



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

COMMISSIONER: JANINE CARELSE

CASE NO: PSHS1218-17/18

DATE OF AWARD: 6 JUNE 2018

In the matter between:

EAMWUSA obo LYLE MICHAELS

APPLICANT

and

DEPARTMENT OF HEALTH- WESTERN CAPE

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. The Arbitration hearing commenced on 22 February 2018 and was part heard on that day. The matter was thereafter set down for the arbitration to resume on 26 April 2018 but the matter was postponed to 29 May 2018, on which date the arbitration was finalised. The Arbitration hearing took place at The Western Cape Nursing College in Cape Town in terms of Section 191(5)(a)(i) of the Labour Relations Act 66 of 1995, as amended, ("the Act"). The proceedings were digitally and manually recorded.
2. The applicant, Mr Lyle Michaels, was present and represented by Mrs Bella Palayandi (Mrs Palayandi) an EAMWUSA union official, whilst the respondent, Department of

Health- Western Cape, was represented by its Labour Relations Officer, Mr Abraham Solomon (Mr Solomon).

3. Both parties handed in bundles of documents. The respondent's bundle was marked bundle A, whilst the applicant's bundle was marked bundle B.
4. The matter proceeded in English.

ISSUES TO BE DECIDED

5. I am required to determine whether or not the dismissal of the applicant was procedurally and/or substantively fair. If I find that the applicant's dismissal was substantively and/or procedurally unfair, I must decide what the appropriate remedy would be.

BACKGROUND TO THE DISPUTE

6. The applicant was employed by the respondent as a Radiation Laboratory Technologist Intern from 1 November 2016 to 31 October 2017. The applicant was dismissed on 31 October 2017 for poor work performance during his probationary period. The applicant contends that his dismissal was both procedurally and substantively unfair and wishes to be reinstated with retrospective effect. The applicant earned a gross annual salary of R 281 148,00 at the date of his dismissal.

SUMMARY OF EVIDENCE AND ARGUMENT

THE RESPONDENT'S REPRESENTATIVES EVIDENCE AND ARGUMENT

7. Ms Mercy Sivalingam Lazarus (Lazarus) testified under oath for the respondent that she is the assistant director for people management and she does work relating to pension, leave, salary, appointments, probation and termination. She averred that the case was referred by Hester Burger (Burger) who assisted her with the case. On 12 June 2017 Burger told her that she was having problems with the applicant and that

he suffers from a lack of concentration, that he has an attention deficit and issues with dexterity. She then requested the applicant to do a medical fitness exam and the results were that the applicant suffers from mild depression and social anxiety disorder. The applicant was also subjected to an occupational therapy assessment and referred to the department of psychiatry and the outcome was that he suffers from performance anxiety and social anxiety disorder. According to the outcome, the applicant's anxiety increases when he is being observed. The applicant was eventually referred to the incapacity management committee which consists of occupational practitioners, a wellness counsellor and witnesses. Burger gave the skills requirements for the job and indicated that fine motor skills and dexterity was required. She stated that after the committee found that the applicant could not do the work, Burger drafted a recommendation and thereafter drafted an *audi* and the applicant was given five days to respond. There after the applicant's termination was confirmed. She contended that the applicant's response was taken into account and she referred to paragraph 4.6.2 on page 56 of bundle A and stated that according to the policy no formal hearing is required. There was a meeting between herself, the applicant, Burger and the applicant's representative about the possibility of exploring dismissal and no contribution was made by the applicant. The applicant accepted the document and signed for it.

8. She averred that she initiated the process against the applicant and all employees who undergo the medical exam signs a consent form before the process is started. The occupational health doctor, Dr Sunday, found that the applicant cannot work at ISOTOP because the working environment was too risky for both him and the patients. She stated further that as a form of remedial interventions, she brought in the appropriate person to conduct the assessments. She contended that Burger created a structured training program for the applicant from March to June 2017 which consisted of all of the work that the applicant needed to perform. The probationary period for the applicant is one year and the probationary policy states that they can terminate at any point and if an extension is requested then the applicant must be able to show why the period must be extended. The incapacity management committee recommended that the applicant be terminated because training would not have assisted him to perform his work.

9. She further contended that the applicant did not disclose on his Z83 that he had a disability and if the applicant had done this, then a conditional job offer and work assessment would have been done, however, due to non-disclosure this could not be done. The applicant was assessed in terms of his probationary period.

10. Under cross-examination she was referred to page 14 of bundle B and read out paragraph 2 which is the occupational therapy report. The doctor confirms that when the applicant is observed then his performance anxiety heightens. According to the occupational therapy report the applicant's disorder impacts on his work. She read out the last paragraph on page 14 of bundle B. She averred that depression and anxiety is categorised as a disability. The applicant was given a structured program from March to June and they performed a work assessment on him and a second opinion was given. The committee indicated that they could not help the applicant. She conceded that the training period was for two years and that the applicant could not complete his training. He had a problem with time management, hand and eye co-ordination and dexterity. Burger further presented evidence that the applicant was not able to perform his tasks and stated that they could not adapt the applicant's environment in order to assess him because the applicant needed to be supervised. She averred that the applicant is disabled according to the definition. She stated that the applicant was not able to meet the required standards. She stated further that a disability should not place an undue burden on the employer and the applicant's work placed an undue hardship on the employer. She denied that the charges against the applicant occurred on one day.

11. Under re-examination she stated that the applicant did not have the inherent requirements to perform the job and the major risk was the exposure of radiation to the applicant and the patients. She further stated that the policy states that if they subjected the applicant to the incapacity ill health process then he cannot work in any job in the open labour market. If an employee is medically boarded then they explore alternatives in the institution. The respondent did not follow the ill-health process because it could possibly prohibit the applicant from working as a nuclear radiologist.

The requirements for ill health is that you must not be able to do any other work and the applicant is qualified as a nuclear medicine radiologist.

12. Ms Hester Burger (Burger) testified under oath for the respondent that within the medical physics division they have subareas and the applicant worked in the mould room. The applicant was to be trained as a radiologist laboratory technologist (RLT). They train them in additional skill sets and the post was advertised and he was required to do training for two years and thereafter they can register with HPCSA as a RLT. They would operate under supervision whilst on training and thereafter independently. Page 13 of bundle A are the key duties of the applicant. The applicant started in November 2016 and within the first month you are required to register and there are certain requirements that needs to be met. The medical practitioner will sign off that the person is fit to function in a radiation environment. She averred that the applicant was sent to the medical practitioner because she received feedback from supervisors that the applicant did not have the skills and experience in terms of lab work. They set up a meeting with the applicant to discuss what is required of him and the safety aspects and radiation control in terms of safety and hazardous substances and working with hot wax and safety. She heard that the applicant had put a burning Bunsen burner under the counter top and they said that he was stressed about working with hot wax because he previously burned himself. She spoke to him about safety and the organogram functions and if he was unhappy with trainers then he can approach whoever. The first medical that they received was feedback from the doctor that they considered the applicant suitable as a radiation worker and he was subsequently registered and they started training him in the training program and this was done within the first month. Meetings were set up in December when the applicant commenced his training and the applicant agreed with the training program in December. He then started with induction. The first two months is not radioactive work and once you are safe in the environment then you proceed to the radioactive environment which is a more dangerous environment. On 19 December 2016 the applicant was observed and the applicant was struggling to use a screwdriver and a drill press and it appeared that he had problems with hand-eye co-ordination. This continued into the time period in March. In March she queried a test result in which he did very poorly. She stated that he was not responding positively to the program and

they sat with everyone again and she instructed the team to create a more structured training program to be done on a week by week basis in terms of skills that he needed.

13. The applicant was thus aware of what was required of him and they wanted to see whether the modified program would assist him. He had various people available to assist him including her. The applicant agreed that the training program that was introduced was fair. The applicant said that it was suitable for his needs and it occurred from March to June. They used positive reinforcement strategies and confidence. The applicant was manufacturing the basic devices, for example, dental laboratory types of devices, build wax devices and manufacture casts. The majority of devices was non clinical devices and basic clinical devices who was assessed by qualified people afterwards. The program was followed until June 2017 and he was given the opportunity and nothing was in the exam that was not in the structured program prior to that. Section 11 of page 31 of bundle A is the detail of the exam in the same structure and manner used by HSPCSA and the applicant was allowed two hours additional time. The exam consisted of six practical's and he was allowed the day to complete the exam. The applicant had to prove that he can work with speed in the mock exam and because it was a mock he was given two additional hours to complete the exam. She stated that subsequent to the exam, a meeting request emerged, as the examiners and supervisors felt that they had to be bring the exam results and the applicant's response to her attention and their concerns were more than the mark. She was notified that during the course of the exam the applicant was sweating and he looked like he was not feeling well. He was given an opportunity to postpone and it appeared as if he was having an anxiety attack during the exam, however, the applicant indicated that he wanted to continue. The applicant did not recognise some of the questions that was put to him and he was struggling to follow sequence and skipped steps. She further stated that the applicant was not completing the tasks the way that it should be done and argued with them and simply continued. Based on the applicant's behaviour she requested that the applicant be subjected to another medical assessment and she took this information to HR and HR recommended that he be sent again on about 13 June. HR felt that the probation period be extended and that he be sent for medicals. HR then contacted the applicant to request whether he is

willing to go for the assessments and that discussion took place with the applicant directly. The applicant was subjected to an OT assessment and the radiation medical.

14. She further contended that the applicant approached her and indicated when he needed to go and he received the message that they requested further assessments with psychiatrist and they don't have any detail of those assessments. She was given feedback that based on the assessments they must pull the applicant away from all work related to radiation and that he must not work with radioactive material and she also received one report from the psychiatrist that the applicant's work environment be adapted and changed to negate anxiety in order to assess the applicant's performance properly. The applicant was told to stay in the lab but he could not do any radiation work and he worked on projects and non-critical work. The applicant was approved as being medically fit at the first medical assessment and the second time not. She read out her report and recommendation that they cannot change the HPCSA training standards because the work that they do is dangerous and they are mandated to train under supervision and that some of the devices once built cannot be assessed after the fact. You cannot see if the correct source or if person chose the correct source and this can only be seen during the manufacturing process and therefore observation must occur while they are doing a task.

15. There is a limit of radiation that the body can stand and the risk of contracting cancer is heightened and therefore time is of the essence. You must work behind shields and you are already compromised in terms of dexterity. The radiation seeds are also of different radio activities. When radiation passes through the body there is a chance that the DNA cells can be damaged. The factors that are essential to the job are time, distance and dexterity. This was stressing the applicant out and he broke out in a sweat. RLT's work with the highest amount of radiation and if you cannot function with speed then you are at a high risk of exceeding radiation limits and she cannot take that risk. She does not believe that it is to the applicant or anyone else's advantage to let him work in such an environment. Groote Schuur Hospital (GSH) has an incapacity committee that deals with performance and incapacity issues and the applicant's issue concerned a performance issue under probation. They completed the probation reports and they were called in to testify to the incapacity committee about what an

RLT does and she made a recommendation to the CEO. The CEO assess all of the evidence that is presented and her recommendation was to terminate the applicant's contract under probation. She stated that they felt that probation would not change anything and that it would be dangerous and unsafe for the applicant to do the work. She stated that extension of the probationary period was not possible and the process stopped there and not continued but replaced by the incapacity committee.

16. Under cross-examination she stated that she was managing the applicant for some time and she is the head of the division. The applicant is trained by Marilyn Manual (training function) and Susan Tovey (management function). She averred that the functions of the mould room is two-fold and that it involves training and service. The RLT's have a function to supply devices and the training of other kinds of radiographers, whilst in the mould room there are several functions and within the mould room there are standard devices, for example, casts and patients must be CT scanned and this may be six to seven per day. In July 2017 the applicant was asked to be removed from radioactive work and he was no longer allowed to work on that and he was never without supervision at any point. The reason why they had shortage of staff was due to illness. Tovey and Manuel was on sick leave. Based on the assessments made, the applicant was told to come to the department because he was still employed and he was involved in the manufacture of some devices. The applicant was given direct instructions to work on projects and it is a great concern that the applicant was under the impression that he ran the department. Tovey was incapacitated and was supervised by Vuyisile Jonas (Jonas) and he was responsible for the mould room functions. Gerrie Maree did the other high-pressured work. In November 2016 it was reported to her that the applicant's actions were dangerous and until June 2017 the matter was referred to HR and concerns did not disappear in June 2017. The assessments are not for her eyes and the incapacity committee had access to those reports. She stated that she does not have the medical reports of the applicant and that the applicant could have requested the medical reports himself.

17. She averred that the first part of his training does not deal with radiation and they did not proceed with high risk radiation. The radiation source is in a secure container and after the reports they were advised to pull him out of that environment. She disagreed

that leather can stop the radiation. It takes 2.4 metres of concrete to stop radiation. No apron can protect you as an RLT. The radiation that is used in radiotherapy is different and the type of radiation is of a different level of penetration. If the applicant believes that an apron is protecting him then it is worrying. In nuclear medicine the patients get injected with radioactive isotope and they lace it with radioactive material and it goes inside the body and the radiographers are exposed to low levels of radiation and the actual doses are lower. As an RLT they must use their hands to manufacture devices and the doses are higher. There is a difference between the two. She is commenting with the applicant functioning as an RLT which is two different professions. It is not the same level of doses and it is completely different. They introduce the mock exam so that the applicant can be tested. It is an additional assessment to determine whether he is responding positively to the training. They set up the structured training program in March 2017 and they moved him to formal structure and he agreed that they will take that phase from March until June and have a mock exam.

18. The applicant was told what to expect in the exam and in March he was given the program and the mock exam took place as scheduled and the applicant declined the opportunity to postpone the exam. On the day of the test the applicant did not declare that he was not feeling well and after he appeared not to be well he was given an opportunity to postpone. It is an extreme risk that applicant would work when he was not feeling well. The applicant performed poorly. There were in total nineteen incidents of poor work performance that were reported and on two occasions he placed a burning Bunsen burner under a counter and he also burned himself once. The applicant is required to work in a lab and dexterity is required. Dexterity involves fine motor skills and the applicant was required to have fine motor skills. They had to fix everything that the applicant did. At one time the applicant made the cast so hot that he burned the student's skin. The onus is on the company to provide tools but the applicant declined that offer to provide a left-handed scissors. A screwdriver is neither left nor right and so are a number of other tools. In terms of assignments he received feedback on every assignment by Maree. The applicant was not on any syllabus for lectures and they slowed down the program for him. The applicant was given tutorials and practical work and he was not given any formal lectures because they held that back. According to her report she recommended that they could not implement the

doctor's recommendations because the applicant could not work alone and the psychiatrist made it clear that the applicant cannot function under supervision and unobserved. The applicant's work must be validated because of the high risk directly associated therewith. They must sign off that RLT has proved himself competent and they must observe to see if he is doing it right but the applicant cannot deal with the pressure of being observed. She believes that due process was followed. At the time of his appointment the applicant's conditions were not declared. There is no dispute that the applicant is able to work with the public but what is necessary is that he cannot work in a radiography laboratory environment.

19. Under re-examination she stated that the applicant did not declare his illness and she only received the report back that the applicant was declared fit to work. If the applicant had declared his condition then she would have asked for advice and they would have asked for legal advice because of the requirements.

20. Ms Susan Tovey (Tovey) testified under oath for the respondent and stated that the applicant was an intern student at Groote Schuur Hospital. She is the supervisor of the mould room department. The first month in November 2017 they saw that the applicant was struggling on the Bunsen burner and other technical things compared to the other students that she has dealt with. She spoke to the applicant and actually trained left handed people before and so previous left-handed students made their own adaptation to own techniques involved and she thought that this was the applicant's initial problem. She dealt with the applicant individually and a log book was completed until March 2017 where they had a meeting with Burger and Jonas and she took three weeks leave. The applicant was working under the supervision of Manuel for that period of time. She signed off the log book with everything that the applicant did and stated that they document everything in their daily register. The HPCSA requires log books and students need to do a number of tasks for training. She referred to the log book entries and stated that numerous supra flabs that was done by the applicant needed to be repeated. She further stated that cut outs, supra flabs and impressions of other student's thumbs were done. She denied that the applicant ran the mould room and he was not allowed to do so. As a student you cannot be in charge or run a mould room and he had to be supervised. The applicant must work under a physicist

or an oncologist. She further informed the applicant that if he needed help that he had to call her. Nobody was running the mould room and Jonas was in charge at the time and there were certain things that had to be postponed and she came into work to do an implant. She further completed the applicant's probationary report and indicated that the applicant struggled with handling the tools and equipment. That report was completed at the beginning of March 2017. In March she gave the applicant a structured program and that was monitored by Maree and Manuel. She did a second review on the applicant and found that his practical skills still needed improvement in order to be competent in that field. She averred that there is always a mock exam before the final exam and it is nothing difficult. They continued monitoring him after the mock and she was not involved in any of the meetings and she was just told that the applicant was not allowed to work with radioactive sources which is part of the second-year training. During the course of the first year the applicant completed the basics such as the supra flaps and plaster of Paris and he did not do this satisfactorily. Most of the time the applicant's tasks were not done properly, for example, the wax layers were not done properly and they had to remake the wax plan and this is critical to patient's accurate treatment. She stated further that she not involved in the termination of the applicant's probation and she was excluded from everything. She had to sign an incapacity form and that's all she was involved in.

21. Under cross-examination she stated further that the incapacity referral was for the applicant to be assessed but she was not involved in that process. She does not know why the applicant was dismissed. She contended that your health status must be declared if you work at GSH. As far as she knows nothing was declared and stated that the applicant did not declare anything on his Z83. Jonas the assistant manager was the supervisor and she was available if anything was requested. When they were told not to allow the applicant to work with any radioactive material, projects were set aside by the HPCSA which he could do without supervision. The mould room was not functioning and during the time that the applicant was not doing his projects, he was practising on other students. The mock exam is the same as the final exam and it is to prepare a person for the final exam.

22. Under re-examination he testified that she and Dr Maree compiled a report about the applicant and she said that the products made by the applicant were not made to standard and took too long. On the day of the mock exam the applicant had a bit of the flu and she said that he can ask for a reschedule of the mock exam but the applicant was insistent that he wanted to continue. She averred that the applicant struggled more than the other students. All of the students were nervous and you have to speak them through the process. The students are at liberty to choose which practical they wanted to do first to put them at ease and there was no pressure on the day of the mock exam.

THE APPLICANT'S EVIDENCE AND ARGUMENT

23. The applicant testified under oath and stated that at the first entry medical which is compulsory for all health workers in the public sector he informed Dr Al Badri about his social anxiety disorder and his history with depression and he said that the institution cannot hold that against him. He asked him to keep it private and only inform Tovey about it and it was granted. He averred that the maximum period of training is three years and the normal time is two years of training. He started with the training on 1 November 2016 and completed the training on 31 October 2017. He expected to receive training and lectures and that was his initial expectation. Before he started to work at GSH he worked at Tygerberg as a nuclear medicine radiographer and did locum work in 2013 as a nuclear medicine radiographer at Chris Barnard and also at Tygerberg. The first instance was 12 months as compulsory community service. All health students (allied health) once they are done studying they must do compulsory service for the state. In 2014 he worked at Tygerberg in nuclear medicine. He did scanning on patients and laboratory work which is not the same as mould room laboratory. He injected patients with radiation and worked with different degrees of radiation at different strengths of radiography. Everything was in order and the materials was supplied to them as workers and they had sufficient backing from management to do basic tasks. He read out his testimonials from his previous supervisors who all indicated that he was competent. He obtained a national diploma in radiography at CPUT. He believes that the situation could have been dealt with better considering his condition or disorder which he believes is not a disability. He

has right to be confidential about his mental illness and he feels that as Dr Charles mentioned more time was needed to negate the effects of the Lyrica and pur bloka, he should have been afforded the opportunity to see if the treatment is effective. He feels that he was not given a chance. He stated that as his psychiatrist added a new treatment regime and he was therefore not given sufficient time to determine whether his condition will improve.

24. He is currently being trained as a shoemaker and works for lock sole in Kuils River and he is looking into watch making. It takes practise to do watch making. He has made mistakes and hurt himself while hand stitching shoes and he is happy with the way he is progressing. His new employer has allowed him to make mistakes and to grow. He feels offended that they say that he is disabled. Lazarus must provide scientific evidence to show that he is disabled. He was never in a special school but a mainstream school. At GSH he was doing first year moulding work and the radioactive seeds is not part of first year work but is part of second year. Moulding is first year work. The properties of the radioactive seeds is what is called a low dosage and previously he worked with more potent radioactive material. It was never an occupational hazard when drawing up a dosage for a patient. He disposed of needles and syringes and radioactivity decreases with time and when they decay to a decent level then they would take them down to waste management. He has previously worked with radioactive sources and he had his badge and all of his radiation monitors and not once was it reported that his radiation level was high it was always within the normal limits. He wanted to do nuclear medicine and he enjoyed his time there but the winds of change had blown and he likes to try different things. His passion is just that he wants to be a good person. He stated that the process could have been handled better in terms of being subtle and fair and his illness is his business. He felt discriminated against and he sees it as an injustice towards him.

25. Under cross-examination he stated that he doesn't recall being called in and he recalls being spoken to. She would tell him where he is going wrong and she said that the first month was just observations. In November she spoke to him again about things that he was not doing right. He averred that it was Tovey and Manuel's job and so they would tell him to improve here and there. He did say that he can get the tools and

Burger responded that they will get it for him. He is afraid of his former boss Burger and he felt that he will say what he wants to say when it is his turn to speak. It is standard in any workplace and in his contract where it states that the employer will provide the employee with the necessary tools. He adapted with the other equipment and instead of using a left-handed scissor he would use a surgical blade and he adapted. He acknowledged that he had shortcomings. According to his understanding he learning is ongoing and if you do not meet the standard then you continue practising. He was sent for medical testing because of his results in the mock exam. As far as he remembers with his very first medical with Dr Al Badri is that he consented that he gives him permission to only disclose his medical condition to Tovey. Burger would be correct in saying that she did not know about his disorder.

26. Under re-examination he stated that he told her about his illness and said that he was doing okay. As a nuclear radiographer he scanned patients for bone scanning cardio fusion, injecting patients with radioactivity, record keeping of stock in radioactive laboratory. Once the patient is done scanning then he would conclude the visit. In some instances, the radioactive material would be at higher levels than what he had dealt with. Fine motor skills were not required in his previous job and he did not have to use nuclear seeds. Over time if you do not work fast enough with radiation then you can develop cancer, leukaemia and various diseases. It can become serious but with practise you become better.

27. Ms Kashiefa Dalvey (Dalvey) testified under oath and stated that she did not do a work assessment and that the applicant was referred for cognitive screening. She does not belong to that committee and she only did a cognitive screening and did no work visits. She saw the applicant on two days and in total four hours. She did an interview and after that he came back to her and did one cognitive test and her findings with regard to that. When she completed her recommendation on 28 July 2017 the recommendations are specific. She said that the recommendation was that his anxiety needs to be looked at and if not under control he cannot work and he must be sent to neuropsychology. He also needed his medication to be changed regularly. She looked at decision making, monitor yourself etc. In the test the applicant scored average and

he took increased time to finish the test. He scored below the norm but the accuracy was not bad. When she made the recommendation, she said that the applicant's anxiety must be looked at. The applicant said that when he was in matric he was diagnosed with social anxiety. Throughout the training he had to do practical's he experienced anxiety when he had to do practicals. After his community service he indicated a bit of low self-esteem. In 2013 he took a break because he was feeling low. After that he applied for various jobs and applied for a job at GSH and besides the social anxiety there were also other diagnoses that he was treated for. When he is anxious he cannot perform. For the two hours that they chatted the applicant said that he was comfortable with her and that was why he performed with accuracy. She said that he must be sent for various professionals. She only did one cognitive test and no simulated tasks. She thinks there was a day that the applicant came to the department and was looking for the file. They followed through with the neuropsychology and these sessions were for coping mechanisms. The applicant felt that if they work with the medication then they can assist him more. If it is a pressure situation then the anxiety would have kicked in. Cognitive screening is the thinking skills and higher order thinking, for example, the executive function, decision making and so forth. The applicant was referred to her in July 2017.

28. Under cross-examination she stated that the applicant was not referred to her for work performance. Under re-examination she stated that the applicant's time management was an issue but that he was accurate. The applicant also fatigued easily in the test and that is why he became slower. He took longer and that is why he scored average. One's accuracy levels can dip if under a lot of pressure. In reality the applicant will not be given two hours to become comfortable with people. The applicant admitted to her that if he becomes anxious he cannot perform.

ANALYSIS OF EVIDENCE AND ARGUMENT

29. Section 192(1) of the Act provides that an employee bears the onus of proving the existence of a dismissal, whilst subsection (2) requires the employer to prove the fairness thereof. In this matter it is not in dispute that the applicant was dismissed on 31 October 2017.

Substantive Fairness

30. In determining whether the applicant's dismissal was substantively fair, the factors listed in Schedule 8 of the Act under Item 8 and 9 of the Code of Good Practise: Dismissal is taken into account.

31. According to Item 8 paragraph e - the employee's performance should be assessed and an employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service.

32. It is common cause that the applicant commenced his training to become a RLT on 1 November 2016 and that during the course of the training he was constantly supervised, instructed, guided and counselled. Both Burger and Tovey testified that they had given the applicant a structured training program from March to June 2017 and that the applicant confirmed that the training program was fair. Tovey had done two performance reviews with the applicant in terms whereof she specifically stated that the applicant needed to listen and respond to instruction, especially when working with tools. She further stated that the applicant required continuous education and practical experience to grow. This assessment was done in March 2017. In response to this the applicant stated that he will practise more in order to master the skills quicker. The second performance evaluation was done in May 2017 and she noted that the applicant needs practical skills throughout the duration of the course to be competent in the field. In this regard the applicant acknowledged that continued practise should ensure practical improvement. Tovey further testified that she would assess the applicant's performance on a continuous basis by completing a daily log book and register. The applicant was further subjected to a mock exam in order to

prepare him for the final exam. The evidence is thus clear that the applicant was aware of what was expected of him. The evidence is further clear that when the respondent became aware that the applicant was not responding positively to the training program, it adapted the applicant's training program in order to accommodate him because they noticed that he was battling to use the screwdriver and drill press and that he had problems with hand-eye co-ordination. According to Burger the applicant's training program was changed to a structured training program and this was approved by the applicant as being a fair training program.

33. Paragraph f of Item 8 provides that if the employer determines that the employee's performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be failing to meet the required standard performance standards. If the employer believes that the employee is incompetent, the employer should advise the employee of the respects in which the employee is incompetent.

34. According to the documentary evidence that was presented by the respondent the applicant's work had to be repeated and redone on more than twenty occasions and this occurred during the period of May 2017 to September 2017. Both Tovey and Burger testified to this. Burger stated that in March she queried the applicant's test result in which he did very poorly. Tovey further testified that the applicant's performance had been below par when compared to the other students work. As mentioned in paragraph 35 above, it is clear that the applicant was aware of what was expected of him and that he needed to improve his practical skills and working with tools. He did not dispute this. The applicant stated that he was left handed and that this could have affected the quality of his work. Burger denied that the applicant requested a left-handed scissor and stated that it was offered to him but he rejected the offer. She further indicated that there are no special screwdriver and drill press for left handed people. The applicant further testified that he adapted and instead of using a scissor he would use a blade. No sufficient evidence was adduced to show that the applicant's performance was below standard as a result of him using tools that were not suitable for left handed people or that he had performed below standard because he is left handed. In view hereof, I do find that the applicant had problems with dexterity

which is an integral and inherent requirement of the job as a RLT. I find that the applicant had failed to meet the required performance standard.

35. What is clear is that the applicant's performance was affected by his depression and anxiety. After Burger requested that the applicant be subjected to a medical assessment, it transpired that the applicant suffers from anxiety and depression and that he cannot perform when he is being observed. This was confirmed by Dalvey who testified that she conducted a cognitive assessment on the applicant and she stated that the applicant informed her that he cannot perform whilst being observed and under supervision. In the result, the psychiatrist recommended that the applicant's work environment be adapted in a way that he is not supervised and observed in order to negate the effects of his anxiety. Burger wrote a recommendation and stated that this was not possible because the HPCSA required that all Interns be observed and supervised during the course of the training to ensure that they were doing the work properly. This was not in dispute and it appeared to be an integral part of the training and something that she could not change.

36. The applicant's case is that he was not given a fair opportunity to meet the required standard because he was placed on new medication and the respondent did not allow sufficient time for the medication to work. This version was not put to any of the witnesses and could not be tested. That being said, I cannot accept this evidence. Furthermore, the applicant stated that he was not given an opportunity to complete the next stage of the training which is radioactive work and that he had previously worked with radioactive material at high levels of radiation. Once again, this evidence was not put to any of witnesses and could not be tested. Burger had testified that the applicant could not have previously worked with radioactive seeds at such high levels and yet the applicant failed to challenge this evidence. The applicant stated that he was scared of Burger. I do not accept this version, as the applicant was represented by his union and there were various other things that he had challenged with her assistance. In the light thereof, I accept Burger evidence in that regard. Moreover, the evidence is clear that the applicant was constantly monitored, supervised, instructed and guided for more than six months and yet his work performance did not improve. The applicant was afforded an additional two hours to complete the mock exam and this did not make

a difference to his performance. I find that the respondent had acted reasonably and that it afforded the applicant sufficient opportunity to improve his work performance.

37. I find that dismissal had been the appropriate sanction for the following reasons:

- a. The evidence showed that the applicant had issues with dexterity which means that he battled to work with tools and to manufacture products or devices of a good quality. Burger testified that the next stage of the training required that the applicant have fine motor skills whilst working with radioactive seeds. She showed what the applicant would have been required to do in the second year of his training and this involved placing tiny radioactive seeds with a tweezers into a thin tube and also placing these seeds in certain patterns. She averred that based on the aforesaid, it was too risky to allow the applicant to do his second year of training, as he and the patients would be exposed to high levels of radiation. She contended that based on the applicant's poor time management, he cannot work with the necessary speed that is required when working with radioactive seeds. Both Dalvey and Tovey stated that the applicant had problems with time management and that he took too long to complete tasks, whilst Burger stated that time management was imperative when working with radioactive material. This was not disputed by the applicant. The applicant did not dispute that he would be required to work fast when working with radioactive seeds. In view hereof, I find that on a balance of probabilities, the applicant would have difficulties performing the tasks in the second year of training. What is more, the respondent should not be expected to take the risk of endangering the health and lives of its patients and the applicant.
- b. Notwithstanding my findings in paragraph a above, the bottom line is that the applicant could not satisfactorily perform in his first year of training. The evidence in that regard speaks for itself. Burger testified that the applicant's work environment could not be adapted as suggested by the psychiatrist because according to the standards of the HPCSA, the applicant had to be supervised. She further indicated that observation of the entire manufacturing of the device is required in order to make a proper assessment. Burger has convinced me that,

based on the nature of the work of an RLT and the HPCSA standards for training of an RLT, supervision is peremptory. The evidence shows that the work involved is of a very meticulous and risky nature. The applicant did not contest that he had placed a burning Bunsen burner under the counter on two occasions and also that he had once burned himself with the Bunsen burner.

- c. The evidence is further clear that an extension of the probationary period would not have made a difference and it is unfortunate for the applicant that his anxiety and depression and the associated medication has resulted in him not being able to perform under supervision which is an inherent requirement of the training. I agree with Dalvey when she stated that in reality the applicant will not be given two hours to become comfortable with people.

38. In the light of the above, I find that the respondent has succeeded in proving, on a balance of probabilities, that the applicant's dismissal had been substantively fair.

Procedural Fairness

39. In his opening address the applicant disputed the procedural fairness of his dismissal and Ms Palayandi argued that the applicant should have been subjected to a hearing or an enquiry. The respondent's case is that the applicant was given an *audi* and that he was requested to respond in writing. Lazarus stated that the respondent followed its stated process in that regard.

40. In ***Avril Elizabeth Home for the Mentally Handicapped v CCMA and others (2006) 27 ILJ 1644 (LC)*** the labour court held that the employer was merely required to conduct an investigation, give the employee or his representative an opportunity to respond to the allegations after a reasonable period and thereafter take a decision and give the employee notice thereof.

41. In view of the aforesaid, I do not find the procedure to have been unfair in the circumstances. The applicant was given an opportunity as to why he should not be dismissed and I do not find that the respondent had done anything in an unfair manner.

Lazarus further stated that the policy states that if they subjected the applicant to the incapacity ill health process then he cannot work in any job in the open labour market. If an employee is medically boarded then they explore alternatives in the institution. The respondent did not follow the ill-health process because it could possibly prohibit the applicant from working as a nuclear radiologist. The requirements for ill health is that you must not be able to do any other work and the applicant is qualified as a nuclear medicine radiologist. This evidence was not disputed. Based on the above-mentioned evidence, I do not believe that the respondent had been incorrect and that it acted unfairly in taking the incapacity poor work performance route.

42. The respondent has succeeded in showing that the applicant's dismissal had been procedurally fair on a balance of probabilities.

AWARD

43. The dismissal of the applicant by the respondent was both substantively and procedurally fair.

44. The applicant's application for arbitration is dismissed.

COMMISSIONER

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Janine Carelse