



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: PSHS990-16/17

Commissioner: T ERASMUS

Date of Award: 6 April 2017

In the matter between:

NEHAWU obo DANIEL SWARTZ

(Union/Applicant)

and

DEPARTMENT OF HEALTH- WESTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for Arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995 ("the LRA") and was heard at the 1st Floor Boardroom, Western Cape College of Nursing, Klipfontein Road, Athlone on 29 March 2017. The Applicant was represented by Mr A Menier of NEHAWU, whilst the Respondent was represented by Mr A Solomon, Labour Relations Officer at Respondent.

ISSUE TO BE DECIDED

2. I must decide whether Applicant was subjected to an unfair labour practice related to demotion.

APPLICANT'S OPENING STATEMENT

3. Applicant was employed at the Bellville Technical workshop and he previously worked at Stikland Hospital. He was transferred from the Stikland Hospital to Karl Bremer/Bellville Technical workshop during 2008, whereafter he was moved to the medical gas department and has worked there ever since.
4. Applicant is now being trained as an electrician in SETA accredited training. Applicant did not receive any form of exposure during the past three years and he feels that there is no exposure in the electrical department, therefore he believes that his career prospects will be better in the medical gas field.
5. Respondent and especially Mr Stefan, his deputy director, asked Applicant to move back to the electrical engineering section. Applicant views it as a demotion, as there are not enough career prospects in that area. Stefan also placed unnecessary pressure on him. Applicant lodged various grievances in the past relating to victimization. Applicant seeks an order in terms whereof he may remain in the medical gas department, with better career prospects. Reference was made to page 24 of bundle A, a document which Applicant feels is private and highly confidential, being a Psychiatrist report and a request was made that the medical report is treated with the utmost confidentiality. Applicant believes he will be demoted if he is not moved back to the gas section.

RESPONDENT'S OPENING STATEMENT

6. Respondent stated that Applicant was transferred from Stikland Hospital to Bellville technical medical workshop. His job title was that of senior handyman, and he worked there until October 2014. He was moved over to the medical gas workshop, he was actually moved by the supervisor of the electrical workshop. Although Applicant was appointed in the electrical department, there was no vacant post, therefore he was appointed in the medical gas section. His original appointment was at Bellville medical gas. The post at medical gas has been abolished. A post was identified in the electrical department. As Applicant is busy with his training as electrician he should get exposure. The college contacted Mr Reichardt, the deputy director and questioned him why Applicant was not getting any exposure in the electrical department. They went back to the records and noted that he

was appointed in the electrical department. He is still a senior handyman. If he moves to the electrical workshop and becomes an electrician, it will put him in a better position for promotion to an electrician.

7. There is no demotion being moved from one workshop to the other as:
 1. The salary won't be affected
 2. The job will still be the same
 3. He will get the necessary exposure required by the college
 4. It can lead to a promotion for Applicant

8. The post in the medical gas department will be abolished by Respondent. There is no prospect of Applicant being promoted in the medical gas department. It seems there is a transfer from one workshop to another and it is the Respondent's case that I cannot deal with a transfer and that I cannot find that the department can't decide to transfer an employee from one department to another.

APPLICANT'S CASE

9. **DANIEL SWARTZ testified in support of his own case (hereinafter referred to as "Applicant")**

10. Applicant commenced employment as a senior handyman at Stikland Hospital. He saw a post as a senior handyman electrical advertised in 2008 for which position he applied, but his application was unsuccessful. Two weeks later, Peet Botha, the foreman of the workshops telephoned him and informed Applicant that they required a handyman in the medical gas department and Applicant agreed to move to the medical gas department and he started working there since 1 August 2008.

11. Reference was made to page 7 of bundle A, being the letter of transfer and appointment of Applicant as senior handyman electrical at the Directorate: Engineering and Technical Support Services, Bellville Mobile Workshop, dated 24 January 2008. Applicant commenced employment in the department until Respondent realized that he had a code 10 and a PDP license. They started using him for electrical work at the government mortuaries.

12. Reference was made to page 11. Applicant started making enquiries. There was disharmony in the workshop, at which time Jessie Muller lost his work, as he stayed out of work quite often. Applicant also stayed off work often, because he was under pressure. Applicant then returned to medical gas.

Applicant is the only employee training for an electrician, whilst the one other employee was also training as a plumber.

13. Reference was made to page 16 with regards to a meeting and confirmation of Applicant's transfer from the electrical department at Bellville Mobile Workshop to the medical gas department. Applicant was questioned why he believes that he cannot go back to the electrical workshop. Applicant stated that there are no bursaries for medical gas. He received a bursary with the SETA for training as an electrician. According to Applicant, he should get exposure in terms of the SETA jurisdiction, therefore he works on his own vehicle in his garage to gain experience. It was put to Applicant that the Respondent stated that they would give him exposure. According to Applicant he has been asking for exposure for the past three years, but they paid no attention until he referred the present dispute to the Council. There were never any discussions that the post at the medical gas department would be abolished. According to Applicant a post was advertised in the medical gas department and somebody else was appointed whilst he was working there. Applicant believes that he was treated unfairly. His vehicle was taken away from him and handed to somebody with a lower position. Apart from the handyman position, there was a shop steward and senior handyman position. Reference was made to page 24, being Applicant's medical certificate. Applicant suffered from depression due to the circumstances at work and nobody at work paid any attention to his dissatisfaction.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

14. Applicant accepted the appointment, whereafter he was transferred to the medical gas department. Applicant was appointed as a senior handyman/electrical, as per page 7, the letter of appointment. He was not appointed as medical gas handyman, as is clear from the letter of appointment, dated 24 January 2008. Applicant confirms that he was appointed as handyman in the electrical department Bellville. Applicant believes that the documentation is not correct. Applicant was challenged whether he worked in the electrical workshop. He confirmed that he worked on the electrical workshop during 2008/2009 when he was driving a truck and started working in the electrical workshop. He applied for the position in medical gas as there were problems in the workshop, chief artisan and some of the workers. He requested his supervisor to resolve the issue.
15. He asked the supervisor to transfer him to the medical gas department when things did not work out in the electrical workshop. He received permission to return to medical gas from the Chief Artisan:

Electrical & Air-Conditioning Department as per Notice of Transfer, dated 14 August 2014. Transfers are confirmed by the Director. It was the Human Resources Department and the deputy director's duty to handle the matter. The deputy director is higher in ranking than the chief artisan. He did not grant permission for Applicant's transfer. It was put to Applicant that the letter was irregular as it was drafted by an employee of lower ranking. The acting director requested Applicant to return to the electrical workshop. Everybody in the department was satisfied with the Applicant's performance, except Mr Reichardt. Badenhorst signed the letters, but the request came from Reichardt, as per page 10, "RELOCATION TO THE ELECTRICAL WORKSHOP AT BELLVILLE MOBILE WORKSHOP IN THE DIRECTORATE: ENGINEERING & TECHNICAL SERVICES" dated 9 May 2016, where the following is stated:

"Reference is made to your appointment letter (as attached) in the advertised post of Senior Handyman (Electrical) in the Directorate Engineering and Technical Services dated 24 January 2008.

As indicated in the above-mentioned letter you successfully applied for a position of Senior Handyman in the Electrical Workshop at Bellville Mobile Workshop, which you have duly accepted by signing the attached Annexure B dated 29 January 2008.

*Your relocation from the Electrical Workshop to the Medical Gas Workshop was done without proper procedure and the relocation was not approved by the delegated authority. You are thus hereby instructed to re-assume duty at the Electrical Workshop of Bellville Mobile Workshop on **16 May 2016**.*

Your selection to take part in the apprenticeship program in the electrical trade was specifically based on the fact that you were employed in the electrical workshop at the time. Your re-location to the Medical Gas Workshop negatively impact on the practical training requirements as part of your apprenticeship. Your re-location to the Electrical Workshop in terms of your original appointment in the Directorate is in line with your current formal training in the electrical trade and it will be in your best interest to re-assume duty in said workshop and it will also promote the operational requirements of the Directorate."

16. Applicant confirmed that he did not follow the instruction on page 10 of Annexure B. While Applicant stated that he still works in the medical gas department and according to him, if he went to the electrical department, he would have been currently unemployed. He has not been demoted to date. He is not satisfied with the letter.

17. It was put to Applicant that he will be guilty of insubordination if he refuses to go to the electrical department and his unfair labour practise dispute related to demotion was premature, as there had not been any demotion to date. Applicant disagreed with this. Reference was made to page 11 of bundle A. Applicant was challenged whether there would be any change to his work if he went to the electrical department and whether he would still be a handyman, to which he conceded. According to Applicant the work was taken away from him, which means that he would sit in the workshop for most of the day and wait for a telephone call to repair a light or a plug. Applicant confirmed that although he lodged a grievance, he did not receive an outcome. Applicant was challenged whether he asked for the grievance to be referred to the Public Service Commission. He denied this as he stated that Respondent elected to refer the matter to the Public Service Commission. It was put to Applicant that the grievance cannot be referred to the Public Service Commission without the aggrieved person's consent. Applicant responded that the grievance was not dealt with appropriately by the department. It was with the Public Commission and they only responded after a year. It was put to Applicant the he lodged a grievance on 17 May 2016 as per page 15 in bundle B and the result of the Public Service Commission was given on page 18 of bundle B, where the following is stated:

“Mr Swartz requested a move back to the Electrical Workshop in 2015. After an investigation during which it was determined that his initial move to the Medical Gas Workshop was not authorized, he received a letter instructing him to return to the Electrical Workshop.

*The PSC found the grievance to be **unsubstantiated** based on the following:*

- The move to the Electrical Workshop was in line with his initial placement and this was further cemented by him undertaking a learnership in order to become an electrician.*
- Mr Swartz is the subject of a disciplinary proceeding and feels victimized and harassed. There is no evidence to suggest that the disciplinary proceeding has been maliciously instituted.”*

18. Reference was made to page 20 of bundle B, being a letter from the department to the Applicant, where the following is stated:

“Please be advised that your grievance was referred to the Public Service Commission (PSC) for further investigation, as per your request.

The PSC investigated your grievance and found it to be unsubstantiated. The PSC indicated the following reason for its finding:

- The move to the Electrical Workshop was in line with your initial placement and this was further cemented by you undertaking a learnership in order to become an electrician.*
- You are the subject of a disciplinary proceeding and feel victimized and harassed. There is no evidence to suggest that the disciplinary proceeding has been maliciously instituted.*

The PSC is satisfied with the manner in which this matter has been dealt with and therefore it is regarded as finalised.”

19. Applicant denies that the letter dated 2 December 2016 evidenced on page 20 of bundle B was ever sent to him. It was put to Applicant that the letter is sent to the Minister and the outcome on page 20 was given to him. Applicant denies receipt of such a letter. Applicant was challenged that if he did not receive the said letter, why he then stated in his referral to the Council that the dispute arose during December 2016, as per page 8 of bundle B, paragraph 5:

“5. *FACTS OF THE DISPUTE*

The dispute arose on 7 December 2016.

The dispute arose where: Bellville Technical Workshop.”

20. Applicant stated that he received the letter evidenced on page 10 of bundle A on his return from holiday, to which he responded. It was put to Applicant that his dispute was outside of the time limits. Applicant responded that everything is strange to him. Reference was made to the letter on page 1 of bundle A, the date of which is not legible, where the following is stated:

**“OUTCOME OF GRIEVANCE APPEAL TO THE PUBLIC SERVICE COMMISSION:
DISSATISFACTION WITH RELOCATION: ENGINEERING AND TECHNICAL SERVICES**

Please be advised that your grievance was referred to the Public Service Commission (PSC) for further investigation, as per your request.

The PSC investigated your grievance and found it to be unsubstantiated. The PSC indicated the following reason for its finding:

- The move to the Electrical Workshop was in line with your initial placement and this was further cemented by you undertaking a learnership in order to become an electrician.*
- You are the subject of a disciplinary proceeding and feel victimized and harassed. There is no evidence to suggest that the disciplinary proceeding has been maliciously instituted.*

The PSC is satisfied with the manner in which this matter has been dealt with and therefore it is regarded as finalised."

21. Therefore Applicant received an outcome to his grievance. Applicant responded that he requested exposure in the electrical department. It was put to Applicant that he would receive more exposure in the electrical department than in the gas department. According to Applicant he requested exposure for the past three years. He had to do everything on his own. The department did not assist him at all. Applicant was challenged in which field he would be working once he completed his electrician course. Applicant responded that he will work in the medical gas department as he knows he will get more exposure there. Applicant stated that when he lodged the dispute he spoke to Badenhorst personally.

THE FOLLOWING ENSUED FROM RE-EXAMINATION:

22. Reference was made to page 4 of bundle A. Applicant confirmed that the form was completed in his handwriting and that he received the relocation letter on page 1 of bundle A.

RESPONDENT'S CASE

23. **STEPHAN ALBERTUS REICHARDT testified on behalf of Respondent (hereinafter referred to as "Reichardt")**

24. Reichardt testified that he works in the Bellville Engineering Technical Support. He is responsible for the day to day management and workshops. Applicant currently works in the medical gas department in Bellville. Reichardt confirmed that he is aware of Applicant's dispute where he alleges that he was demoted. He is not aware of any demotion. Applicant was requested to move back from the gas department to the electrical workshop. It is not analogous to a demotion. This request was based on the fact that Applicant was busy with an apprenticeship program. Both the college and the Applicant requested more exposure in the electrical field on numerous occasions. If Applicant moved from medical gas to electrical department, he would still be employed as a handyman. There is no real change to his job description. There is currently no indication that Applicant will be demoted if the transfer takes place as:

1. his remuneration will remain unchanged
2. the contents of his job description will remain unchanged
3. the level of the post will remain the same

25. If Applicant is to remain in the medical gas department he will not get the necessary exposure to electrical work in which case he would not be able to complete his apprenticeship. Applicant wants to remain in the medical gas department. Operationally his services are required in the electrical department as the electrical gas department gets a lot more job cards than in electrical department. He heard that Applicant was on sick leave recently, but he is not aware of the details as he was not informed. Reference was made to Applicant's grievance, more specifically the solution suggested by Applicant on page 15, as follows:

"What solution do you propose:

My solution is I'm appointed at medical gas. Therefore I have to immediately stop harassing me and allow me to continue with my work and training. I also demand a written apology from the DD, Mr Stephan Reichert. And for you to institute progressive disciplinary action against him of which prove must be supplied."

26. Applicant therefore demands that the harassment must stop immediately and that he must continue working in the medical gas department and Reichardt must apologize. Reichardt responded that he does not believe that Applicant is being harassed. Reichardt is simply doing his work. It is reasonable management according to operational requirements and he does not believe that he should be subjected to disciplinary action because he was doing his work. Applicant's grievance was sent to the Public Service Commission. The Public Service Commission handled Applicant's transfer and it was established that it was in line with his original appointment. There was no proof of any mollifying against Applicant. Applicant landed in the medical gas department when Leslie Semono, the chief electrician at Bellville electric at director's level, gave him permission to go to the medical gas department. It was not a legal instruction.

THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:

27. Reference was made to page 23 of bundle B, where the following is stated:

"We hereby wish to inform you that Mr. Daniel Swartz, who previously worked in the Electrical Department at Bellville Mobile workshop has been transferred to the Medical Gas Department. He will resume duty in the Medical Gas Department from Monday, 18 August 2014."

28. The letter was signed by Mr Semono, Chief Artisan: Electrical & Air-Conditioning. According to Reichardt this letter was not legal, as Semono was not delegated to move Applicant. Reichardt only saw this letter for the first time during the Arbitration hearing and learnt how Applicant landed in the medical gas department. The letter was not issued by the director. He was unaware who gave the instruction. Semono was Applicant's direct supervisor. There was no incorrect behaviour on Applicant's side. Reichardt has been employed by the Respondent for the past 5½ years and in the capacity as a director for the last year and a half.
29. Reference was made to page 15 of bundle B. Reichardt confirmed that Badenhorst discussed the grievance with him. The grievance was lodged after Reichardt gave an instruction that Applicant should be moved to the electrical department. Applicant stated that the working conditions at the electrical department were not acceptable. Reichardt responded that he did not receive enough to respond to. The following was stated: "Reichardt must make my conditions..." The matter was referred to Badenhorst and thereafter to the Public Service Commission and Reichardt was no longer involved in the grievance. It was put to Reichardt that he testified in his evidence in chief that the

reason for the transfer was more exposure and the volume of work in the electrical department workshop. It was put to Reichardt that he gave Applicant instructions on 3 May 2016 to report to the electrical department, yet Applicant has not done so, therefore it is not true that there is a high volume of work in the electrical department workshop. Reichardt responded that Applicant refused to follow a legal instruction given to him by Reichardt to move to the electrical department. He awaited the outcome of the decision by the Public Service Commission and currently the outcome of the Arbitration hearing. The next step would be to follow disciplinary procedures against Applicant for his insubordination. The Applicant is currently still working in the medical gas department. Reichardt was challenged whether Applicant received exposure in the past. He responded that he has only been in the post for the past 18 months and immediately when he realised that Applicant had a lack of exposure, he took the necessary steps to give Applicant exposure. It was put to Reichardt that Applicant had personal issues with some of the other workers in the workshop. It was put to Reichardt that Applicant was not able to perform his work in the workshop, due to these issues. Reichardt had no knowledge of this as it was before his time. It was put to Reichardt that it is Applicant's case that he will have better career prospects in the medical gas department. Reichardt disagreed with this as the amount of electrical work in the medical gas department is a lot less than in the electrical department.

30. It was put to Reichardt that it is part of his job to see to harmonious working relationships. Reichardt responded that it is the control technician's responsibility, which will be escalated to him. It was put to Reichardt that if Applicant is moved it is a demotion in his career prospects. Reichardt denied this and stated that there are a lot more prospects in electrical department and there is very little prospects in terms of progression in the gas department

APPLICANT'S CLOSING ARGUMENT

31. Applicant feels that if he is moved to the electrical workshop, he will not be able to do his work diligently. Applicant believes that his move will be a demotion. Applicant want to remain in his current position as it holds in better prospects for himself. If he is moved it will be a demotion. Demotion does not only take place in money and posts, but there are other forms as well.

RESPONDENT'S CLOSING ARGUMENT

32. A demotion has not taken place yet, therefore the Applicant's referral of the dispute to the Council is premature. Applicant did not prove that he was demoted. He is talking about a future possible demotion and even then his transfer to the electrical department, his
1. salary will remain unchanged
 2. level of his post will remain unchanged
 3. It is a lateral transfer and only the reporting structure will change.
33. Therefore the Bargaining Council does not have jurisdiction over lateral transfers. Reference was made to page 7 of bundle B, where Applicant stated in paragraph 3, NATURE OF DISPUTE: Unfair Labour Practice related to demotion. The letter of transfer is excluded from the jurisdiction of the Bargaining Council. The transfer is in line with the job Applicant is doing and with the training he is getting. Applicant's own request and that of the college was that he needs more exposure in electrical work. 100 % of the work in the electrical department will be exposure, whilst only part of the work in the gas department will allow him exposure. If the transfer is the only thing on the table, the Commissioner must look at the jurisdiction and the referral must be dismissed on that basis.

APPLICANT'S REPLICATION

34. Applicant believes that it is not intended demotion. Applicant received a letter to report for duty on 16 May 2016. The instruction was already given, therefore it is not premature. The instruction is viewed as a demotion, as the instruction was already there.

ANALYSIS OF EVIDENCE AND ARGUMENT

35. I must decide whether Applicant had been subjected to an unfair labour practise in terms of section 186(2)(a):

"186. Meaning of dismissal and unfair labour practice.

(2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving—

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;”

36. Applicant alleges that he was subjected to an unfair labour practices related to demotion. In terms of the evidence before me Applicant maintained the same position but Respondent simply transferred him back to the electrical department where he was originally appointed. Therefore Applicant's appointment had not changed, nor his position, status or salary.

37. I therefore find that Applicant was not subjected to an unfair labour practise.

AWARD

38. I find that Applicant was not subjected to an unfair labour practise and Applicant is therefore not entitled to any relief.



COMMISSIONER: T ERASMUS