



# ARBITRATION AWARD

Case No: **PSHS170-16/17**

Commissioner: **T ERASMUS**

Date of Award: 20 May 2017

In the matter between:

**DENOSA obo CHARMAINE DE VILLIERS**

(Union/Applicant)

and

**DEPARTMENT OF HEALTH- WESTERN CAPE**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for Arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 ("the LRA") and was heard at the offices of the 1<sup>st</sup> Floor Boardroom, Western Cape College of Nursing, Klipfontein Road, Athlone, Cape Town on 1 February 2017. The parties initially appeared before Commissioner Rani, who recused himself and the matter was postponed as a part heard matter. I was appointed to continue with the Arbitration, after Commissioner Rani's recusal. The matter was postponed as a part heard matter for transcription of the record and was again heard on 19 April 2017. Applicant was represented by D Roman and T Tyilekile from DENOSA, whilst the Respondent was represented by Mr F Rodrigues, Labour Relations Officer at Respondent.

## ISSUE TO BE DECIDED

2. I must decide whether Applicant's dismissal was both procedurally and substantively fair.

## BACKGROUND TO THE DISPUTE

3. The Applicant was charged with the following transgressions at a disciplinary hearing:

**"1. Transgression: Refusing reasonable commands by 3 managers to take off your gilet in the clinical area, thus being insubordinate**

*Refusing to execute reasonable instructions (insubordination) from Management is in contravention to the prescripts as contained in the Code of Conduct for the Public Service. The instruction is based on the KBH internal policy on Standardized Uniforms for Nursing Personnel.*

**2. Transgression: Non-adherence to the uniform dress code of Circulars H170/2011 and H116/2014 of the Nursing Directorate, Western Cape Government (Health)**

*As per Karl Bremer Hospital policy based on the provincial guidelines on the Standardized Uniform for Nursing Personnel, based on Circular H170/2011, the wearing of a gilet is not prescribed for production staff.*

**3. Transgression: Non-adherence to the Infection and Prevention control principles by working with patients in the clinical area with your gilet**

*Paragraph 4.7.3 of Circular H170/2011 states that in the interest of infection control; these garments are not permitted in the clinical areas. Non-adherence to the prescripts is putting the patient and his health at risk.*

**4. Transgression: Not following the correct communication channels – Sanction reduced to Written Warning**

*In line with the Code of Conduct for the Public Service, appropriate communication channels should be used. The appropriate channel should always be via the immediate supervisor and then upwards."*

## RESPONDENT'S CASE

4. **FRANCELINE CATHERINA GEORGINA BAARTMAN testified in support of Respondent's case (hereinafter referred to as "Baartman")**

5. Baartman testified that she is the Head of nursing at Karl Bremer Hospital, responsible for 360 staff members, as well as the implementation of the policy in the interest of the safety and care of the 300 bed facility.

6. Nurses are regulated by the SA Nursing Council.

7. The official policy to be implemented under circular H170/2011 is still affective. She referred to paragraph 2 where the following is stated:

*"All nursing personnel in the employ of the Western Cape Provincial Department of Health receive an annual uniform allowance. It is therefore expected that all nurses **who are required to wear uniforms in the execution of their duties**, receive this allowance. It is imperative that **all** nurses who enter the clinical areas must be dressed according to correct prescribed uniform."*

8. Applicant worked at the Karl Bremer hospital as a registered nurse, she was allocated to ICU high care.

9. Reference was made to paragraph 4.3 on page 7, Operational Managers. The main focus was to prevent injury to self and others. Baartman also referred to paragraph 4.4 on page 7 where reference was made to production nursing staff.

### **4.3 Operational Managers**

4.3.1 *Acceptable colours: white and navy blue*

4.3.2 *Tops should be white*

4.3.3 *Navy gilet*

4.3.4 *Trousers / skirts should be white or navy*

### **4.4 Production nursing staff**

*This includes registered nurses, staff nurses and nursing auxiliary.*

4.4.1 *Acceptable colours: white and navy blue*

- 4.4.2 *Tops should be white*
- 4.4.3 *Jerseys and jackets should be navy*
- 4.4.4 *Trousers / skirts should be white or navy*

4.7.3 ***Jackets, cardigans, jerseys & pullovers*** are not permitted in clinical areas in the interest of infection control. Dress up warmly underneath. Exceptions may be made in certain areas.”

10. “Exceptions may be made in certain areas” means a different method in a different environment, staff nurses are working with clean wounds. In theatre they must take everything off for instance in a Red Cross Hospital they wear children friendly clothes. In psychiatric units, uniforms do not have place for scissors so that patients cannot harm the nurse.
11. Baartman referred to page 9 where the uniform styles are described. Baartman testified that she is part of the provincial nurse management forum and they looked on national level to have white uniforms supplied to all nurses. The fabric depends on where the nurse buys the uniform.
12. Baartman then referred to page 5 of bundle A, Circular H152/2014, To all Heads of Regional/District Offices/Institutions/Directorates, The dress code for nursing personnel. The memo was signed by Florence Africa on 5 September 2014, the provincial director of nursing services.
13. Reference was made to (d) Special Events / Theme Days:  
  
*“Nurses working in the clinical areas must adhere to the prescribed SANC dress code regulations. The nursing distinguishing devices must be worn with discretion. The theme of the day should be applied in line with the services rendered. According to the Patient right charter “the patient must be nursed by a named nurse” therefore, the nurses’ name tags must be visible at all times.”*
14. Baartman then referred to page 4 of bundle A, being a memo from Florence Africa, dated 21 May 2014, To all Heads of Directorates/Regional/District Offices/Institutions, Standardized uniform for nursing personnel.

15. Baartman also confirmed that there was a circular with specific reference to Karl Bremer Hospital on page 59 of the bundle, Notice Nr.21/2009, Uniform code for nursing personnel, Karl Bremer Hospital Nursing Division. Reference was made to paragraph 3.2:

*“3.2 Assistant Managers, the Registered Nurse in charge of various wards/areas is to wear the prescribed skirt and/or trouser suit with specified blouse. Shoes navy blue/black.*

*3.3 Operational Managers, the Registered Nurse in charge of a ward/unit is to wear the prescribed blue skirt or trousers with or without blue piping. Shoes blue/black.*

*3.4 All other categories of nursing staff are to wear the prescribed navy blue skirt or trousers with or without blue piping. Shoes navy blue.*

***NB! When wearing trousers only stocking or navy blue coloured socks are allowed.”***

16. Baartman confirmed that she was the draughtsman of the internal policy at Karl Bremer Hospital. All nursing managers must ensure that the policy is adhered to in order to prevent infection of patients and their uniformity was important to safeguard safety of patients. The dress code of staff nurses is below the knee. No gilets are indicated for staff nurses because a gilet is seen as an extra risk in clinical areas. That is the general perception.

17. Applicant’s refusal to adhere to the hospital policy, regarding uniforms was reported to Baartman. Baartman told Applicant that she was aware that she worked at Tygerberg hospital as an operational manager and that she was unhappy with the management at Tygerberg hospital. She wanted to ensure that Applicant was happy at Karl Bremer, as Respondent had already invested so much in Applicant and her clinical work was good.

18. Baartman told Applicant that there was national dialogue in terms of the uniform that comes from the Minister, Applicant must just be patient, as the policy will be sorted out for everybody, but she must adhere to the rules in the meantime.

19. Baartman explained to Applicant that she cannot allow her as the only professional nurse to work against the hospital policy. She explained to Applicant that she is a professional nurse and ICU sister. A clean uniform must be put on every day in the best interest of the patients, as they work with

patients with open wounds. Respondent has to be consistent in enforcement of the policy. Other nurses were unhappy about Applicant wearing a gilet.

20. Baartman told Applicant during an interview with Applicant where Ms Adams and OM Fritz were present as well, that although she was an operational manager in her previous position at Tygerberg Hospital, she is now employed as a professional nurse, therefore the gilet and the blouse she is wearing does not form part of her current position and that she is therefore not allowed to wear the gilet. Applicant worked in high care with the risk of infection.
21. Three managers had spoken to Applicant and told her not to wear her gilet, but Applicant refused to take off her gilet. Baartman told Applicant that she valued her and that she didn't want her to be as unhappy as she was at Tygerberg Hospital. Baartman told Applicant to comply with the grievance policy if she was unhappy.
22. Baartman told Applicant that she exploited all her avenues, because she wanted to ensure harmony in the workplace and she wanted Applicant to continue with her work. Baartman told Applicant that she was going to hand the matter over to the operational manager, Sister Fritz.
23. Baartman wanted to request Applicant's suspension and she was never consulted in the matter, therefore she was not happy with it, where after she contacted Florence Africa as well as her supervisor and the letter on page 59 of bundle B refers to the response to her e-mail.
24. Reference was made in respect of the second paragraph:

*"DNS do not support the sanction served on Professional Nurse C de Villiers based on the inconsistent application of the Dress Code for Nurses in the Province by all managers as well as the management at Karl Bremer Hospital. It will be befitting for the managers at Karl Bremer hospital to institute such a sentence if all the requirements of the Dress Code are adhered to but at Karl Bremer hospital it is not followed. Nursing staff are not wearing the shoes as per the policy and the uniforms worn are not according to the required material or styles.*

*The aspect on the infringement of the infection control standards cannot be substantiated because the medical professionals and other multi-disciplinary team members are consulting the patients without any protective wear such as white coats. The Nursing managers are wearing different colour blouses. To give strict effect to the policy the Operational managers should remove their gilets as*

*soon as they are entering the wards because their duties are more than 50% clinical. The Assistant managers are wearing different colour blouses which are out of requirements of the Dress Code.”*

25. Baartman confirmed that no meeting was held with Africa after this e-mail. She consulted the Labour Relations Department in the Northern Tygerberg substructure on the case and was advised to continue with the insubordination case against Applicant. She consulted the chief director at Karl Bremer Hospital and thus proceeded with the disciplinary action against Applicant.
26. The outcome of the hearing was a finding of guilty and subsequent dismissal. Applicant's dismissal was upheld on appeal.

**THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

27. It was put to Baartman that Africa is higher in rank than her. Baartman replied that they are not in the same line function. They have independent roles, yet they work together, therefore Baartman does not report to Africa. Africa is a director whilst Baartman is the head of the institution and she conceded that Africa's position is slightly higher than that of hers.
28. It was put to Baartman that according to the Respondent's policy nobody could wear a gilet. Baartman was challenged as to what a gilet was. Baartman confirmed that it is like a pullover. It was put to Baartman that Applicant was not dismissed for wearing a gilet. She confirmed this and stated that Applicant was dismissed for failure to obey a reasonable instruction not to wear a gilet. At no stage did Africa inform her that it is inconsistent with the application of the dress code for nurses.
29. Reference was made to page 6 of the bundle, more specifically number 3, the Rationale:  
  
*“The purpose of the circular is to ensure that the professional image of the nursing personnel working in the Department is maintained and upheld. All nursing staff regardless of their category is expected to wear the appropriate attire, hairstyles, jewellery and footwear taking into account accepted / appropriated cultural and religious beliefs.”*
30. Baartman confirmed that a staff nurse never got permission to wear a gilet. Applicant does not fall within the categories that are allowed to wear gilets. Reference was made to page 7, the policy of Professor Houzham for production nursing staff, paragraph 4.7.3, a pullover is a gilet, yet Baartman was challenged that there was no reference to “gilet” in this paragraph. Baartman confirmed that

these items are not to be worn in a clinical area. Applicant has not been given permission to wear a gilet in her area. It is not specified, it only talks about jackets and jerseys, which Baartman conceded to.

31. The current uniform policy was amended, it has not been agreed to. It was not presented to the IBC. All policies must comply with the provincial policy. Reference was made to page 3, more specifically 6.4, where it is stated:

**“GENERAL**

*6.4 Jackets, cardigans, jerseys & pullovers are not permitted in clinical areas in the interest of infection and prevention control.”*

32. Applicant agreed to adhere to the instruction not to wear her gilet.
33. Applicant however failed to comply with the agreement, as a result of which Baartman requested Applicant's suspension, due to her refusal to follow a reasonable instruction and failure to comply with the code of conduct of the dress code
34. Applicant was not suspended, but she was subjected to a formal disciplinary hearing.
35. The rest of the staff was unhappy, because everybody adhered to the uniform policy, except for Applicant.
36. There was one other staff nurse who also wore a gilet but she was dismissed.

**THE FOLLOWING ENSUED FROM RE-EXAMINATION:**

37. Reference was made to the opinion of Africa on page 59 with regards to Sister De Villiers that the dress code does not adhere to at Karl Bremer Hospital. According to Baartman it was adhered to, apart from Applicant and the staff nurse who failed to follow it. The policy H170/2011 is still in effect. The Applicant is not entitled to wear a gilet. Applicant was not allowed to wear a gilet in clinical areas.
38. **ANTOINETTE FRITZ testified on behalf of Respondent (hereinafter referred to as Fritz)**

39. Fritz is the operational manager at Karl Bremer hospital. Fritz confirmed the uniform policy for nurses as testified by Baartman.
40. Fritz testified that corrective measures must be taken against nurses who refuse to act according to the policy.
41. Fritz called Applicant in to address her about wearing the gilet. She referred to the internal uniform policy and Applicant informed Fritz that she was familiar with the 2009 policy and that it was updated.
42. Fritz informed Applicant about the latest policy circular 170/2011. Applicant commenced employment with Respondent during October 2014.
43. Fritz informed Applicant about the uniform policy when she commenced employment with Respondent at Karl Bremer and told her that she may not wear a gilet.
44. Applicant told Fritz that she would continue wearing the gilet, despite Fritz having quoted the circular.
45. Fritz held interviews with Applicant on 27 March 2015 and on 15 June 2015 when Applicant eventually agreed to wear the correct uniform.
46. Applicant however informed Fritz a week later that she intended to wear the gilet again as it is prescribed by the Government of the Western Cape.
47. Fritz asked Applicant to comply with the uniform policy of Karl Bremer as it is in line with the Western Cape Government policy. Fritz informed Applicant that other nurses too wanted to wear a gilet, if Applicant was allowed to wear a gilet.
48. "Transversal policy Framework: Clothing for work" on page 23 of bundle B contains the provincial policy.
49. Applicant confirmed in writing that she would continue wearing a gilet and that she had discussions with Ms V Werely at head office in this regard.
50. Applicant was then granted an opportunity to write down her reasons for refusing to follow the instruction to remove her gilet.

51. Applicant was informed as follows in writing: According to the disciplinary committee you are liable since 27 March 2015 of the following acts: Refusing to adhere to reasonable command three times to take off your gilet in the clinical area. Failure to adhere to policy 170/2011 and 116/2014 is insubordinate.
52. Applicant did not lodge a grievance at all. Applicant was subjected to a disciplinary hearing for her failure to adhere to the uniform policy, as a result of which she was found guilty and dismissed.

### **THE FOLLOWING ENSUED FROM CROSS-EXAMINATION**

53. Dr Engelbrecht was the HOD at the time when Fritz was appointed, she was initially appointed in an acting capacity. All staff members are bound by 'n command coming from head office. Fritz confirmed that circular H170/2011: "STANDARDIZED UNIFORM FOR NURSING PERSONNEL" was still applicable. The uniform and dress code of nursing is the same thing, as there is a prescribed dress code that nurses have to wear. The uniform is the dress code. Fritz confirmed that nurses at Karl Bremer Hospital do not wear gilets when working in outpatients.
54. Reference was made to page 30 of bundle A, where it is evidenced that on 29 September 2015, Mrs Grobler did her rounds in the high care unit and found Applicant wearing a jersey, whilst holding the hand of a fresh surgical patient. Grobler reprimanded Applicant for wearing the gilet in a clinical area, where after the incident was reported.
55. Applicant's dismissal was fair, as she was insubordinate, she did not listen to a reasonable instruction. It was related to wearing a gilet. Fritz relied on the policy H170/2011 on pages 6 to 10 of the bundle. Karl Bremer had a 2009 policy and afterwards as the proceedings went along, Fritz made use of the policy on page 1 – 2012 policy – Nov/Dec 2014, after Applicant was appointed. Fritz testified that she used the 2009 policy combined with the 2011 circular. The Karl Bremer 2009 internal policy and the policy on page 1 came from the 2011 circular on page 6. The first time Applicant received an *audi alteram partem* – page 14 – the policy on page 1 did not exist.
56. Another policy that was introduced, relating to uniform, was the 2014 policy, as per page 5 of the bundle.

57. Reference was made to page 5 “Clinical Areas: All patient areas – Nurses must wear the nursing uniform...” The wearing of a gilet could be the cause of infection, as the gilet is not changed on a daily basis as is the case with the rest of the uniform. Corrective measures should be taken against a nurse who refuses to adhere to the policy.
58. Reference was made to page 36 of bundle A, being a letter from Dr Naudé, Manager: Medical Services, where Applicant’s disregard to circular 21/2009 and 12/2005 as well as 170/2011, regarding the provincial dress code in a clinical environment, is addressed. It was recorded that:  
*“Applicant received a final written warning for refusing to obey a lawful instruction by her supervisor on 18 August 2015.*

*Applicant signed an undertaking on 25 November 2015 to adhere to the instruction not to wear a gilet in the ICU until her dispute that she lodged with the Public Service Sector Bargaining Council has been finalized. Applicant stopped wearing the gilet for a short while, but has since continued with her practice of wearing a gilet in the ICU. Applicant has subsequently been requested to adhere to the dress code, which request was twice repeated on 8 February 2016, but the Applicant still refuses. Her attitude is very negative in the workplace and her unprofessional behaviour equates to rudeness and insolence with negatively influences the working environment. The following recommendation was made: Ms De Villiers’ actions are the cause of serious disruptions in interpersonal relationships in the workplace and her flagrant regard for safety standards must be viewed in a serious light. This also endangers the safety of the others with serious or potentially serious consequences for the PGWC and its staff, In order to ensure harmony in the workplace, it is requested that the employee be suspended with immediate effect until the finalization of the formal disciplinary hearing which is scheduled for 18 February 2016.”*

59. It was put to Fritz that in terms of the the nursing council rules on uniform, you must wear specific devices on specific clothes, you are obliged to wear your prescribed uniform. You may wear a tailored jacket. A gilet is a sleeveless jacket. A nurse is allowed to wear a gilet. SANC doesn’t specify in which areas, e.g. on duty or clinical area. It was put to Fritz that although the policy was changed, Respondent continued to discipline Applicant. Fritz replies that with reference to circular H 170/2011 the policy is clear. Respondent could still use the 2011 circular.

60. It was put to Fritz that she was confused, which was denied by Fritz. She went through the 170/2011 policy and read through the 2014 circular. Fritz referred to page 5 at the bottom, where the following was stated: *“this circular must be read in conjunction with circulars H170/2011 and H93/2014.*
61. Fritz confirmed that the 2011 policy was signed by the HOD of the Department of Health. Florence Africa signed the 2014 policy. Reference was made to page 19 of Bundle B where Ms Werely questioned the uniform policy at the Karl Bremer Hospital. Fritz responded that if Applicant did not understand the policy, she should have gone higher than herself to Adams, but she wrote directly to the nursing directorate. Baartman provided guidance to Applicant. Although Werely disagreed with the application of the policy, she is not the custodian of the policy.
62. Fritz placed on record that Applicant believed that a gilet is allowed to be worn in clinical areas as she came from a hospital where it is allowed. Fritz confirmed that she went according to the Karl Bremer policy. She asked Applicant on numerous occasions to abide by the policy and the circular and that is where the insubordination came in. Fritz confirmed that she did not make the decision, it is the head of nursing who made the decision of the nursing uniform. Her job does not involve making policies. Baartman and the assistant managers are responsible for drafting the policies. She is aware of the policy, but was not directly involved in writing this policy. Karl Bremer hospital designed their own policy.

#### **THE FOLLOWING ENSUED FROM RE-EXAMINATION:**

63. Reference was made to page 5 of bundle A, being circular 152/2014, Dress Code for Nursing Personnel:
- “(a) **Clinical Areas: All patient areas.**  
*Nurses must wear the nursing uniform (refer to Annexure B) with the distinguishing devices (Annexure C) as per the South African Nursing Council (SANC) dress code regulations, to ensure that the professional image of the nursing personnel working in the Department is maintained and upheld.* “
64. The circular 170/2011 must be read in conjunction, therefore it means that H170/2011 is still valid. H116/2014 she is not aware of. It does not state anywhere on page 5 that H170/2011 was amended at any stage. There is a Karl Bremer uniform policy in 2009 which was not disputed. Reference was

made to pages 38 and 39 of Respondent's bundle, charge 2: "*You refused to adhere to the uniform dress code of circular H170/2011 and H116/2014.*" The Applicant was dismissed for refusing to follow an instruction. Fritz had numerous interviews with Applicant. She spoke to her at least twice. Applicant said she understood the policy and that she would start wearing the uniform from the following week. They had discussions and she said at Tygerberg in her capacity of operational manager she wore a gilet. She promised first that she would wear the correct uniform. Adams also spoke to her about the gilet, whilst Fritz was on leave. Applicant did not give a reason why she should not adhere to the policy. She said that there was no policy. The Applicant agreed at one stage to adhere to the policy, but she did not continue to comply.

65. **JENNIFER ROSE SAPTO testified on behalf of Respondent (hereinafter referred to as "Sapto")**

66. Sapto was previously employed at Tygerberg Hospital as assistant manager nursing, obstetrics. Applicant worked in the high care unit at Tygerberg Hospital. She testified that circular 170/2011 is a standardized nursing uniform.

67. Applicant was a chief professional nurse in the high care area. She worked until 30 June 2014, whereafter she resigned. When she worked at Tygerberg she had frequent interactions with Applicant, because she was the assistant manager of the daily wards. They had differences as she was Applicant's direct supervisor. They had a good working relationship, but they had a lot of differences. Applicant has a strong personality and it takes a lot to convince her about a policy. During Applicant's exit interviews she advised that Applicant should not be appointed at Tygerberg hospital again, due to her disregard for authority. Applicant is a good sister with good training, yet she disregards authority, even with the head of nursing. She is not a team player. She will play with time when it comes to authority. She stated that she does not want to work with her, as it is difficult to work with somebody who does not accept authority.

**THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

68. Although Applicant disregarded her authority she never disciplined her for insubordination. The process was started, but then Applicant resigned. She gave Applicant a final written warning for misconduct, she did not adhere to the policy and went over her head. She confirmed that Applicant is an assertive person, but there are guidelines that need to be followed and that they have to function within policies. You need to lead by example as a manager. It is not difficult to work with an assertive

person, but within the boundaries of a policy, for instance where she asked for a nurse, based on operational requirements, it is not sufficient for insisting on the nurse. Respondent is currently functioning with norms and/or perceptions to attend to the needs of the patients. Although she had a good working relationship with Applicant, there were a lot of differences, due to Applicant's disregard for authority. She stated that she did not have an opportunity to inform Applicant in the exit interview that she recommended that she should not be re-employed at Tygerberg, as Applicant left without even greeting her. It is not an exit interview as such, but a form that is completed and she ticked off that she would not consider Applicant for re-employment. She could not have an exit interview with Applicant as Applicant did not want to participate.

#### **THE FOLLOWING ENSUED FROM RE-EXAMINATION:**

69. Applicant did not state her reason for resignation. She was responsible for a 4 bedded unit. Sapto suggested to managers and the unit post. Applicant said she is not ready to manage a 26 bed ward.

#### **APPLICANT'S CASE**

70. **CHARMAINE DE VILLIERS testified in support of her own case (hereinafter referred to as "Applicant")**
71. Applicant testified that she worked at Karl Bremer Hospital in the capacity of a registered nurse. Her duties included patient care, off duties, ensure doctors' rounds are completed, ventilating patients and training of junior staff. When Fritz was not there she had to ensure that leave forms are completed, the SMPT system must be in place for evaluating staff. Sister Fritz oversees the staff, she is not on the floor. She would relief Applicant for lunch if she worked alone, to ensure that the shift is covered.
72. According to Applicant, in terms of the 2009 policy, there is no indication that she is not allowed to wear a gilet. Fritz wore a gilet, but Applicant was not allowed to wear a gilet, although she indeed wore her gilet. Where she previously worked, every nurse was allowed to wear a gilet. She first saw the policy at Karl Bremer when she was disciplined. She wore the gilet at Karl Bremer after she was told not to wear the gilet, as Fritz told her that according to their internal policy she is not allowed to wear a gilet. She looked at the policy 170/2011 and saw the name of the person who wrote the policy and that is why she decided to continue wearing the gilet. According to Applicant if one wanted to

change the policy, you have to contact the policy maker and in this case it was Ms Werely. She became aware of the policy on pages 6 to 8 of bundle A, signed by Professor Hauzeman, when she started working at Karl Bremer. She understood in terms of policy H152/2014 that she may wear a gilet. She initially agreed to adhere to the policy and removed her gilet when she was first approached by Fritz who told her it was an internal policy. She told her that she previously worked at a government hospital, where it is every nurse's right to wear a gilet. She agreed to take off the gilet and then phoned head office and spoke to sister Werely who told her that every nurse is entitled to wear a gilet.

73. Applicant stated that the reason for her insubordination was that the instruction given to her was not a reasonable instruction. She told Fritz, Baartman and Adams that she did basic training on infection at Tygerberg and the fact that you have to wear protective clothing when working with patients with open wounds, both clothing and uniform. A gilet does not cause infection. Both the uniform and gilet is clothing. There is no evidence that the uniform spreads infection, but your hands, if you do not wash your hands properly. The department's concerns about infection with the gilets are therefore not justified. If the clothes are dirty it could contribute to infection. The SA Nursing Policy to Distinguishing Devices and Clothing – there is nothing stated about a gilet, only what one must wear to be properly identified. Applicant denies that she failed to comply with the SA Nursing's Council Regulations. She first became aware of the Regulations when Sister Fourie was the investigating officer. She gave Applicant a charge sheet in December 2015. Afterwards she told her that the disciplinary hearing was cancelled due to the unavailability of some witnesses. In February 2016, she came to Applicant with the charge sheet again and then she heard about the 5<sup>th</sup> charge, she was not counselled on it at all. It was her understanding that everyone can wear the gilet and she stated the various reasons for wearing the gilet. She understood that she was allowed to wear the gilet.

**THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

74. Applicant conceded that she was aware of the policy when she started working at Karl Bremer. She also became aware of the 170/2011 policy when she started working at Karl Bremer. Violene and Florence Africa were the drafters of the policy and they submitted it to Hauzeman. He is the highest authority and only he and not Violene or Florence can amend the policy, to which Applicant conceded. Applicant conceded that if Florence Africa gives an opinion it can have no impact on the policy. When the workplace rules say "production nursing staff is not entitled to wear gilets" it is correct and that it

is a valid workplace rule. Applicant conceded that if she is of the opinion that a workplace rule created by the HOD is unfair, she has two options:

1. To lodge a grievance or
2. To approach the union to address the matter.

75. Applicant stated that she approached the union. At first there was no response from the union, but she contacted Mr Jonas, who was her union representative. He represented her during the disciplinary hearing. Applicant was challenged why not a single document was lodged by Jonas, prior to her receiving the final written warning. Applicant was challenged to produce the minutes of the meeting. She stated there were no minutes taken, but Adams was there. Usually whenever the union is present, there are minutes. She conceded to this. Jonas came along when she was interviewed and given an *audi*, as well when she received a final written warning. She never approached the Director with a grievance. Applicant was challenged that nowhere does she state that circular H170/2011 is unreasonable. According to Applicant she filed a grievance, which she gave to her union representative. Applicant was challenged to produce proof, but she was unable to do so. Applicant stated that she filed a grievance at Karl Bremer and that Hilton Africa at Labour Relations signed it off. It was put to Applicant that Van Rooyen is not the person in control of labour relations and that if she had indeed lodge a grievance it would have formed part of the bundle. It was put to Applicant that a final written warning was served on her during July 2015 and that she followed it up with a grievance between July 2015 and February 2016, as there is no proof of a grievance filed during February 2016. According to Applicant she filed a grievance and then left it. Applicant was challenged as to why she believed the policy was unreasonable.

76. It was put to Applicant that if she was continuously harassed and victimized by management, as alleged, why this was not put to Baartman or Fritz during their testimony. According to Applicant her previous union representative told her not to speak unless she is told by the Commissioner to speak. It was put to Applicant she continuously engaged her representative today to put questions to the witness, therefore she would have done the same previously. It was put to Applicant that as per page 32 of bundle A she wanted the final written warning removed from her record. Applicant responded that her dispute was about victimization. The union representative at Karl Bremer did not inform her of the suspension and she was not suspended. She only saw the suspension later. It was put to Applicant that although she states that she regards the instructions as unreasonable, she does not state this anywhere on page 32, where the following is stated:

*“As per your instructions for me to remove my ‘gilet’, not to form part of my uniform, please be advised that I herewith tender my adherence to such instructions and will no longer be wearing the gilet as part of my uniform.*

*Since the dispute as to whether the gilet can and or should be worn by a nurse of my designation, has been lodged with the Public Service Sector Bargaining Council, I have subjected myself to such process and in furtherance of a more tolerable working environment and as an interim measure I have decide to adhere to the instruction not the wear a gilet.*

*I trust that you will find this in order.”*

(Dated 25 November 2015)

77. It was put to Applicant that when an instruction is deemed to be unreasonable, she must first carry out the instruction and then lodge a grievance. Applicant conceded to this and also conceded that she did not follow the process. Applicant denies that she was transgressing if she did not follow the process. She maintains that it was an unreasonable instruction. Applicant stated that she removed the gilet and filed a grievance. It is not in her documents, she informed her union representative. Applicant was challenged that it was never put to Baartman that she filed a grievance. Applicant confirmed that she did not tell Baartman about her grievance, nor did she put it to Fritz under cross-examination that she filed a grievance. It was put to Applicant that she testified during her evidence in chief that she interpreted Werely’s e-mail as giving her permission to wear a gilet. This was conceded to by Applicant. She also spoke to Werely is an expert on the policy. It was put to Applicant that nowhere does she state that she can ignore H170/2011 or that it was stated that she does not have to adhere to the policy and that it was ok for her to wear a gilet. This was conceded to by Applicant. Applicant conceded that the policy was not amended and nowhere in Werely’s e-mail was it stated that the policy was amended. Applicant conceded that when her representative put it to Fritz that H170/2011 was amended, it was incorrect.
78. Reference was made to page 61 of bundle A, H 116/2014, Annexure A – it refers to that document and does not refer to H170/2011. The document confirms that whatever is stated here must be read in conjunction with H170/2011. It was put to Applicant that her representative misled Fritz when he said pages 10 to 11 is Annexure A. This was denied by Applicant. It was put to Applicant that the Head of the Department gave reasons why jackets and gilets are not to be worn in clinical areas.

According to Applicant he does not say it is for the prevention of infections. Please dress up warmly underneath - exceptions are made in certain areas in theatre. Applicant conceded that not all members are allowed to wear a gilet. According to Applicant Toko told her to keep her mouth shut, until the Commissioner tells her she is allowed to talk, therefore she did not tell her to put certain aspects to the witnesses.

79. It was put to Applicant that she was charged with refusal to comply with H170/2011. Applicant conceded that she received 3 to 4 warnings and a final written warning, but it was an unreasonable instruction, therefore she refused to take off the gilet. She is wearing the uniform in the correct manner. It was put to Applicant that she only decided to submit her grievance after the disciplinary action was taken against her. This was denied by Applicant. Applicant has been a nurse for more than 25 years and therefore it can be safely assumed that she knows the process.

**THE FOLLOWING ENSUED FROM RE-EXAMINATION:**

80. Applicant decided to follow Werely's instruction because she trusted her and it is more reasonable. It was put to Applicant that she submitted a grievance when she became aware that disciplinary action was to be taken against her. Applicant responded that she completed the grievance earlier, but decided to continue with the grievance due to the bullying.
81. **VOLENE WERELY testified on behalf of Applicant (hereinafter referred to as "Werely")**
82. Werely is the Provincial nursing manager in the Western Cape and her portfolio is that of nursing practice, overseeing all matters regarding nursing practice, including writing policies and strategies support and guidance to nurses in the Western Cape and to stake holders, beyond the Western Cape Government. They make policies from strategic policies, for setting standards, consult with all before asking supervisors to sign and endorse policies and ethical and legal and professional standards, guided by the national directorate and Department of Health.
83. Applicant was dismissed for insubordination, as she refused to take off her gilet. The manager at Karl Bremer Hospital instructed nurses to wear white uniforms, although the province wanted to implement the National Minister of Health's policy to wear the white uniforms. In lieu of a policy it went back to the National Chamber Western Cape. The policy cannot be implemented in the absence of a national directive. Reference was made to an e-mail on page 19 of bundle B:

*“See enclosed letter of dismay sent to me from professional nurse at you institution. Kindly note that we are threading on a fine line with regards to uniforms. We cannot insist what the nurses must wear otherwise this matter is again going to take us to the Bargaining Council.*

*It should be noted that the jilet was brought in for various reasons eg to high the challenging areas if the figure, to allow the nurses to put their pens in the pockets, etc., etc.*

*With regards to the approach to my seat by Mrs Adams...This is the second time that I am informed that Ms Adams disregard my position by making snide remarks,...it's not appreciated by me, I don't need to inform my colleagues where I fit in to the system, Mrs Adams, as a senior should know what to say, when and how she relate to the nursing staff.”*

84. She was approached by Adams, one of the nursing managers at Karl Bremer and at this stage she was in charge. Adams reported to Baartman. She felt that Adams disrespected her position. She was out of order in the way she spoke to a junior nurse. Werely was challenged on who was allowed to wear a gilet and whether the instruction to take off the gilet was reasonable. According to Werely the 2011 policy stated nurse managers could wear a gilet, but the policy was retracted in 2014 as per page 38. According to Werely the Respondent could have managed the situation better. The employer did not apply the rule consistently, because they feel the nurses can wear the gilet. The nurses look more professional with the gilet. She was challenged on whether it was reasonable for a person to tell her to take off the gilet, whilst they are wearing it in all the areas. There is no evidence that a gilet can cause infection. It was put to Werely that Respondent stated that Applicant was insubordinate in not taking off the gilet. She responded that it was only at Karl Bremer Hospital that nurses were asked to take off the gilet. Applicant came from Tygerberg where there are about 2 000 nurses, where they all wear gilets, even in ICU at Tygerberg, Grootte Schuur and Somerset hospitals. It is unreasonable to take off the gilet in the light of the lack of a national policy. The new policy had not been implemented yet. The gilet is allowed in terms of the new policy. The new policy is not signed or implement yet, but it is agreed that a gilet may be worn by all categories of nurses. Gilets give them a professional image. She was challenged on whether Karl Bremer management are allowed to supersede the national office's policy. In the absence of a uniform policy of the national policy, Applicant asked for the policy where it is stated that she may not wear the gilet. Applicant asked for the policy, she was not wrong in not taking it off her gilet. She was asking for the policy and they could not provide her with the policy.

As the manager she must find her facts, especially with employees like the Applicant who questions matters.

85. Reference was made to page 59 of bundle B. Mr Rowan, director Labour Relations requested an opinion. NS nursing services did not support the sanction served on Applicant. Werely was challenged on whether it is correct that Respondent is also claiming that Applicant was rude in the workplace. She responded that it cannot be seen as rude if you are standing for your rights, one is confident and not rude. One has to take introspection of yourself. She cannot view Applicant's behaviour as rude. She received the Macila Makujani reward for outstanding work, going beyond the call of duty a few years ago. Nurses must be understood for the kind of work they do. Werely cannot see how it could disrupt the harmony at work by wearing a gilet. It sounds more like a relationship issue. She does not believe that the sanction of dismissal is reasonable, as she has not heard of any other dismissals for not taking off a gilet, other than at Karl Bremer Hospital.
86. She did not support the dismissal at all, it should have been taken to the next level. It could have been taken to the Chambers. It could have been dealt with differently.

**THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

87. The Uniform policy for nurses does not apply to all nurses. Werely was challenged with reference to page 38 of bundle B where it states that circular 2011 have been retracted. (H93/2014). It reads as follows, the current uniforms will be acceptable.
88. The interpretation of this is we cannot have a set nurses uniform, without a national policy. It is a guideline, not a policy.
89. Werely was referred to page 6, the Head of Health, Prof Huazeman's policy and she was challenged whether she had the right to retract the policy. She confirmed that she could in the absence of a national policy. She was asked that if the HOD gives an instruction, if she has the right to change the policy. Werely confirmed that they would go through the HOD. National has not concluded a national standard of nurses uniform to date, therefore national policy will apply. H170/2011 has not been retracted, therefore it still applies. This issue was dealt with at the Bargaining Chambers, Labour Relations said it must be changed.

90. It was put to Werely that she testified in evidence in chief, her opinion was requested by Director Labour Relations (page 59). It was recommended that all policies should be retracted. The date of her opinion was December 2014, but prior to that they were informed that they cannot have a nurses' policy in the absence of a national policy. It was put to Werely that the status quo will remain, any circular will stay affective. Besides 3.1 of 170 the rest still stands. The circular is amended. The final paragraph – this matter will be discussed at the Sectoral Bargaining Council in Pretoria - this does not eliminate policies – the status quo remains – these are merely guidelines, in the absence of national guidelines. It was put to Werely that if you are a manager, if you give a subordinate an instruction and she doesn't carry out the instruction, she is committing misconduct. Werely replied in the context of management is not punitive, but Respondent has to be reasonable. She must observe the behaviour and determine if it is a challenging behaviour or is it behaviour trying to overthrow the whole system.
91. It is the responsibility of directorate nursing services to apply policies. Werely is the drafter of the circular send out by HOD. Respondent expect nurse managers to comply. It was put to Werely that corrective measures must be taken by people who don't follow the policy. She responded that she cannot argue on a policy that was retracted.
92. Reference was made to page 8 of Respondent's bundle in paragraph 7 where Werely wrote "*corrective measures should be taken*". Werely was challenged whether Respondent was within its rights to consider paragraph 7 of circular H170. Werely responded: "No, because the circular is outdated." It was put to Werely that nowhere in her opinion on page 93 to Joey Roman, does she state that H170 was retracted. Werely replied: "I don't know what to say, as there is a new policy out, H93/2014.
93. It was put to Werely that if a nurse is called in and told that we as managers say you cannot wear a gilet and the instruction is unreasonable, what is that nurse to do? (The witness avoids the questions and stated management must be fair.) It was put to Werely that the nurse has the right to contest by following the grievance route, yet Applicant failed to do so, she was invited to meetings 5 or 6 times and asked to follow procedures. The manager has the right to take action.
94. It was put to Werely that she does not know what action should be taken after a manager called in an employee. Werely replied that she would have liked the nurse to take the matter back to Roman's level. It was put to Werely that the Respondent may take action if the employee fails to follow a reasonable instruction. Werely replied that there must be a way to manage a difficult employee as the Respondent does not want to be in a punitive environment. It was put to Werely that Applicant stated

in her testimony "*I am a nurse and I am allowed to wear a uniform*", yet Applicant forgets that she has refused to follow an instruction. Reference was made to page 13 of bundle A, where Applicant stated "*I will wear my gilet, because I spoke to Volene Werely*", but Applicant did not state that Volene Werely told her that circular 170/2011 was retracted. Werely replied that she does not understand that, as she informed Baartman at the meeting about the change in the circular. Sometime during December Applicant decided to abide by the instruction to take off her gilet. Werely was not aware of this.

95. Werely was challenged why Applicant would abide with the circular in December 2015, after having spoken to Werely, if circular 170/2011 was indeed retracted. It was put to Werely that Applicant was also called in by the manager to abide by the circular, whereafter Applicant agreed to abide.
96. It was put to Werely that Applicant was disobedient towards her manager and that it was a reasonable instruction which Applicant refused to follow. Werely responded that Applicant was not insubordinate, but that she was following the rule. It was put to Werely that in the light thereof that Respondent had served Applicant with a final written warning, it was the Respondent's right to administer dismissal as an appropriate sanction. Werely replied that it seems that Applicant was working in an intolerable working environment and it seems there was a lot of victimization. Werely was challenged that it flies in the face of her evidence in chief where Werely said it cannot cause conflict and disharmony if Applicant refuses to take off her gilet.

## THE FOLLOWING ENSUED FROM RE-EXAMINATION:

97. Werely confirmed that the newest 2014 policy has not been amended yet. Werely confirmed that Roman stated that the status quo will remain, she stated it meant that the white and navy uniforms could still be worn.
98. Werely confirmed that when Applicant indicated that she was willing to take off her gilet it indicated that she was abiding by the rule. Werely was challenged whether the managers at Karl Bremer Hospital were reasonable in following a disciplinary route against Applicant. Werely responded that she would have expected them to get guidance instead from her office or from Labour Relations in the absence of a policy that was amended. It was put to Werely that Baartman testified that she does not report to Werely. Werely responded that although she does not manage Baartman, she oversees the process. Her line is directly to them in nursing matters as there is a dotted line. Werely confirmed that she sent an e-mail to give her opinion.
99. **DR EDWARD JACOBUS LANGENEGGER testified on behalf of Applicant (hereinafter referred to as “Langenegger”)**
100. Langenegger testified that he is the current head of the obstetrical care unit, maternal special and Obstetrician. Langenegger met Applicant in 2016, they had a problem with increased maternal mortality. They approached Applicant to help them to provide critical care to mothers. Initially Applicant advised them and later took up the position of critical care. One of the big parts was to teach midwives. Langenegger confirmed that he was aware that Applicant was dismissed, although he is unaware of the exact details. He understood there were problems with the wearing of the gilet and Applicant had to change her uniform. There was disciplinary action, now the rest of the process.
101. Langenegger confirmed that he never heard of a worker being disciplined because of the dress code. If an incident happened at Tygerberg and he witnessed that someone would have to take a uniform off, he would find out what is the reason behind it. An employee has to be identified that he/she works at the hospital. As part of infection control all staff, including students, have to wash their hands when they enter ICU and wear barrier clothing. Langenegger testified that he would find out what is the reason why an employee must remove his/her uniform in terms of patient care. Langenegger saw Applicant and other staff wearing the gilet. It is in terms of infection and prevention control. Langenegger testified that he was employed at Tygerberg Hospital when and not at Karl Bremer when

Applicant was requested to remove the gilet. Langenegger testified that in terms of his understanding for someone to remove a uniform, he does not think it has a direct impact on patient care and believes that it is a fair reason for dismissal.

102. Langenegger testified that Sister Sapto worked as a professional nurse since 2000 at Tygerberg Hospital and before her Ms Roodt, from whom Sapto took over. Applicant is an advocate for a patient. Applicant was in a very difficult job when she worked for Langenegger. It is difficult to explain to a matron, who does not have experience in obstetrics. Langenegger never observed an incident between Sapto and Applicant where Applicant behaved insubordinate towards Sapto.

**THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

103. Langenegger confirmed that he was a registrar at Tygerberg since 2000 and a specialist since 2005. He is the head of obstetrics and in addition responsible for critical care services. He confirmed that his duties include having to correct behaviour of junior doctors under his supervision. It was put to Langenegger that if a junior doctor does not comply with an instruction which Langenegger deemed to be reasonable which he refuses to follow he would take corrective action, to which he conceded. If he continuous his behaviour 5 to 6 times he would take disciplinary action. Langenegger confirmed that he is not familiar with the annexures to the disciplinary code. He stated that he only knows what he was told about what happened with Applicant. Langenegger stated that it depends what a reasonable instruction is. It was put to Langenegger that the first thing Applicant had to do, is to put the grievance on paper. Langenegger responded that he is unaware of the full contents of the gazette, he just know the process in the hospital. He was unaware that Applicant was charged with gross insubordination, he only knows about insubordination that has to do with patient care, e.g. don't wash your hands or give wrong medication.
104. Gross insubordination is when an employee continuously disregards a reasonable instruction. Applicant was interviewed on several occasions and requested not to wear the gilet and she then refused.

**THE FOLLOWING ENSUED FROM RE-EXAMINATION:**

105. Langenegger was challenged on whether the instruction to Applicant to take off the gilet was reasonable. Langenegger responded that from his point of view it was not reasonable. At that time, he

never saw anyone tell her to take the gilet off. His understanding of the process is, if you do something that will jeopardize the patient's life, that they act on it immediately and immediately gets in more senior help and sort it out there and then. They encourage doctors to wear clothes that are respectable if the doctor complies with the major aspects of patient safety.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

106. I was not tasked with interpretation of a policy, but with the charges of insubordination against Applicant.
107. Applicant was charged with disobeying a rule of the Karl Bremer Hospital where she was employed at the time and not that of Government Hospitals in general.
108. Applicant admits that she refused to remove her gilet.
109. Applicant confirmed that she worked in an area with patients with open wounds.
110. Applicant received a final written warning for a refusal to stop wearing a gilet.
111. Applicant adhered to the uniform policy by removing her gilet for a short period only. Applicant once again started wearing her gilet during in spite of the policy, prohibiting staff nurses and nurses in clinical areas, where they work with patients with open wounds, from wearing a gilet.
112. Applicant acknowledged the existence of the policy, but submitted that the policy is unfair and that the instruction to remove her gilet was not a reasonable instruction.
113. Applicant conceded that her supervisors reprimanded her on various occasions to remove her gilet, but she did not adhere to the warnings and/or instructions to remove her gilet, as she views the instruction as unreasonable. There was no proof that Applicant lodged a grievance at any stage. Applicant's dismissal was confirmed on Appeal.
114. I find that Respondent had a policy in place, prohibiting Applicant from wearing a gilet.

115. The policy was reasonable, especially bearing the safety of patients in clinical areas in mind and the danger of infections.

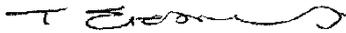
116. I find that both Baartman and Sister Fritz's instructions to Applicant to remove her gilet were reasonable.

117. Therefore Applicant's refusal to adhere to a reasonable instruction amounts to gross insubordination.

118. There was no evidence before me of procedural unfairness.

### **AWARD**

119. I find that Applicant's dismissal was both procedurally and substantively fair. Therefore Applicant is not entitled to any relief.



**COMMISSIONER: T ERASMUS**