



ARBITRATION AWARD

Case No: PSHS1088-17/18

Commissioner: Joseph Mphaphuli

Date of award: 7 May 2019

In the matter between:

Dr Brenda Vakele

Applicant

and

DEPARTMENT OF HEALTH- MPUMALANGA

Respondent

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The hearing was conducted at the Respondent's premises in Evander. The hearing was conducted in terms of Section 191 of the Labour Relations Act and on 08/9/10 April 2019.

1.2 Advocate Moipone Kgatla appeared for the Respondent. The Applicant was represented by Advocate Breytenbach.

1.3 The proceedings were digitally recorded.

1.4 Parties agreed to file their written closing arguments on 24 April 2019.

2. ISSUE IN DISPUTE

2.1 I had to determine whether the Applicant's dismissal was fair or not and determine the appropriate remedy, if any.

3. BACKGROUND TO THE DISPUTE

3.1 The Applicant commenced employment on 01 October 2012. The Applicant served in the capacity of medical officer. The Applicant's services were terminated on 20 June 2017.

3.2 Termination of employment was for a reason related to the Applicant's conduct.

3.3 The Applicant sought reinstatement in the event of a favourable award.

4. COMMON CAUSE FACTORS

4.1 The Applicant was scheduled for work on 09 to 10 February 2017 over which period the Applicant failed to report for duty.

4.2 The reason for the Applicant's failure to attend at work was not communicated to the Respondent.

4.3 The Applicant exchanged her shift with another doctor i.e. Doctor Karen, without management authorization.

5. SURVEY OF EVIDENCE

5.1 RESPONDENT'S CASE

5.1.1 Dr Mweimbi Kalemani testified for the Respondent. She was the clinical manager at the hospital. She has been in the service of the hospital since 2017. She previously reported to Doctor Pule, prior to her appointment to her current position.

5.1.2 She was responsible for the supervision of medical officers.

- 5.1.3 Sessional doctors were allocated in terms of sessions for agreed days and hours. Sessional doctors came in as and when required by the hospital
- 5.1.4 Permanent doctors on the other hand work every day and not at agreed intervals, like sessional doctors.
- 5.1.5 All be it that sessional doctors were not in the permanent employ of the Respondent, their relationship were regulated in terms of standards, guidelines and policies of the workplace.
- 5.1.6 The standard operating procedure was that doctors must report for duty as rostered, give advanced notice of absence and receive the manager's approval prior to swapping shifts.
- 5.1.7 In the case of swapping, the stand in doctor must possess the same skill, ability, qualification and experience failing which authorization will not be granted.
- 5.1.8 Swapping shifts with a doctor with inferior skills, experience and qualification was likely to pose a danger to patients as well as putting patients' lives at risk.
- 5.1.9 The Applicant defaulted to report for duty on 09 February 2017 as scheduled. Instead the Applicant enlisted the services of a fellow doctor, namely Doctor Kareen.
- 5.1.10 Doctor Kareen was a community service doctor. The Applicant was a senior doctor. Doctor Kareen was at a lower level and a junior at that. Doctor Kareen was not a suitable doctor to fill in for the Applicant.
- 5.1.11 It was a known fact that Doctor Kareen was a junior doctor who had just completed medical training.
- 5.1.12 The Applicant was identified as a sessional doctor on the roster of 09 February 2017.
- 5.1.13 The roster made express provision to the effect that swops must be arranged in advance and must be authorized by the clinical manager.

- 5.1.14 The Applicant's sessional contract make provision that an employee is obliged to notify the employer of her absence before the commencement of her call and should find an equally qualified replacement.
- 5.1.15 The standard applies across the board and equally to permanent employees.
- 5.1.16 Where there is breach of the terms of the contract the innocent party may terminate the contract.
- 5.1.17 The Applicant claimed for work done on 09 February 2017 on 06 March 2017 when in fact the Applicant did not tender services on 09 February 2017.
- 5.1.18 The fact that the Applicant claimed for work not done by herself on 09 February 2017 served to confirm that the Applicant had subcontracted the services of another doctor.
- 5.1.19 A patient was attended to by Doctor Kareen on the night of 09 February 2017. The procedure, following an incomplete abortion was imperfect resulting in the patient being unable to pass stools in the normal way.
- 5.1.20 Doctor Kareen lacked the skills and the expertise to conduct the procedure at hand.
- 5.1.21 She did not feel confident to work with the Applicant due to the irrevocable breakdown in the trust relationship.
- 5.1.22 Mr. Jankie Aphane, Chief Executive Officer testified in the Respondent's case. He was appointed in the position on 15 November 2015. He was responsible for the overall management of the hospital.
- 5.1.23 The Applicant was appointed as a sessional doctor to provide services additional to the services provided by permanent medical officers. All sessional doctor work in terms of an agreed schedule for limited duration.
- 5.1.24 Sessional doctors utilize the balance of their time to run their own practices.
- 5.1.25 The sessional doctors' contracts were introduced to regulate the relationship between the Respondent and the sessional doctors. These were later withdrawn following an outcry by the sessional doctors.

- 5.1.26 Letters of appointment were then substituted as the instrument to regulate the relations between the Respondent and sessional doctors.
- 5.1.27 The mode of operation was that sessional doctors would advise the Respondent of their availability. The dates and times of availability would be used to roster the sessional doctors.
- 5.1.28 It was imperative for swopping to be authorised by the clinical manager and that such takes place between medical officers of equal or like skills, training, qualification and experience.
- 5.1.29 It was not permissible for a grade 3 medical officer to swop shifts with a grade 2 or 1 medical officer. In the first instance a doctor on a higher grade earned more than a lower grade medial officer in which event the swopping would result in pay anomalies as the junior doctor would earn at the rate of a senior doctor.
- 5.1.30 The then clinical manager, Doctor Pule, emphasised the accepted mode of operation where it concerned call swopping in 2013 condemning the prevailing practice of swopping shifts in a manner that undermined the hospital standard. To the best of his knowledge, the doctor who stood in for the Applicant on 09 February 2017 was a junior doctor and was not the appropriate doctor to replace the Applicant. The fact that doctor Kareen, the replacement doctor was a Community Service Doctor signified that he was unexperienced, new in the profession making him a junior doctor.
- 5.1.31 He found the Applicant's conduct so gross that it makes the restoration of a normal work relationship unimaginable. The Applicant's conduct showed a deliberate and willful inclination to violate a well-known standard.
- 5.1.32 The Respondent closed its case.

5.2 APPLICANT'S CASE

- 5.2.1 She served as sessional doctor grade 2. She commenced services in October 2012. The document that regulated her relationship with the Respondent was the

appointment letter. She was remunerated at R438.00 per hour at an average of R49 000.00 per month

- 5.2.2 The Applicant disclaimed knowledge of the circular pertaining to call swopping.
- 5.2.3 She felt unwell on 09 February 2017. She could not report for duty as scheduled. She attempted to enlist the services of an equally qualified doctor without success.
- 5.2.4 She turned her attention to doctor Kareen, a permanent employee who was available and willing to take her call. It was unfortunate that Doctor Kareen performed an operation that resulted in hardship to a patient.
- 5.2.5 Her experience was that call swops were not reflected on the roster.
- 5.2.6 She was confident that Doctor Kareen was a competent doctor who was equal to the task of a senior doctor and had replaced other senior doctors on previous occasions.
- 5.2.7 She knew of one Doctor Flatela, a Community Service Doctor who stood in for a senior doctor in which case there were no consequences.
- 5.2.8 She had taken liberty to advise the Respondent as to why she did not report as scheduled on 09 February 2017, all be it that she did so after the fact.
- 5.2.9 She did not believe that the trust relationship was damaged as she continued to work after the incident. She had an unblemished disciplinary record and added value to the hospital.
- 5.2.10 The dismissal had cut short her profession as she was blacklisted from serving anywhere in South Africa.
- 5.2.11 Doctor Obed Mpfu, medical doctor testified in the Applicant's case. The practice known to him was that a doctor on call could find a replacement in the event of incapacity.
- 5.2.12 Community Service Doctors and foreign doctors functioned under supervision. There was however no way to know who was a junior doctor.

5.2.13 The practice of the hospital where it concerned swapping of calls was not restricted to seniority. Management in the institution was fully aware that swapping was taking place in the way that the Applicant did a swop with Doctor Kareen on 09 February 2017.

5.2.14 He had no knowledge of the circular on the subject of call swops.

5.2.15 Doctor Mpofu stated in cross examination that sessional doctors were independent contractors and were at liberty to sub-contract.

6. ANALYSIS OF EVIDENCE AND ARGUMENT

6.1 The representatives have prior to the commencement of arbitration placed on record that the Applicant was a permanent employee in the service of the Respondent.

6.2 The witnesses' testimony however, proved otherwise. All the witnesses including the Applicant testified to the effect that the Applicant was a sessional doctor.

6.3 The witnesses, including the Applicant understood sessional doctor to mean a medical practitioner with his or her own practice.

6.4 Sessional doctors were at liberty to contract with more than one health institution. Sessional doctors were allocated duties or rostered on the strength of their diary.

6.5 It was common cause that the Applicant was contracted to Embalenhle Clinic and Kwa – Mhlanga Hospital at the time when her contract was terminated at Evander Hospital.

6.6 The basis on which the Applicant and the Respondent concluded that the Applicant was an employee as defined in the Act had no legal basis and was incorrect.

6.7 The conclusion was informed by Section 198A of the Act, implying that the Applicant became a permanent employee at the expiry of three months in the service of the Respondent as contemplated by the deeming provision.

- 6.8 The conclusion ignores the fact that the provision applies to fixed term employment contracts and further that it excludes employees earning above the threshold. That the Applicant's rate of pay was above the threshold was not in dispute.
- 6.9 The conclusion so arrived at by both representatives over looked the provision of Section 200A of the Act wherein presumption of who is an employee is fully explored.
- 6.10 Once more section 200A makes express provision that a person earning above the threshold is excluded in which event such person may not be presumed as an employee.
- 6.11 Undisputed facts namely, that the Applicant tendered services at more than one institution, tendered services on days and times of her choice and invoiced the Respondent for time worked are ingredients of an independent contractor.
- 6.12 Doctor Mpofo, who is also an advocate did not mince his words when he pronounced on the nature of the relationship between a sessional doctor and the affected institution.
- 6.13 The aversion of the representatives remains such, were not evidence and were not at all supported by evidence.
- 6.14 Evidence is the yard of making a determination in arbitration. The evidence from both sides converged on the Applicant being an independent contractor.
- 6.15 Independent contractors do not enjoy the protection of the Act. The Act only applies in circumstances where there is an employment relation.
- 6.16 Bargaining Councils were created by the Act to exercise jurisdiction in matters falling within the ambit of the Act.
- 6.17 Matters falling outside the ambit of the Act may not be a subject of adjudication by a bargaining council.
- 6.18 The fact that the Applicant was an independent contractor places her outside the realm of employees whose disputes are adjudicable by the Council.

7. AWARD

7.1 The dispute did not resort under Council jurisdiction.

7.2 I dismiss the application for the alleged unfair dismissal.



Joseph Mphaphuli