ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Case No: **PSHS1011-19/20**
Commissioner: **Jerald Vedan**
Date of ruling: **25 June 2020**

In the matter between:

PSA obo Nondumiso Ndlovu Applicant

and

Department of Health – KwaZulu Natal Respondent

DETAILS OF HEARING, REPRESENTATION AND BACKGROUND

1. The hearing took place at the Boardroom, Clairwood Hospital on 09 June 2020 at 10:00 am.

2. The Applicant was represented by D. Govender, an union official.

3. The Respondent was represented by M. Lembethe.

ISSUES TO BE DECIDED

4. Whether the Respondent committed an unfair labour practice by suspending the Applicant for one month without pay, and further temporarily suspending her commuted overtime.

OVERVIEW OF EVIDENCE AND ARGUMENT

5. Procedurally there was no challenge to the hearing.

6. The Applicant was called at 4h15 on 20 December 2018 to respond to an emergency situation that involved a baby who had resuscitation problems.

7. According to hospital procedure, an on-call doctor is allocated for each night as per a roster. The Applicant was not on the roster as the on-call doctor for the night in question. According to the roster, the doctor on-call for the 19th to 20th December 2018 was Dr Buyisiwe Gloria Mabaso, the Medical Manager

8. The Matron on duty, at the time of the incident, misread the roster and erroneously called the Applicant, instead of Dr Mabaso. The Applicant answered the call and advised the Matron on procedure to follow until she could arrive.

9. The Applicant stated that due to a hip injury, she is unable to drive herself and therefore she had logistical issues. She had to wait for her driver to arrive. The driver's residence was at South Beach, Durban, and the Applicant lived at Mount Edgecombe, and it would take the driver approximately half an hour to reach her.

10. Dr Mabaso was later contacted, after there was a delay in the Applicant arriving at the hospital, and thereafter Dr Mabaso went to attend to the emergency. Either before or after she was phoned by Dr Mabaso she phoned her colleague Dr L.

Dube, who lived closer to the hospital, and asked her to attend to the emergency. Dr Dube phoned the hospital and ascertained that Dr Mabaso was already there.

11. The patient passed away at around 7h00 on the same day, after being attended to by Dr Mabaso.

12. The Respondent stated the Applicant did not attend to the matter with urgency, despite being called, and claimed that the Applicant did not arrive at the hospital. The Respondent further stated that the Applicant should have informed the Matron that she was not on-call.

13. The Applicant was thereafter charged with misrepresenting herself and contravening the legislation and principles that ensure access to healthcare. She was also charged with bringing disrepute to the institution's reputation and contravening the Public Servant's Code of Conduct.

14. She was found guilty after a disciplinary enquiry, and was issued with the sanction of one-month suspension without pay, and the temporary suspension of commuted overtime, until the Medical Manager is convinced that the Applicant would be able to respond to emergency calls without compromise.

15. The Applicant asked for the guilty verdict and suspension, along with the written warning, to be set aside. She also asked that the sanction of suspended commuted overtime to be set aside. She further asked for compensation for the damage to her reputation in the form of a solatium.

APPLICANT'S EVIDENCE AND ARGUMENT

16. The Applicant testified that the institution does not have a Doctor on site for call duties, and that this has been an issue due to the fact that the hospital attends to premature babies. The babies are kept in a ward, known as the Kangaroo Mothers Care Ward (KMC), and the procedure at the hospital was that there was a roster system for Doctors on-call to attend emergencies.

17. If a Doctor is on-call from 16h00 on one day then the call period ends at 8h00 on the next day. In other words, the call period overlaps over two dates.

18. The system at the Clairwood Hospital was that once the Doctor on-call is summoned they have to make their way to the hospital, and attend to the situation. They are paid overtime for this. There was no stipulation about the distance their place of residence must be from the hospital

19. On emergency procedure, the Applicant stated that the nurses assess the patient and determine whether there is a need for a Doctor to attend to a situation. If deemed necessary, the nurse will then telephone the night Supervisor who, after consulting the roster, will contact the Doctor rostered for that night. The night Supervisor will thereafter telephonically patch the Doctor through to the ward so that the situation may be ascertained.

20. On the night of the emergency in question, the Applicant was not rostered in as the on-call doctor. Dr Mabaso was listed on the roster as the on-call doctor.

21. The Applicant was involved in a motor car collision in June 2013, and sustained injuries to her hip femur and her right arm, and as a result encountered mobility problems. She had a hip replacement. Due to this she was unable to drive, and did not feel confident to do so.

22. Since the commencement of her term at Clairwood Hospital, the Applicant had engaged a driver to chauffeur her to work and back. The driver was well acquainted with her needs should an emergency situation arise at the hospital, and was aware that should there be an emergency, he is required to respond urgently to drive the Applicant to work. The Applicant stated that the institution was aware of the fact that she did not drive, and that they had never seen her drive a car since her employment began there.

23. The driver resides in Point, Durban while the Applicant lives in Mount Edgecombe.

24. At 4h00 on 20 December 2018, the night of the incident, the Applicant received a call from the night Supervisor, who informed her that there was an emergency in the KMC ward. The Applicant asked the night Supervisor to patch her through to the ward and she spoke to the Nurse. She was informed that a baby was experiencing breathing difficulties.

25. The Applicant stated that she gave the Nurse instructions on how to handle the situation, and advised that she would be there as soon as possible.

26. Immediately after her call with the Nurse, the Applicant stated that she contacted her driver and informed him that there was an emergency situation at the hospital. He responded accordingly by leaving his home to fetch the Applicant immediately.

27. The Applicant claimed to have freshened up while waiting for her driver to arrive. She further stated that during this time, she called Dr Dube, who works at Clairwood Hospital and resides in Glenwood, and asked her to go and assess the situation, as Dr Dube would have reached the hospital faster.

28. At that point, the Applicant had been informed by her driver that he was on his way. She was not physically on her way to the hospital, as she was waiting for her driver. Due to the gravity of the situation, she made the call to Dr Dube.

29. The Applicant stated that the Doctor on-call for the night, Dr Mabaso, contacted her and asked her why she was not at the hospital. Dr Mabaso told the Applicant that she was taking too long. The Applicant then informed Dr Mabaso that she was waiting for her driver, who was at that time on the highway, to fetch her. The Applicant claimed that Dr Mabaso was not pleased, and told her to go to the hospital.

30. When her driver arrived, and she had gotten into the car, the Applicant received another telephone call advising her that Dr Mabaso had arrived at the hospital. Dr Dube advised her of the same. The Applicant called the ward several times to ascertain the condition of the baby.

31. The Applicant testified that hospital rules state that if Nurses are unable to get a hold of the Doctor on-call, they must then contact the Supervisor of the Doctors.

32. The Applicant stated that she received two charge sheets in this matter, the first of which alleged that she failed to act on the day that she was on-call. She contended that she was not on-call for the day in question. The second charge sheet, which was presented at the disciplinary hearing, corrected the abovementioned error.

33. According to the Applicant, the Matron misread the roster and called her instead of Dr Mabaso, who was scheduled to be on-call. The Applicant was not on-call at the time. However, she did not inform the matron of this due to adherence to her duties as a Doctor: if you are called for an emergency, you attend to it.

34. The Applicant stated that Dr Mabaso testified at the disciplinary hearing that the Applicant stated that she was taking a bath before attending to the emergency. The Applicant denied this and stated that she was freshening up while waiting for her driver to arrive.

35. Dr Dube confirmed that she received a request from the Applicant to check on the emergency in the interim.

36. The Applicant stated that she had previously attended to other emergencies while utilising her driver. The delay in her response time was due to the fact that the Applicant is unable to drive herself, and had to wait for her driver to fetch her and take her to the hospital. She further stated that her driver does not waste time in the event of an emergency situation and makes concerted efforts to act with urgency.

37. The Applicant's driver, Emmanuel Matuje, was called in as a witness. He stated that he was employed by the Applicant from September 2018 to November/December 2019. According to him, the contract between the Applicant and himself was to transport the Applicant to work and back. He also drops off her son who studied in Greenwood Park on the way to the Applicant's place of work, and picks him up on his way to the Applicant's home.

38. The driver resides in South Beach while the Applicant lives in Mount Edgecombe.

39. On the morning in question, he remembers receiving a call from the Applicant at around 4h30. He stated that the trip from his house to the Applicant's house usually takes 30 minutes, however he rushed to get to her house as he knew that it was an emergency.

40. Mr. Matuje stated that he was informed by the Applicant that he would have to be available to drive her when she is on-call or on a rest day, as emergencies crop up. Therefore, he was aware that he had to act with urgency.

41. On the day in question, he arrived at the Applicant's house before 5 am as he had taken the gravity of the situation into account, and drove faster than usual. However the Applicant had received a call, and then informed him that there was no longer a need to go to the hospital.

RESPONDENT'S EVIDENCE AND ARGUMENT

42. The first witness for the Respondent was Dr Buyisiwe Gloria Mabaso, who is employed at Clairwood Hospital as a Medical Manager. Dr Mabaso stated that she was aware of the incident that occurred on 20 December 2018. She had received a call at around 5h20 from Sister Ngcobo, who informed her that there was a resuscitation taking place in the KMC Ward. A baby's condition was deteriorating.

43. She was informed that they had called the Applicant at around 4h15, but the Applicant had yet to arrive. Dr Mabaso stated that she had called the Applicant to ascertain the situation just after 5h20.

44. According to Dr Mabaso, the Applicant initially lied to her and claimed that the nurses had only just called her, refuting the claim that they had called her at 4h15. Dr Mabaso further stated that the Applicant informed her that she needed to take a bath before going to the hospital.

45. When Dr Mabaso asked the Applicant where she was, the Applicant stated that she was on the N2 at Mount Edgecombe.

46. Dr Mabaso stated that she arrived at the hospital at around 5h45, and went to the ward, where she discovered the Nurses attempting the resuscitation. She then went to assist them. There was no other Doctor in the ward at that time.

47. She stated that the baby was declared dead at around 7h00. After completing the relevant paperwork, she went home at around 8h30.

48. Dr Mabaso claimed that the Applicant never informed her of her inability to drive, and she was unaware that the Applicant utilised the services of a driver. However she was aware that the Applicant had undergone a hip replacement operation.

49. She stated that the Applicant was aware that calls were off-site, and that a response was required when called. She clarified that “off-site” referred to calls while a Doctor is at home. Dr Mabaso stated that if a Doctor is unable to attend a call, that Doctor must inform the nurse or contact a colleague or the Supervisor.

50. Dr Mabaso stated that she thought that calling the Applicant at that point was an oversight on the part of the nurses. She further stated that a Doctor must respond to an emergency within twenty minutes.

51. According to Dr Mabaso, she lives in Doon Heights and Dr Dube lives in Glenmore.

52. Under cross examination, Dr Mabaso stated that she was called in much later due to the fact that the Applicant had told the Nurses that she was on her way. She stated that she was aware that it was her responsibility, as she was on the roster for that morning. However she called the Applicant in order to find out what was happening. She needed to determine who would be able to reach the hospital faster.

53. Dr Mabaso stated that she had rushed to the hospital, despite the Applicant being called, because she was the on-call Doctor and it was an emergency. She proceeded to intubate the baby, which is not in a Nurse’s scope of practice.

54. According to Dr Mabaso, the Applicant had not informed her of the transport issue.

55. The second witness for the Respondent was Ms. K. Mthimkulu, an enrolled nurse employed at Clairwood Hospital.

56. She stated that she entered the ward to find Sister Nzama and Sister Dlamini, her colleagues, resuscitating a baby. Upon instructions from Sister Nzama, she went to the office to contact the on-call doctor. She proceeded to contact the Matron, who then put her through to the Applicant at around 4h15.

57. Ms. Mthimkule stated that she is not aware of which doctors are on-call. She called the Matron, who checked the roster and put her through to the Applicant. The Applicant then told her that the resuscitation should be carried on with, and assured her that she was on her way.

58. According to Ms. Mthimkulu, the Applicant did not arrive at the hospital. However she saw Dr Mabaso enter the ward. She did not know why Dr Mabaso was there, as she had contacted the Applicant.

59. She further stated that the office should have known which doctor was on-call at the time.

ANALYSIS OF EVIDENCE AND ARGUMENT

60. The general rule is that he/she who alleges a fact must prove it on a balance of probabilities. In unfair labour disputes, such as the present case, the onus rests on the Applicant to prove the unfair practice. In *Lindsay v Ithala Development Finance Corporation Ltd* (2) (2002) 23 ILJ 418 (CCMA), the Commissioner considered that, "with regard to onus, the principles of our labour law is clear that the initial burden of proof is always on the employee to show that the employer did something, whether it be a dismissal, or a labour practice, and once the existence of that fact is established, the burden of proof moves to the employer to show that what it did was fair". The overall onus always rests on the employee to show the existence of an unfair labour practice. The Applicant has to prove his case on a balance of probabilities.

61. The Applicant was charged with misrepresentation by lying to her Supervisor about the time of the call, and her whereabouts. She was further charged with contravening the Batho Pele Principles 3 and 4 (access and courtesy), the KwaZulu-Natal Health Act, Act 1 of 2009, Section 7(1) (a)(c), the Department of Health's Patients' Rights charter and section of the Constitution of South Africa by denying a

health care user access to emergency care services. The third charge was that she brought the image of the institution that of the Department and its administration as well as her profession to disrepute and contravened the Code of Conduct for public servants, Section 4.2.3.

62. Having analysed the above, it was the Applicant's own version that when she received the emergency call, at 4h15, she responded to the call positively. She did not realise, nor raise the point, that she was not on-call on that particular morning, and that it was indeed Dr Mabaso who was on-call.

63. Furthermore, she assured the staff that she would attend to the emergency, in order words that she would arrive at the hospital to attend to the baby, who was clearly in need of emergency treatment that could only be proffered by a qualified Doctor.

64. It is common cause that Mrs Millicent Ngcobo, who was working in the Matrons office on that night, had been mistaken about who was to be called, and misread the roster.

65. The Applicant even conceded that as a medical Doctor when you are called you had to attend to the emergency, and she did say that she would go to the hospital. She did not inform Ngcobo, or anyone else at the hospital, that she is having difficulty with transport, or that there would be a delay as regards transportation, nor did she inform them of any other difficulties.

66. Instead they waited for her, and even telephoned her again asking her as to the delay, whereupon Dr Mabaso was called at 5h20, and Dr Mabaso arrived about twenty five minutes later, and tried to save the baby. Unfortunately the baby passed away at 7h00.

67. It would appear that the Applicant had also given instructions on the phone to the Nurses, as to how to attend to the patient. However this was insufficient, as her physical presence was needed.

68. The Applicant having placed herself on the roster to be on-call duty, which entailed receiving overtime payment as well, should have made suitable arrangements to arrive at the hospital as rapidly as possible. Her driver testified that it normally takes about thirty minutes from his place on South Beach to pick up the Applicant, and take her to the hospital. This is an inordinate delay in the circumstances as well.

69. The driver indicated that he arrived at her place at 5h00, and yet at 5h20 the Applicant was still not on her way.

70. There appears to be no motive for Dr Mabaso to be untruthful about what the Applicant has told her about having a bath, and about the time that the hospital had called her, and further about being on the freeway.

71. Dr Mabaso gave her evidence in a clear and credible manner, and the veracity of her evidence stood cross-examination solidly. She could not have been wrong on all three scores as to what the Applicant told her, and although the Respondent did not pursue the allegations fabricated vigorously at the arbitration hearing, however the evidence tends to lead to the conclusion that these were the words to Dr Mabaso.

72. The Applicant had appealed against the sanction, and the Appeals Authority had confirmed same.

73. If the Applicant had informed the person who phoned her that she was not on-call arrangements would have been made to obtain the services of the Medical Manager or another substitute. The situation warranted that she had to tell the caller that she would not arrive at the hospital, and that the driver would take time to reach her.

Further she had to tell Dr Mabaso that she would not be coming, rather than tell Dr Mabaso that she was on the N2.

74. Although many factors could have caused the baby's death, perhaps if the Applicant has arrived on time critical health care could have been rendered, which could have saved the baby's life.

FINDINGS

75. Based on the above, I find that the Respondent has not committed an unfair labour practice against the Applicant.

AWARD

76. The application is dismissed.

77. There is no order as to costs.

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JERALD VEDAN
Commissioner