 June 2005, the Applicant referred the dispute to the Council, pointing out that he has not received any response from the Respondent within the time frame laid down by the Council. (pages 5- 14)."

Charles Andrew Persence testified under oath. After he had received his letter of appointment on or about 25 November 2005 he decided he must give the Mpumalanga department of education 30 days notice. Upon enquiry on 25 November 2006 he was told by the respondent's Mrs. Herter that he does not qualify for the benefit and that the respondent would not be giving it to him. He was then further informed by Mr. Galant and Mr. N. Daniels that if his transfer were not in respect of a promotion post he would not qualify for the benefit. He then raised the issues in respect of circular 90 of 1998 (which circular contains the respondent's policy regarding resettlement costs) with Daniels. Daniels then told him he could make representations regarding relocation assistance and his motor vehicle subsidy.

Mogamat Kashief Galant testified under oath. He is familiar with regulation 90. It was the respondent's policy to cover the transfer costs of educators appointed into a higher or promotion post. The respondent had informed Persence that it would not be paying his transfer costs as his was a horizontal transfer. In all of the other provincial education departments that department would pay all resettlement costs regardless of which level the transfer was at.

He also testified that the respondent was more likely to pay resettlement costs where an educator had been appointed into a promotion post as the respondent was more likely to want such a person. A further reason for the exclusion of the benefit from educators on a horizontal transfer was that of budgetary constraints.

ANALYSIS OF EVIDENCE AND ARGUMENT

The applicant has argued that regulation 90 is of national application and that it should apply. The applicant argues therefore that circular 90/98 is ultra vires as the head of department does not have the power to make policy which excludes educators who are being transferred. Although the respondent has argued that it is incumbent on both parties to disclose at the interview their respective understanding of the qualification for relocation costs, I am of the view that it is most unlikely that Persence would have known of circular 90/98. I also cannot agree with the argument of the respondent that it cannot be expected to go through hundreds of circulars with a job applicant. The respondent would be aware of the fact that inter-provincial relocation costs would be high and accordingly should bring its policy to the attention of a relevant job applicant. The respondent would also be aware of the fact that it has introduced a circular in terms of regulation 90.

I do however agree with the respondent that Persence did in fact become aware of the problem prior to his resigning his post in Mpumalanga. At that time he was also aware of the fact that he might not have a favourable outcome to his representation made to the respondent.

Persence had however experienced transfers within State departments and in which circumstances his resettlement costs had been paid by the recipient department in particular the department of education in Mpumalanga. There is thus no reason why he should not have thought reasonably that his resettlement costs in this instance would be paid. As circular 90/98 itself states that the principal or the school governing body should inform the applicant of its contents, it would now be unreasonable for the respondent to argue that Persence ought not to have taken up the post upon being informed by the respondent on 26 November 2004 that he would not be eligible for resettlement costs to be paid to him.

The testimony of Galant is interesting in respect of his having said that the respondent was more likely to pay where the appointment had been into a promotion post. He argued that this was the case as it indicated that the respondent wanted that particular educator. This argument is unacceptable as it would imply that the respondent had not wanted Persence in the post into which he had been appointed. This is illogical and is rejected. The respondent did want Persence in the position that is why it had appointed him. As it is so that the respondent had wanted Persence it should pay him in accordance with the reasoning expressed by Galant. Galant's further testimony therefore makes sense in respect of the other education departments nationally paying the resettlement costs of even educators on a horizontal transfer. This would comply with the provisions of regulation 90 and would be in accordance with the most fundamental principle in the

employment contract viz. that both parties want to be involved in an employment relationship with each other.

While it is so that Persence had not introduced any documentary evidence of his relocation costs there is sufficient oral evidence presented at this arbitration for me to conclude what the quantum of such costs is. In this regard Persence himself had testified that his actual accommodation costs were R1513 (one thousand five hundred and thirteen rand) per month for 3 months. I accept too as reasonable Persence's claim for traveling from Mpumalanga to the Western Cape being 1513 kilometers at R1.46 (one rand and forty six cents) per kilometer.

I am furthermore of the same mind as the applicant in considering the construction of regulation 90 in respect of the content of such policy. It is clear that the purpose of regulation 90 is to give relief to persons such as Persence. While there are certain guidelines in regulation 90 these are in place in order to guide the head of department in its giving effect to the intention of the legislature. To invoke these guidelines in such a fashion as to defeat the intention of the legislature would result in such action being ultra vires. To this extent then circular 90/98 is itself ultra vires and consequently so is the respondent's refusal to pay Persence's resettlement costs.

It is furthermore so, as argued by the respondent, that regulation 90 makes provision for actual costs incurred by a beneficiary under this regulation. Persence would therefore be required to furnish proof of his actual costs incurred to the respondent in order for it to comply with regulation 90.

Regarding the respondent's argument pertaining to budgetary constraints, here too the employer would be entitled to take such constraints into account. The employer would however be enjoined to budget in such a fashion that the beneficiaries under this provision would indeed remain beneficiaries and not be excluded from the provisions of the regulation. Such is the peremptory nature of regulation 90.

While I am of the view that the respondent may make policy in respect of the quantum it may pay any educator the respondent has clearly not included educators on a horizontal transfer. As a consequence thereof the respondent has not put in place any restrictions on the relocation costs incurred by Persence.

Having considered all the evidence and argument presented at this arbitration I find that the conduct of the respondent in denying Persence his resettlement costs to be unfair. I do however point out that these costs are the actual costs incurred by Persence as this he is now able to furnish to the respondent. As the applicant has correctly pointed out, regulation 90 has been installed in order to give relief to the persons who benefit in accordance therewith. I am therefore of the view that it is remiss of Persence to demand that the respondent pay his accommodation costs based on quotations obtained from a four star hotel. Such a demand goes beyond the purpose of granting relief. I do however find acceptable Persence's testimony that he in fact then ultimately paid R1500 per month for three months in respect of his accommodation.

In respect of the transportation of his furniture Persence has testified that his furniture had still not been moved from Mpumalanga. In respect of this aspect of Persence's claim I do however find acceptable his testimony in respect of the quotation at Page 97 of the bundle of documents, that he had obtained a quotation from Stuttaford Van Lines to transport his furniture for R7165.78. I also find acceptable Persens calculation of the distance from Mpumalanga to Cape town of 1500 kilometres at R1.46 per kilometer.

Having considered all the evidence and argument presented at this arbitration I find that the failure of the respondent to pay Persence's resettlement costs constitutes unfair conduct within the context of section 186 of the Labour Relations Act 66 of 1995 as amended and is consequently an unfair labour practice.

Regarding the respondent's motor vehicle policy, the national transportation policy it is clear that officials of a State department, which will include the respondent, qualify for the subsidy upon proof of having traveled 21,000 kilometres. The application of the respondent's policy to only specific areas is incorrect as the criterion in terms of the national policy pertains only to distance traveled. To deny Persence this benefit upon his qualifying therefore would constitute an unfair labour practice in terms of section 186(2) of the Labour Relations Act 66 of 1995 as amended. Persence has however not adduced evidence of 21,000 kilometres traveled in accordance with the national transportation policy and therefore cannot claim to have been denied the benefit.

AWARD

In making this award I have taken into account the provisions of the Labour Relations Act 66 of 1995 as amended.

I order the respondent to pay Persence resettlement costs in accordance with the provisions of regulation 90.

I therefore order the respondent to pay Persence's relocation costs as follows:

Accommodation $R1,500 \times 3 = R4,500,00$

Traveling 1513 (kilometers) $\times R1,46 = R2\,208,98$

I order the respondent to pay Persence for the transportation of his furniture an amount of R7165.78. Although this is not the actual cost incurred by Persence it would be unfair to have Persence first pay out of his own pocket and then to claim the money back from the respondent. The evidence in any event suggests that the respondent in accordance with its practice usually pays on receipt of a quotation in this regard.

I also order the respondent to pay Persence compensation equal to the salary he would have earned for one month in the amount of R11266,50 as he had to go to great length and expense to get the benefit to which he is entitled.

I accordingly order the respondent to pay Persence by no later than 30 September 2006 after which it will attract interest at the legal rate of interest the amount of R25141,26 (Twenty five thousand one hundred and forty one rand and twenty six cents) as this is just and equitable.

I have also considered the argument of the applicant for a costs award in respect of the respondent's application for absolution from the instance. I find it would be inappropriate to award costs in favour of the applicant as the respondent's application for absolution from the instance cannot be said to have been frivolous or vexatious.

L.O Martin
Panelist