



ARBITRATION AWARD

Panellist: Bella Goldman
Case No.: PSHS502-11/12
Date of Award: 04 June 2012

In the ARBITRATION between:

DENOSA obo Lowaldo Dlela

(Union / Applicant)

And

Department of Health - Western Cape

(Respondent)

Union/Applicant's representative: Thokozile Tyilikile, Union Official
Union/Applicant's address:

Telephone:

Telefax: 021 424 4667

Respondent's representative: Xolisa Nginase and Njonjo Duma, Labour Relations Officers
Respondent's address:

Telephone: 021 483 4503

Telefax: 021 483 3952

DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for an arbitration hearing at the Athlone Nursing College on 20 February 2012. It was part heard on that day and was completed on 3 May 2012. Ms Thokozile Tyilikile, Union Official represented the applicant. Mr Xolisa Nginase and Mr Njonjo Duma, Labour Relation Officers represented the respondent on the respective days. Ms Faith Khasive, Labour Relations acted as interpreter and was sworn in as such. The proceedings were digitally recorded. It was agreed that closing arguments would be submitted in writing.

ISSUE TO BE DECIDED

2. I have to decide whether or not the employee's dismissal was procedurally and substantively fair in terms of the Labour Relations Act 1995 as amended (LRA).

BACKGROUND TO THE ISSUE

3. The respondent employed the applicant from January 2011 until 23 June 2011 when he was dismissed for misconduct; the applicant appealed his dismissal which was upheld on 8 September 2011. At the time of his dismissal the applicant was employed as a Registered Nurse and was completing his Community Service training at the Delft Ante Natal Clinic.
4. The applicant was suspended on 4 April 2011 with respect to incidents which took place in March 2011. On 6 June 2011 he was issued with notice to attend a disciplinary on 10 June 2011. The charges against him were:
5. **Charge 1:** You are in breach of a rule contained in Annexure 'A' of the disciplinary Code and Procedures for the Public Service Resolution 1 of 2003 read with the Sexual harassment Policy of the Western Cape, which deals with sexual harassment in that on or about 7 March 2011 whilst on duty you made unwelcome innuendoes, sexual moves towards Ms Nosiyambonga Nomatshizel when you asked her to move into a corner and then further you asked her to lift her dress, pulled down her underwear and put your finger inside her vagina.
6. **Charge 2:** You are in breach of a rule contained in Annexure 'A' of the disciplinary Code and Procedures for the Public Service Resolution 1 of 2003 read with the Sexual Harassment Policy of the Western Cape,

which deals with sexual harassment in that on or about 7 March 2011 whilst on duty you made unwelcome innuendoes, sexual moves towards Ms Portia Mfeketho, when you asked her to pull down her underwear and thereafter you looked at her vagina without permission.

7. **Charge 3:** You are in breach of a rule contained in Annexure 'A' of the disciplinary Code and Procedures for the Public Service Resolution 1 of 2003 read with the Sexual harassment Policy of the Western Cape, which deals with sexual harassment in that you on or about 7 March 2011 whilst on duty you made unwelcome innuendoes, sexual moves towards Ms Nandipha Bangi when you locked the door and asked her to take off her underwear and you touched her breasts and looked at her private parts and put your finger inside her vagina without permission.
8. The applicant is claiming that his dismissal was substantively unfair in that he is not guilty of misconduct in that, being a trained obstetrics nurse it was part of his duties to conduct vaginal examinations. He is claiming that his dismissal was procedurally unfair in that the chairperson was biased in that she is a friend of the Nursing Manager in that they had studied together and she did not give the union a chance to elaborate on certain points and she made assumptions on behalf of the union.
9. The applicant has not found alternative employment and is seeking reinstatement.

SURVEY OF THE EVIDENCE AND ARGUMENT

10. I have considered all the evidence and argument, but because the LRA (section 138(7)) requires an award to be issued with brief reasons for the findings, I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

Documentary Evidence

11. The parties submitted bundles of documents in evidence which were agreed as being what they purported to be. The applicant's bundle was marked 'A' and was numbered 1 to 28. The respondent's bundles were marked 'B' and 'C' and were numbered 1 to 51 and 1 to 9 respectively. The latter was the statements of the complainants.

Employer's Evidence

The respondent called four witnesses, Murdoch Joseph Horne, Nursing Manager, Nandipha Bangi, Complainant, Monique Morta, Professional Nurse, and Nosiyambonga Notshizela, Complainant. All gave evidence under oath. The following is a summary of their testimonies:

Murdoch Joseph Horne

12. The incidents in question came to the attention of the witness on 24 March 2011 when Sister Kiewitz informed him of allegations that certain patients made against the applicant in terms of improper conduct as per the charges. The witness told her to obtain statements from them which she did. The witness then reported this to the Facility Manager, Mr Van Heerden. However prior to writing to Mr Van Heerden the witness informed the applicant of the allegations against him and at that point the applicant denied touching the complaints in an improper manner, that is putting his finger in their vaginas or looking at their vaginas. The applicant's statement dated 4 April 2011 confirms this.
13. What had taken place was that the complainants had only realised that what the applicant had done was not part of normal procedure when they had arrived at the clinic for their next visit and discussed their respective experiences with other patients.
14. The witness described what the applicant's duties were on that particular day. He was posted at the 'Blood / Injection Room' (BR). When new patients first attend the clinic and their pregnancy has been confirmed they collect a folder and then go to the BR where blood is drawn for testing and their medical history is taken and recorded by the nurse on duty who at the time was the applicant. There is no bed in the BR only one a desk and two chairs. Once blood has been drawn and a medical history has been taken, the patient is then directed to the next room where there is a bed. This is where physical examinations are conducted when and if necessary by a qualified midwife. Trainees of whom the applicant was one were all specifically informed of this procedure. The witness stated that he had specifically told male trainee nurses in January 2011 that whenever they conduct a physical examination on a female patient they must always ensure that a female was present with them and this formed part of their orientation.
15. There had been problems with the applicant in that he had not been completing the medical history of patients properly and had to be spoken to in this regard by both the witness and Sister Kiewitz when his duties were again emphasized and clarified. After 24 March 2011 until his suspension the applicant was then moved from the BR to another part of the clinic.

16. It was put to the witness in cross examination that the applicant was never orientated and that he has never seen the sexual harassment policy referred to in the charge sheet. The witness stated that the applicant was orientated. It was also put to the witness that he conducted vaginal examinations on patients where he deemed it necessary. The witness again stated that it was under no circumstances part of his duties to do so.

Nandipha Bangi

17. On the day of the incident the applicant went into the BR where the applicant was and the applicant took blood from her after which, he asked her to close the door and stand up and to take off her pantyhose and underwear which she did. The applicant then looked at her breasts and then he put on a pair of rubber gloves and inserted his finger into her vagina and said he was looking for discharge. The applicant told her he looked at her breasts to see if she could breast feed. He told her she would get the result of the vaginal examination in the next room. The applicant said that in the next room she was told that the result of her HIV test was negative but there was no mention of the result of her vaginal examination and the only physical examination that took place in that room was that the circumference of her stomach was measured. The applicant stated that apart from the applicant's examination the only time that she experienced a vaginal examination was when she was admitted to hospital to have her baby.

18. The applicant then went out and sat in the waiting room, whilst she was there she spoke to another lady who asked her if the person in the BR put his finger in her vagina and she said he did. When she returned for her next appointment she discovered that the applicant was being investigated and nurses and patients were talking about it and she was asked by Mr Horne what the applicant had done to her on her last visit and she recounted her experience and was asked to write a statement which she did.

Monique Morta

19. The witness stated that the Head of the Department Sister Sikiti orientated the applicant when he commenced his training at the beginning of January 2011. He was allocated to the BR and the witness told him what his duties were there which was the taking of blood for HIV testing and for ante natal testing and medical history taking. The BR is a small room in which there is a small table with two chairs, there is no bed and hence no physical examinations can be conducted there.

20. On 24 March 2011 the witness returned from leave at about midday she heard a commotion and Sister Miriam told her to call management. Mr Horne, the Nursing Manager was not there so she called Sister Kiewitz, his Deputy. Apparently patients were complaining that on 7 March 2011 the person who was on

duty in the BR had treated them indecently and they wanted to go to the police and to the media. Mr Horne arrived about an hour later.

21. It was put to the witness that she instructed the applicant to conduct vaginal examinations, the witness denied this. She stated that there had been problems with the applicant in that he did not want to take instructions and would not complete the medical history as he should. When the witness gave him instructions he would say that he knows what to do and how to do it and the witness complained of this attitude to Sister Sikiti, he then reported to Sister Fredericks but she resigned and the applicant then reverted to reporting to the witness.

Nosiyambonga Notshizela

22. The witness attended the clinic on 7 March 2011, it was her first visit for her first baby and she did not know what to expect. She entered the BR with her folder. The applicant took the folder and asked her the relevant questions so that he could complete it.
23. The applicant then asked her if she had any problems, she said she had none. He then asked her to stand in the passage of the room behind the door and to take off her underwear; she was wearing a dress. He then put a rubber glove on and put his finger into her vagina. He then told her to get dressed and sit on the chair. He asked her for her phone number. She told him that it was on her folder, he told her he wanted the phone number for himself. The witness did not give him the phone number. He then picked up a pamphlet on breast feeding and wrote his phone number on it and gave it to her and she referred to a copy of the pamphlet with what the witness assumed was his number on it. The applicant denied that it was his number or his writing.
24. The applicant in response to being asked how she felt about the vaginal examination stated that she was scared but as it was her first visit to the clinic she thought it may have been part of the normal process. Only on 24 March 2011 when she came for her 2nd appointment and was speaking to other patients, the applicant passed by. One patient said there goes the guy who puts his finger in patient's vaginas and touches their breasts. The applicant then recounted her experience and was told that he was not permitted to do that. The applicant and other patients then went to report their experience to management who asked them to write statements which they did.
25. The witness was asked in cross examination whether the applicant explained to the witness what he was going to do before he gave her a vaginal examination and why he was doing the examination. The witness

said he did not, he just told her to open her legs wider. She was asked whether she had a vaginal infection she said she did not.

26. The witness said that the applicant told her what he was going to do and why he was doing it when he drew blood from her.

Employee's Evidence

The applicant Lowaldo Dlela gave evidence and called one witness Nomvuyo Xhimiti, Professional Nurse. Both gave evidence under oath. The following is a summary of their testimonies:

Lowaldo Dlela

27. The applicant confirmed that in 2011 he was serving his Community Service training at the Delft Clinic and he was supposed to work under supervision. He originally reported to Sister Mota then Sister Frederick's as Sister Mota said he was difficult and did not complete the medical history part of the patient's folder properly. When Sister Fredericks left he did not report to anyone.
28. The applicant stated that at the beginning of March 2011 he attended a two to three day workshop on ante natal care. The applicant also attended a training course on how to take a medical history. The applicant stated that he had never seen the respondent's sexual harassment policy but knew what sexual harassment was.
29. The applicant referred to a template of a patient's folder on which there are general headings; Medical and General History, Examination, Vaginal Examination, etcetera. The applicant stated that Sister Sikiti told him that he must complete the relevant part of the folder (Vaginal Examination) if the patient has sore breasts or a vaginal discharge or infection. Hence if a patient complained of these symptoms he would conduct a vaginal examination and would conduct a breast examination to see if a patient could breast feed. The applicant stated that in hindsight he can now see that the examination should not have been done in that room but at the time he was trying to be proactive and helpful and at the same time learn as much as he could.
30. The applicant denied that he gave the 2nd complainant a pamphlet with his cell number on it and he denied that the number was his or that he asked her for her phone number.
31. The applicant was asked why in his statement dated 4 April 2011 he stated "*I have never touched women's vaginas inside that room*". The applicant admitted writing the statement but said that he was

harassed and stressed and sick that day. The applicant stated in any event when conducting a vaginal examination he would not insert his whole finger into the vaginal but only the tip of his finger.

Nomvuyo Xhimiti

32. The witness is a midwife with sixteen years experience. She has worked at Groote Schuur and now does agency work. She stated that it is not appropriate to do vaginal examinations in a BR but it can happen in certain circumstances. The witness stated that she does not know the circumstances of the case in question and hence cannot comment on this case.

33. The parties submitted argument in support of their respective cases which I will refer to where necessary in my analysis.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

34. In a case where unfair dismissal is alleged it is for the respondent to prove on a balance of probabilities that the dismissal was fair.

35. If an applicant is dismissed for misconduct, Schedule 8 of the LRA requires the dismissal to be substantively and procedurally fair. In order for the dismissal to be procedurally fair the employer should prior to dismissing the employee, conduct an investigation to determine if there are grounds for dismissal. In terms of this investigation the employer is required to do the following:

- Notify the applicant of the charges against him / her;
- Give the applicant reasonable time to prepare a response the charges against him / her;
- Allow the applicant to be assisted by a fellow employee or a trade union representative and
- After the investigation the respondent should communicate the decision taken and should preferable notify the applicant in writing of the reasons for the decision.

36. In order for the dismissal to be substantively fair the respondent must prove that:

- There was a rule.
- The rule was reasonable.
- The rule was known to the applicant or should have been known.
- The rule was broken by the applicant.
- Dismissal was the appropriate sanction for the breach of the rule.

37. In terms of procedural fairness, the applicant made some allegations of procedural unfairness in opening statement but led no evidence with respect thereto. All the requirements of procedural fairness referred to above were adhered to and I found no evidence of procedural unfairness and hence I find that the applicant's dismissal was procedurally fair.

38. In terms of substantive fairness, the applicant denied breaking a rule and stated that it was part of his duties to conduct vaginal and breast examinations in the BR and thus conducting such examinations were not acts of sexual harassment. Even though it was not disputed that the applicant had never seen the respondent's sexual harassment policy the applicant confirmed that he knew what sexual harassment was and his understanding of it was correct.

39. I found the applicant not to be a credible witness for the following reasons:

- In his statement he denied ***ever touching women's vaginas in that room***, his reason for making that statement was that he was sick and stressed. That would not account for making a completely untrue statement on his version.
- Further if the applicant was testing for an infection he would have to have a plan for giving the patient her results, he would have to take a sample etcetera, the applicant had no such plan. He also gave no results of either the vaginal or the breast examination nor did he have a plan to do so.
- Sister Morta stated that after Sister Fredericks left, the applicant again reported to her, the applicant never put it to her that this was not the case as he stated in his evidence.
- It is also extremely improbable that one would be required to do a vaginal examination in a room where there is no bed, when there is a bed in the next room. Even the applicant's own witness stated that it is only in exceptional circumstances that a vaginal examination is conducted in a BR.
- Further the complainants had nothing to gain from fabricating their stories.

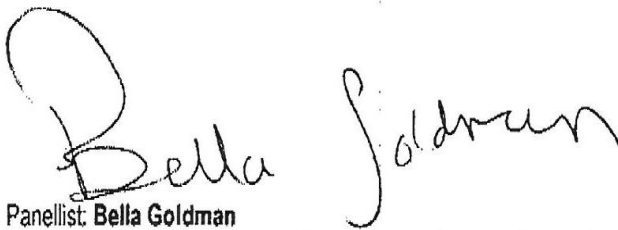
40. I thus find that the applicant knew he was not permitted to conduct vaginal and breast examinations in the BR and he did and that this amounted to sexual harassment. The respondent was not able to locate the complainant referred to in charge 2 and I thus find the applicant guilty with respect to charge 1 and 3.

41. The charge of sexual harassment is extremely serious for any employee but especially so for an employee embarking on a nursing career where integrity and trust are so highly regarded and I thus find that dismissal is the only appropriate sanction in such a case. I thus find that the applicant's dismissal was substantively fair.

AWARD

42. I find that the applicant's dismissal was procedurally and substantively fair and the referral is dismissed.

43. There is no order as to costs.

A handwritten signature in black ink that reads "Bella Goldman". The signature is written in a cursive, flowing style.

Panelist: **Bella Goldman**

Sector: **Public Health & Social Development Sectoral Bargaining Council**