



ARBITRATION AWARD

Panellist/s: Ronnie Bracks
Case No.: PSHS495-10/11
Date of Award: 15-Apr-2011

In the ARBITRATION between:

Khunoana Attorneys obo Sepeng M.R.

(Employee)

and

Department of Health - Gauteng

(Company)

Employee Representative: Khunoana Attorneys obo Sepeng M.R.

Employee's address: P.O. Box 286

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DETAILS OF HEARING AND REPRESENTATION

- A. The Arbitration was scheduled for hearing at the Respondent's office at Tshwane District Hospital in Pretoria on the 18th March 2011. The Employee was represented by Mr Bezuidenhout, a legal representative. Ms Kedibone Maphune, 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's dismissal was substantively unfair.

BACKGROUND TO THE ISSUE

- C. Applicant was employed by the Department of Health as a professional nurse earning R21 000. She was dismissed on the 17th December 2009 after a hearing held on the 22nd October 2009. She was charged on the 2 October 2009 for breaching the code of Conduct of her profession by divulging the HIV status to a fellow employee.
- D. The matter was referred to the Council for Conciliation on the 12th October 2010 after the Applicant's condonation application was granted. The matter was conciliated on the 25th November 2010 when it remained unresolved and was referred to arbitration.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

- E Bundles of documents marked "A" to "E" were submitted.

Employer's Evidence:

The Respondent called four witnesses who testified in brief after being duly sworn in:

Voyeya Maggy Ratlabana, Facility Manger, testified as follows:

- F She was a professional nurse and managed the facility at Suurman Clinic. She explained her responsibilities. She and the Applicant were colleagues and she was dismissed for violating patient confidentiality.
- G The witness referred to the National Health Act, 61 of 2003 section 14 which dealt with confidentiality of the status of patients. She said the clause was aimed at preventing disclosure of confidential information of patients.
- H After being referred to Annexure "E" which is Health Professions Council of South Africa in particular section 3 she explained that the guidelines numerated the conditions under which information can be

disclosed since that patient had the right to confidentiality. She said the actions of the Applicant caused the patient to lose confidence in the institution.

- I Undercross-examination the witness explained how she became involved in the dispute and said the Applicant had disclosed the information to Ms Manala and Peteke according to the complainant. Peteke told the witness that the Applicant had told her Kabinde tested positive. The witness confirmed that the information was not in the file they had at the clinic. The Applicant would only have known if she tested them.

Mmathapelo Ellen Peteke, Registered Nurse, testified briefly as follows:

- J She started at the clinic in 2009 and worked with the Applicant. She explained about the issues relating to transfers which had taken place and said it resulted from a case which Kabinde brought against the Applicant.
- K The case flowed from a breach of confidentiality. She explained that on the day of the incident she was in the consulting room when the Applicant came in and asked her what was happening between Manala and Kabinde because she had seen them together a couple of times. The witness told her that they were dating. The Applicant then told the witness that Kabinde was a patient at the wellness clinic where he was taking medication.
- L The Applicant then requested the witness to pass this information to Manala. The Applicant said that she had performed PCR testing on Kabinde's child and that was how she knew Kabinde's status. The witness conveyed the information to Manala who in turned conveyed it to Kabinde.
- M The following day Kabinde called to speak to the Applicant and later visited the clinic. They were called in to explain what had transpired which they did. The Applicant then apologized to Ms Manala but Manala told her that she was not the one to whom she should be apologizing. The witness said that they were not allowed to disclose information about patients without their permission.
- N Undercross-examination the witness said that she and Manala were childhood friends. She said people who attended the wellness clinic were on anti-retrovirals. The Applicant's representative put it to the witness that the Applicant could not have disclosed confidential information as Kabinde was attending the clinic so the information could not be confidential. The witness then gave lengthy evidence about what had transpired between the witness and Manala after Manala had met Kabinde. This evidence is a matter of record. It was then put to the witness that no action was taken against her as she had disclosed the information also. The witness said she only spoke to Manala about Kabinde's status because the Applicant had told her to do so.

Magdalene Shibitlha Manala, Assistant Nurse, testified as follows:

- O She explained what her duties were and said that the Applicant was a colleague and a friend until the conversation with Peteke. She and Peteke used to go home together. Peteke told the witness that the Applicant had asked her to warn the witness that Kabinde was tested at the clinic before they were employees and he was HIV positive and was being treated at the wellness clinic.
- P The witness said that she had mentioned to Peteke about a person she was considering starting a relationship with who was HIV positive but had not said it was Kabinde. She wanted Peteke's view on the feasibility of such a relationship.

- Q The witness said she told Kabinde about this and he was very furious because he believed that the information about his status was limited to certain people. He went to the clinic to talk to the Applicant. However the meeting was fruitless as there was no way forward. All that Kabinde in fact wanted to receive was an apology from the Applicant.
- R The witness said that Kabinde informed the department that he was going to proceed with the matter as it was a violation of his human rights and he sought the assistance of the organisation dealing with this kind of violation.
- S According to the witness the situation had since led to her embarrassment since many of the other staff became aware of the issue and they are under the impression that she was also positive and have been sympathizing with her.
- T On the question how the Applicant could have known of his status as she had not tested him the witness stated that the Applicant knew Kabinde from the clinic. She had tested Kabinde's child from a previous relationship.

Excellent Siphon Kabinde, Complainant, testified as follows:

- U He knew the Applicant from Suurman clinic. His child had undergone PCR at the clinic and the Applicant assisted them. They went to PCR because he was positive. In 2009 he was shocked when he was told by Manala that Peteke said that he was positive.
- V He called the Applicant on the 20 May 2009. They met and during the meeting the Applicant confessed that she had said so and that she acted on her right as a professional nurse. She was obligated to disclose in order to protect Manala. She refused to apologise and he decided to take legal action.
- W The witness said he was no longer attending the wellness clinic as he was presently on the medical aid of Manala and attending a private clinic. He said that at the clinic he requested a second file to be opened because the staff who was employed at the clinic also lived in the same area as him. The reason for requesting a second file was that the first reflected his status.
- X The witness said all that he wanted was for the Applicant to apologise and the matter would have been resolved but she had refused to do so. According to the witness the Respondent had the responsibility of ensuring that they kept to their ethics. His condition should have been kept confidential.
- Y It was put to the witness that the Applicant could not have known his status as she had not tested him. The witness refuted this stating that she had done the PCR testing. The witness said that he had been attending the wellness clinic since between 2008 and 2009 on a quarterly basis. He said the fact that he attended the wellness clinic could not automatically have led to the assumption that he was positive since there were often support people who also went there.
- Z He said that she confessed during the hearing that she had said he was HIV positive. He had instituted civil action by referring his papers to the Human Rights group. He did not know what the status of the action was.

Employee's Evidence

The Employee, Mmama Ruth Sepeng, after being sworn in testified as follows:

- AA She was employed in 1983 as a Senior Nurse; she has been a nurse for 30 years and has never been disciplined. She was aware of the confidentiality rule and that the status of patients' conditions must be held confidential and could only be disclosed under exceptional circumstances.
- BB She explained what had transpired at the clinic in April. This evidence is not going to be repeated save to state that the Applicant said by 09h00 the patients were not coming through. She went to the vital area and found Manala and Kabinde in conversation. She asked Manala what was going on but she refused to respond. She reported the matter to Rathabana but instead of the matter being attended to she was told to deal with it as she was a manager.
- CC Two weeks later Kabinde was there again and the situation was exactly the same and patients started complaining because when Kabinde was there nothing happened. She called Peteke and enquired what happening between Kabinde and Manala as their relationship was affecting the service. Peteke told her that Kabinde was proposing to Manala and that he had disclosed to Manala that he was HIV positive; Manala had approached Peteke for her opinion about the relationship.
- DD Peteke said she told Manala to use her own discretion. The Applicant then asked Peteke about Kabinde's girlfriend and child as she had done a PCR testing on the child. She did not know what the results were but she was told by Peteke that Kabinde had told Manala that if the results came back negative it would be the end of the relationship hence he was with Manala.
- EE She was therefore surprised in May that it was alleged that she had disclosed his status. She did not take it serious because she knew she had not done so. She said had received an anonymous call telling her about the National Health Act regarding confidentiality. She was under the impression that it could be people from quality control. However it was then that Kabinde identified himself and he informed her that Manala had told him that Peteke had told (her) Manala that he was HIV positive. She told him she could not discuss it on the telephone as he did not know what he was talking about.
- FF Later that afternoon she asked for a meeting to be called to discuss what she was informed during the phone call. Manala confessed that she was told about Kabinde's HIV status by Peteke. Manala disclosed it to Peteke as a personal friend. Kabinde came to discuss the matter. She was quiet throughout the meeting not knowing what to say as she was being falsely accused. She was then transferred to another clinic. She did not know Kabinde's status as she had not done any testing on him.
- GG She only heard about the second file today as it was not the practice to open two files. On the issue of the sanction she said that the Respondent had considered any other sanction but dismissed her. She prayed to be reinstated.
- HH The Applicant was asked why she went to Peteke on the second occasion. The Applicant stated that she did not want to interfere but was concerned that the staff was suffering. When asked why she had done the PCR test she stated that it was to test for HIV. She said that she knew the mother was positive because the file was brought to her.

- II The Applicant denied that she had disclosed the status of Kabinde to Peteke but could not explain why it was not put to the witnesses. She said action should not be taken against the Respondent but Peteke should be sued.
- JJ The Applicant agreed that she had consulted Kabinde twice on the first occasion it was in respect of a sick note she gave him and on the second occasion was perform the test.

ANALYSIS OF EVIDENCE AND ARGUMENT

- 1 The burden of proof, on a balance of probabilities, that the Applicant's dismissal was substantively fair, rests with the employer. The Labour Relations Act provides the relevant law on substantive fairness in the Code of Good Practice: Dismissal in schedule 8 article 7.
- 2 The Code of Good Practice: Dismissal provides that any person who is determining whether a dismissal for misconduct is unfair should consider-
 - (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
 - (b) if a rule or standard was contravened, whether or not-
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.
- 3 The first question is whether or not there was a rule or policy and if the Applicant was aware of this. The evidence presented regarding this issue was that The National Health Act 61 of 2003 provided in section 14 that :-
 - "14.(1) All information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment, is confidential.*
 - (2) Subject to section 15, no person may disclose any information contemplated in subsection (1) unless—*
 - (a) the user consents to that disclosure in writing;*
 - (b) a court order or any law requires that disclosure; or*
 - (c) non-disclosure of the information represents a serious threat to public health.*
- 4 The Health Professional Council of South Africa in its Guidelines for Good Practice in the Health Care Profession – Confidentiality: Protecting and Providing Information under point 3 headed Patient's right to Confidentiality makes reference to the above legislation and states further that rule 13 of the Ethical Rules of the Health Professional Council of South Africa states that practitioners can only divulge information under certain conditions which it enumerates.
- 5 From the evidence presented it is clear that the Applicant had disclosed the status of Kabinde. The evidence of Kabinde was that the Applicant had confessed and said that she had done it to protect Manala. In addition the Applicant was at pains to state that she did not know Kabinde's status yet in her evidence she confirmed that the PCR is done because it is suspected that at least one of the

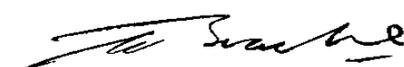
parents was HIV positive. This fact was confirmed when she stated that she was aware that he was attending the wellness clinic. It is therefore clear that she did not have to have treated him to have known.

- 6 No evidence was presented why Kabinde would fabricate evidence as to what had transpired at the meeting between the parties. Further he was very adamant that she had refused to apologise. Why would Kabinde have gone to these lengths?
 - 7 Furthermore the Applicant had acknowledged that she was aware of the rule. The need for the rule was never challenged.
 - 8 Regarding the sanction of dismissal I am further of the view that it was appropriate under the circumstances; if the conduct of the Applicant caused the employment relationship between himself and his employer to break down, dismissal would be justified. Support for this view is found in the fact that when an employee neglects to do as he/she is told it undermines the employer's trust in him/her. The employer cannot run an organisation when he cannot rely on the Applicant to do his/her job. This would, in turn, break down the employment relationship. It is therefore reasonable, under the circumstances, not to expect the employer to carry on in such an employment relationship.
 - 9 In the area of access to health care, it is trite to say that all health care workers and related institutions have a moral and legal duty to keep a patient's status confidential. The *locus classicus* on the right to privacy is the Appeal Court's decision of Jansen Van Vuuren v Kruger 1993 (4) SA 842 (A), better known as the McGreary case, where Judge Harms held that where rights of this nature are threatened, people should be afforded protection by our courts. "I see the matter in this light", he said, "AIDS is a dangerous condition. That on its own does not detract from the right of privacy of the afflicted person, especially if that right is founded in the doctor-patient relationship. A patient has the right to expect due compliance by the practitioner with his professional ethical standards."
- While the historic norm may have been for those being HIV positive to unwillingly forgo disclosure for fear of discrimination, in more recent years, people are constantly encouraged to be tested and to be open about their status. It should be remembered, however, that the overriding rights to privacy and confidentiality must at all times remain intact. The fact that the Applicant had been with the institution for 30 years exacerbates her situation in that she should have exercised a greater deal of caution than disclosing the status of the Applicant.
- 10 For the reasons stated above I find the Applicant's dismissal to have been substantively and procedurally fair and that dismissal is an appropriate sanction.

AWARD

The case against the Respondent is dismissed

Signed and dated in Johannesburg on this 5th day in April 2011.



Adv. RONNIE BRACKS
PHWSBC Panelist