



**PHSDSBC
PUBLIC HEALTH AND
SOCIAL DEVELOPMENT
SECTORAL BARGAINING
COUNCIL**

ARBITRATION AWARD

Panelist/s: **Advocate Ronnie Bracks**
Case No.: **PSHS536-10/11**
Date of Award: **14 July 2011**

In the ARBITRATION between:

NEHAWU obo M Siwele and Other

(Employee)

and

Department of Health- Gauteng Province

(Respondent)

Employee Representative: **NEHAWU obo M Siwele and Other**

Employee's address: **Private Bag X9311**

Halfway House

1865

Telephone: **(011) 817 5059**

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Company/Employer representative: **Department of Health- Gauteng Province**

Company's address: **P.O. Box 8311**

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DETAILS OF HEARING AND REPRESENTATION

- A. The Arbitration was scheduled for hearing at the Respondent's office at Bank of Lisbon Building 14th Floor, cnr Sauer and Market Streets, Johannesburg on 3 June 2011. The Employee was represented by Mr. Ntshebe, a legal representative. Mr. Sipiwe Mazibuko, the Labour Relations Officer of the Employer represented it. *The proceedings were recorded both manually and electronically.*

ISSUE TO BE DECIDED

- B. Whether or not the Applicant was translated to the correct level in terms of the Council's Resolution 3 of 2007 commonly known as Occupational Specific Dispensation of Nurses (OSD).

BACKGROUND TO THE ISSUE

- C. The Applicant was employed by the Department of Health and Social Development as an Emergency Care Practitioner Chief Divisional Officer: Emergency Care with effect 1st July 2006. He was laterally transferred to the post of Station Manager: Emergency Medical Services with effect from 1st July 2009.
- D. The Applicant alleges that he was not properly translated to the OSD structure. He further alleges that he should have retained the position of Chief Divisional Officer which is the equivalent of Sub District Manager.
- E. The arbitration was set down for the 31st March 2011 when it was postponed to the 3rd June 2011. The parties submitted a pre-Arbitration minute and agreed that no evidence would be led but that they would address the issues by way of written submissions.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

- F An agreed bundle of document was submitted.

Employees' Evidence:

The Applicant's representative made the following submissions:

- The Applicant was appointed as an Emergency Care Practitioner Chief Divisional Officer: Emergency Care with effect from 1st July 2006 (Annexure 12).
- With effect from 1st July 2009 he was laterally transferred to the post of Station Manager: Emergency Medical Services (Annexure 16).
- According to the current structure i.e. after the implementation of OSD the post of Chief Divisional Officer is equivalent to the post of Sub-District Manager, while the post of Station Manager (07) is equivalent to Station Manager. As Chief Divisional Officer the Applicant's responsibilities were to manage several stations, namely Natal Spruit, Germiston and Tembisa. This was discussed and agreed in the meeting held on 8th June 2009 (Annexure 10; 6.1).
- After receiving the letter of lateral transfer, the Applicant lodged a grievance of unfair demotion to the level of Station Manager (Annexure 2) and requested to be taken back to his original post of Chief Divisional Officer which is now called Sub-District Manager. The grievance was never resolved. After lodging the grievance the Applicant was given the responsibility of managing only one station namely Germiston. This was done to suit the Respondent's decision and to justify that the Applicant was now managing only one station according to the post of Station Manager as stated in the lateral transfer letter (Annexure 16).
- In the process of completing the OSD form (Annexure 15) parts D and E were filled in on behalf of the Applicant – part E stated that his proposed OSD position with effect from 1 July would be Station Manager. The Applicant only filled in parts A to C, signed part F and dated it the 16th October 2009.
- Annexure 17 states that his date of entry to the post of Station Manager was 1st September 2006 contrary to his letter of appointment (Annexure 12) which states that he was appointed as Chief Divisional Officer: Emergency care with effect from July 2006.
- The Applicant never applied for and accepted the post of Station Manager as stated in Annexure 17. This was done unilaterally by the Respondent as per Annexures 16 and 15 (parts D and E) of the bundle of documents.
- According to the previous structure of EMS, Chief Divisional Officer reported to Assistant Director. In translation to the current structure Chief Divisional Officer is equivalent to Sub-District Manager and will report to District Manager (Assistant Director in the previous structure).
- Annexure 17, in the bundle of documents, states that as Station Manager the Applicant will report to Assistant Director: EMS. This is contrary to the actual protocol which dictates that a Station Manager will report to the Sub-District Manager who will in turn report to the District Manager.
- The Applicant is currently reporting to Mr. Galela who is Acting District Manager. It therefore cannot be correct that the Applicant as Station Manager should report to the District Manager. Instead he should report to the Sub-District Manager. This literally translates that the Applicant is reporting to the same level as his.
- The Applicant was wrongly translated to the rank of Station Manager which is lower than his actual rank of Sub-District Manager (Chief Divisional Officer).

- Even when OSD was implemented, the Applicant was considered and paid at the level of Station Manager as opposed to the level of Sub-District Manager.
- They prayed that it be ruled in the Applicant's favour and that he should be considered for his actual post of Sub-District Manager and that his OSD be implemented from the level of Chief Divisional Officer to District Manager with effect from 1 July 2009.

Employers' Evidence:

The Respondent's representative made the following submissions:

- The Applicant is an employee of the Department of Health and Social Development and is stationed at the Emergency Medical Services (EMS) Development in the Ekurhuleni District.
- The Applicant is demanding that he be translated correctly to the OSD structure and retain his ranking of Chief Divisional Officer which is the equivalent of Sub-District Manager in the new ranking structure.
- Prior to the Department moving the Applicant to the Ekurhuleni district he was placed at the Midrand EMS office as an Emergency Care Practitioner: Chief Divisional Officer. There were also other emergency care practitioners, e.g. Advanced, Basic and Intermediate.
- The then CEO of EMS took a decision to restructure the emergency services and to utilize personnel productively and assigned new responsibilities to the officers including the Applicant.
- The Applicant and others were redundant in the Midrand offices, so after consultation with all the officers in the Midrand office the CEO decided to relocate all of them. Page 5 in the bundle is the attendance register of the meeting held with the EMS officers on 8 June 2009. The minutes (page 10 of bundle A) indicate that Mr. Manenze was the only person who was not happy with the placement/restructuring and that all the other officers accepted.
- This in essence means that the Applicant was consulted and he accepted management's restructuring which had an effect on his role in the department.

- The OSD was negotiated and finally signed on the 7th August 2009 and the Applicant was moved to Ekurhuleni on the 1st July 2009. This was prior to the agreement being signed. The implementation directive was signed in October 2009.
 - At the time the Applicant was Station Manager grade 3 and when the OSD was implemented a number of factors were taken into consideration, such as that you must be registered with the Health Professions Council of South Africa (HPCSA) as an Ambulance Emergency Assistant (AEA) for grades 3 and 4.
 - The Applicant complied with the above requirements for the OSD being registered as an AEA (page 15 bundle A) which led to him being translated to 165 960 from 163 596 (page 13 bundle A).
 - The lateral transfer was an agreement between the EMS officers and management; page 16 of bundle A is a letter which serves as a notice to the Applicant implementing the 8 June 2009 decision.
 - Page 4, bundle A confirms that management did not act unfairly as it should be realized that there is no difference between Chief Divisional Officer and Station Manager. As a matter of fact management addressed the grievance of officers relating to job description as requested on page 4.
 - The argument by the Applicant that he was demoted is totally misleading. In page 4 of bundle A the aggrieved parties argue "your advert in the Sunday Times for post of Station Manager dated 6 July 2008 refers. We are currently on level 8 employed at EMS Midrand. We are on the same level as the advertised post..." This statement by the aggrieved parties confirms that there was nothing malicious in management giving them the title of Station Manager.
 - The Applicant is confused as he cannot say that the Chief Divisional Officer and Station Manager posts are the same and then go on to say that he was demoted. Management acted in the best interest of the department by restructuring the EMS, but also assisted in ensuring that the redundant workers are placed where they would be gainfully employed.
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- It is the Respondent's view that there was no malice in transferring the officers to different offices and the translation that followed.
 - Based on the above submission, the Respondent prayed that it be ruled in its favour and that the Applicant's case be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT

1. The Labour Relations Act (LRA) prohibits unfair labour practices. An unfair labour practice is any unfair act or omission at the workplace, involving:

- unfair conduct of an employer relating to the promotion or demotion or probation of an employee;

- unfair conduct relating to the provision of training of an employee;
- unfair conduct relating to the provision of benefits (for example, pension, medical aid, etc) to an employee;
- unfair disciplinary action against an employee (short of a dismissal). For example, a final written warning or unfair suspension;
- the refusal to reinstate or re-employ a former employee in terms of any agreement. For example, a retrenchment;
- an occupational setback in contravention of the Protected Disclosures Act (No 26 of 2000) because an employee has made a protected disclosure defined in that Act. For example, an employee is denied overtime because he made a disclosure in terms of the 'Disclosure of Information Act'.

2 In terms of the definition of what constitutes an unfair labour practice the onus rests with the Applicant to show that the Respondent's actions were unfair.

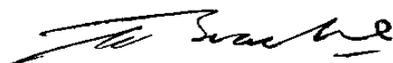
3 From the submissions made it is clear that the Respondent had restructured the Midrand office. The Respondent's representative alleges that this process was done in consultation with the Applicant and made reference to a minute where this was recorded. In terms of the minute of a meeting held on the 8th June 2009 it was stated "4.5 CEO indicated that they are going to move people for Operations and place them according to the area of residence but it will not cover all accordingly." The minute then continues to set out how the employees will be placed. It is clear from the minute that there was no consultation. It emerged that the Applicant was placed with Mr. Mkhize in Ekurhuleni as Station Manager. The Respondent did not present the agreement which was supposed to have been reached with the Applicant to be laterally transferred.

4. The undisputed evidence is that the Applicant was in the position of Chief Divisional Officer and with the restructuring he is now in the position of Station Manager. This is tantamount to a demotion and this is what our courts have stated in this regard. The Labour Court in ***Van Der Riet v Leisure Net t/a Health and Racquet Clubs [1997] 6 BLLR at 721 (LAC)***, held that, "failure to consult with an employee in a non – disciplinary demotion is an unfair labour practice". In ***Du Toit and Others Labour Relations Law (4th Edition at 465)*** the learned authors state that, "In law demotion could also mean a reduction or diminution of dignity, importance, responsibility, power or status even if salary, attendant benefits and rank are retained".

5 In light of the above it is my view that the Applicant had discharged the onus of showing that he was unfairly demoted. Flowing from this is also the fact that as a result he would have been incorrectly translated and should be translated to the position of Sub-District Manager.

AWARD

1. The Respondent is ordered to promote the Applicant to the position of Sub-District Manager and to pay him remuneration and benefits applicable to that position.
2. The promotion referred to in 1 above shall operate retrospectively from the 1st July 2009.
3. Respondent is further required to pay all remunerations and benefits as back pay, resulting from the retrospective operation of the promotion.
4. The above order should be complied with within 30 days from the date of the Respondent receiving the award



Adv. RONNIE BRACKS