



ARBITRATION AWARD

Panellist/s: Paul Kirstein
Case No.: PSHS525-10/11
Date of Award: 3-Mar-2011

In the ARBITRATION between:

**IN THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORIAL
BARGAINING COUNCIL (HELD AT CAPE TOWN)**

CASE NO: PSHS525-10/11

In the matter between

NEHAWU obo B LENGISI

Applicant

and

NATIONAL DEPARTMENT OF HEALTH

Respondent

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1.

The matter was set down for arbitration on 25 February 2011 at the Forensic Chemistry Laboratory in Cape Town. The applicant was represented by A Mosia, an official of NEHAWU. The respondent was represented by T Tau, an official in the employment of the respondent. The respondent submitted a bundle of documents marked bundle "A". The arbitration was mechanically recorded.

ISSUE IN DISPUTE

2.

The applicant contends that the respondent committed an unfair labour practice in terms of Section 186(2)(c) of the Labour Relations Act, Act 66 of 1995 ("LRA") in that the respondent failed or refused to reinstate the applicant in terms of a settlement agreement dated 12 November 2009.

SUMMARY OF EVIDENCE

3.

The applicant testified and referred to the conditions of the settlement agreement dated 12 November 2009. Clause 1 of the settlement agreement reads as follows:

"Full reinstatement as Section Head of the Blood Alcohol Section with full Management Responsibility i.e. based on attached Job description."

The applicant referred to e-mails confirming that his direct supervisor was made aware of the settlement agreement. The applicant referred to a new job description that was not attached to the settlement agreement. The applicant resumed his duties as Section Head of the Blood Alcohol Section on 12 November 2009. The applicant referred to staff issues. No staff members were allocated to the Blood Alcohol Section. Staff rotated from different sections. During the

rotation period the applicant was not managing the staff. The applicant referred to equipment issued and the non-operating status of equipment. The applicant indicated that he carried the responsibility of equipment not functioning. The applicant referred to the backlog issue. The applicant indicated that he was left in a void and was not given a status report regarding overtime allocated and claims for overtime. The applicant referred to meetings that he was never informed of. The applicant contends that he has been given the responsibility of Section Head of the Blood Alcohol Section but not the authority to execute the responsibility.

4.

During argument the applicant indicated that he was transferred to Johannesburg with effect from 1 March 2011. The remedy the applicant seeks is compensation. The applicant indicated that remuneration in the amount of two month's remuneration would be just and equitable.

5.

AM Schillack, the Head of the Forensic Laboratory, testified on behalf of the respondent. Schillack indicate that the applicant was fully reinstated in his position of Section Head of the Blood Alcohol Section with effect from November 2009. Schillack referred to the rotation of staff members and the operational requirements to give staff exposure to all the sections at the laboratory. During the

rotation period the applicant was responsible to manage the staff working in his section. Schillack referred to the vacant posts and the prospects of filling the vacant posts in the near future. The vacant posts were not filled due to a moratorium. The moratorium has been lifted recently. Schillack referred to the equipment issued and gave a report on what systems were functional. Schillack referred to new equipment that will be sourced in April 2011. Schillack indicated that the applicant has been invited to all management meetings. Some of the meetings he did not want to attend. During cross-examination Schillack indicated that according to SANAS requirements the applicant needs to be a technical signatory. The applicant refused to be a technical signatory on the basis that it was not part of the settlement agreement condition.

ANALYSIS

6.

It is common cause that the applicant and the respondent entered into a settlement agreement on 12 November 2009 upon which the applicant was fully reinstated as Section Head of the Blood Alcohol Section with full management responsibility. It is common cause that the applicant took up the post of Section Head of the Blood Alcohol Section with effect from 12 November 2009. It is however the applicant's contention that there was not compliance with the settlement agreement in that

the applicant was not put in a position with regard to staff, equipment and the attendance of meetings to fully comply with his responsibility as Section Head of the Blood Alcohol Section. It is implied in the settlement agreement that the applicant should be placed in a position to execute his responsibilities in accordance with his job description. The job description of the applicant has been amended since the settlement agreement has been concluded. The amendment of the job description is not an issue that has a material effect on the dispute that needs to be arbitrated. The real issue to be determined is whether the applicant was put in a position to execute his responsibility. The first issue that the applicant complained about is the lack of staff at the Blood Alcohol Section. Schillack explained why there was a rotation of staff system in place. Staff members have been given the opportunity to have exposure to all sections in the laboratory. If staff is only allocated to the Blood Alcohol Section their exposure as analysts would be limited. The rotation system implemented does seem to be a rational operational requirement. The Blood Alcohol Section was not left without staff. The indication is that the applicant failed to accept the responsibility as a technical signatory. The applicant therefore did not sign analyst reports as technical signatory. If the applicant wants to claim full management responsibilities he must accept that he cannot choose what responsibilities he wants to execute.

The next issue the applicant referred to was the non-operating status of equipment. Schillack indicated that in the new budget year, starting in April 2011, the issue of equipment will be addressed. The main issue, however, seems to be the lack of staff to fully utilise the available equipment. The staff issue has been addressed after the moratorium of the appointment of new staff has been lifted. The indication is that the equipment can be utilised more effectively once the new appointees resume duty. The applicant indicated that he was not invited to meetings. Schillack's evidence is that he was invited to all management meetings. The evidence presented at the arbitration does not confirm that the applicant was deliberately excluded from management meetings.

8.

It is accepted that the applicant had some difficulty to execute his functions according to the job description due to the lack of staff and non-functioning of equipment. The lack of staff as well as the non-functioning of equipment will be, according to the evidence of Schillack, addressed in the near future. The applicant was given a responsibility as Section Head of the Blood Alcohol Section. The responsibility can only be executed with the available resources. The indication is that the applicant had done everything possible with the available resources to execute his duties. If the applicant as Section Head of the Blood Alcohol Section had done everything possible to secure the necessary resources and was not able to

do so the applicant cannot be held liable for not executing his responsibilities in terms of a job description. The indication is that there were indeed insufficient resources, i.e. staff and functional equipment to deal with the backlog and to deliver an acceptable service. It must however be accepted that the laboratory functions within the constraints of a budget and other regulatory measures. The indication is that once the moratorium on recruitment of staff was lifted the issue of staff was addressed. The indication is that the new budget allows for equipment to be upgraded and that action in this regard has been taken. Although the applicant may not have been put in a position to fully execute his duties as Section Head of the Blood Alcohol Section in terms of the settlement agreement it cannot be determined that the failure was caused by deliberate and/or negligent action from management of the Forensic Chemistry Laboratory. External issues such as the moratorium on the recruitment of new staff and budget constrains was the main cause of the failure to allow the applicant to fully execute his managerial functions in the capacity as Section Head of the Blood Alcohol Section. In such circumstances it cannot be determined that the respondent failed or refused to reinstate the applicant in terms of the settlement agreement and therefore conducted an unfair labour practice in terms of Section 186(2)(c) of the LRA. The determination is however of academic value to the extent that the applicant has been transferred with effect from 1 March 2011.

AWARD

1. The application is dismissed.
2. No order as to costs.

SIGNED AT PRETORIA ON THIS THE 1ST DAY OF MARCH 2011



PH KIRSTEIN