



PHSDSBC

Public Health and Social Development
Sectoral Bargaining Council

ARBITRATION AWARD

Commissioner: **N. Bantwini**

Case No.: **PSHS425-11/12**

Date of award: **26 September 2020**

In the matter between:

Mohammad Yusuf Bhatti

(Employee/ Applicant)

and

Department of Health – Eastern Cape

(Employer/ Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration came before the PHSDSBC in terms of Section 191(1)(5) (a) of the Labour Relations Act 66 of 1995 as amended (the LRA) for the dismissal of the applicant based on allegations of misconduct. It was enrolled for the arbitration process at the offices of the respondent at Livingstone Hospital and at Club Chambers in Port Elizabeth. It was part heard on the following dates; 15 February 2016, 16 February 2016, 22 August 2016, 01 July 2020, 14 August 2020 and was finalized on 11 September 2020.
2. Mr. Marius Van Zyl from François Rew Attorneys who was later substituted by Advocate Mzwamadoda Mnyani instructed by Mr Daniel Bezuidenhout an Attorney from Bezuidenhout Attorneys appeared for the applicant while Advocate Nyameko Gqamane who was later substituted by Advocate Igris Dala instructed by Ms. Moggie Govender of the State Attorney appeared for the respondent. Parties agreed to submit written closing arguments on 18 September 2020. The proceedings were electronically recorded.

3. It is significant to mention that the applicant initially referred his case to the PHSDSBC. An award was issued on 18 May 2012 and was decided in favor of the respondent. The applicant took the award on review to the Labour Court. The judgement was delivered on 26 June 2015 and the matter was remitted to the PHSDSBC to be arbitrated *de novo* by another arbitrator hence this award.
4. On 02 February 2017, the case was scheduled for arbitration but the applicant and his representative failed to attend and the case was dismissed. The applicant applied for rescission and a ruling was issued on 28 July 2017. The ruling was taken on review and the case was remitted to the PHSDSBC and was rescheduled for arbitration hearings until it was finalized on 11 September 2020.

ISSUE TO BE DECIDED

5. I am required to decide whether the dismissal of the applicant was procedural and substantively fair or not.
6. I have considered all the evidence and arguments, but because section 138 (7) of the Labour Relations Act, 66 of 1995, as amended requires brief reasons. I have only referred to the evidence and arguments that I regard as necessary to substantiate my findings and determination of the dispute.

BACKGROUND TO THE DISPUTE

7. The applicant was employed by the respondent on 01 October 1993 as a Principal Medical Doctor. He was dismissed on 25 January 2011 earning R62 542.00 per month at the time of dismissal.

SURVEY OF EVIDENCE

The Employer's evidence

8. According to Advocate Gqamana's opening statement, the applicant's services were terminated based on misconduct which emanated from fraud wherein the applicant claimed and was paid for hours of work where he either never worked or were duplicated.

9. The applicant refused a lawful instruction as he did not report at Dora Nginza Hospital but decided to report at Rape Crisis Centre. The applicant decided to place himself in a facility which he was not allowed to be in that center.

10. The applicant was found guilty of the charges and was subsequently dismissed after a disciplinary hearing was conducted. He was charged as follows:

Charge 1

- *“Committed fraud in that you had claimed payment of remuneration in respect of hours worked in circumstances where those hours were not actually worked and or were **duplicated**.*
- *Charge 2- Failed to carry out a lawful order or routine instruction without just or reasonable cause in that you refused to be allocated at Dora Nginza Hospital Casualty section.*
- *Charge 3- Prejudiced the administration or efficiency of the Department by speaking to the media with regards to issues affecting the PE Hospital Complex.*
- *Alternative charge- You contravened the prescribed Code of Conduct for Public Service by speaking to the media with regards to issues affecting the PE Hospital Complex.*

11. The first respondent’s witness, Doctor Aydin Vehbi testified as follows:

12. He was employed by the respondent as a Senior Medical Superintendent at the time of the incident and was reporting to Doctor Ranks. The applicant was a full time Doctor and was placed in casualty department of Dora Nginza Hospital. The PE Complex comprises of Dora Nginza, Livingstone and PE Provincial Hospitals. The rape crisis centre was NGO driven initiative and was part of the casualty department.

13. The applicant was supposed to work for 40 hour week between 08h00 to 16h00. He was entitled to work 16 hours commuted overtime per week and the Doctor has to be physically present at the hospital seeing patients (bundle B page16). Sessional contracts are issued to doctors who are not full time employees of the respondent.

The applicant signed a contract and agreed to work overtime at Dora Nginza Hospital as the system was expanded to full time doctors as well. The applicant was paid additional amount of money (bundle B page 4 clauses 6.6.1).

14. The session is from 1 hour of clinical work done by a doctor. A claim form is signed by the supervisor, HOD to authorize payment by finance department. The witness made reference to the claim form that appears on page 8 of bundle A and stated that doctors are only paid for hours physically worked and not on standby or on call. The applicant claimed for 96 hours for working overtime at Dora Nginza Hospital in September 2009. Page 7 of bundle A also reflects 43 hours claimed for September 2009 for working at Letitia Bam Clinic in Uitenhage. The rate differs according to the level of the doctor.
15. Page 6 of bundle A reflects September 2009 rooster for rape crisis centre at Dora Nginza Hospital wherein he worked from 03 and 04 September 2009 from 24h00 to 08h00. From 08 September 2009 to 10 September 2009 from 24h00 to 08h00. From 14 to 17 September 2009 from 16h00 to 24h00. From 15 to 17 September 2009, the applicant is reflected to have worked from 16h00 to 08h00. On 18 September 2009, the applicant worked from 16h00 to 24h00.
16. The same rooster also reflects 21 September 2009 to 24 September 2009 from 08h00 to 16h00 and 24h00 to 08h00 from 21 to 23 September 2009. From 16h00 to 24h00 from 28 September 2009 to 30 September 2009.
17. Page 5 of bundle A contains a rooster for Letitia Bam Clinic and the applicant's name appears on the following dates and time as follows:
 - On 07 September 2009 from 08h00 to 08h00, on 10 September 2009 from 19h00 to 24h00, 14 September 2009 from 19h00 to 24h00, on 17 September 2009 from 07h00 to 24h00. On 18 September 2009 from 19h00 to 07h00. On 21 September 2009 from 08h00 to 08h00. On 28 September 2009 from 08h00 to 08h00.
 - The applicant on 17 September 2009 claimed in 2 different institutions for the same hours, which is physically impossible. He claimed 5 hours at Letitia Bam and 8 hours for rape crisis centre. The applicant at the disciplinary hearing claimed

to have swapped with another doctor. This is not legally permissible as sessions are paid according to the doctor's salary level. No evidence as to how the applicant paid the other doctor. The sessions were not worked and the applicant at some stage conceded not to have worked at Letitia Bam on 17 September 2009 although he claimed and was paid for the hours.

18. The witness further made reference to the policy on whenever the applicant required swapping which is contained in clause 8 of his contract (page 29 bundle A). The applicant should have contacted his supervisor about the double booking at Letitia Bam Clinic. On 21 September 2009, the applicant claimed twice for 08h00 to 16h00 and for 20h00 to 08h00.
19. With regards to charge 2, the applicant refused to report at casualty department when he (the witness) issued the instruction which was repeated by Mr Pretorius. He wrote the second letter and he found the applicant at rape crisis centre in the afternoon on 04 January 2010 not attending to patients. The attendance register confirms that the applicant did not report at casualty section on 04 January 2010 (pages 22 and 23).
20. On charge 3, the applicant had no authority to speak to the media and all what he said was false. The applicant was aware about the grievance procedure of the respondent instead of speaking to the media. Before receiving an internal memorandum which was issued by Doctor Ranks regarding investigation of active sessional doctors, he was not aware that the applicant was doing sessional work in Uitenhage/Letitia Bam Clinic. He had to request information from the district, rape crisis centre, Dora Nginza casualty as the systems were completely separate. This was a lengthy process and the investigator was an independent person from Bhisho.
21. The witness stated further that the applicant was not supposed to do swapping with the doctor alone as authorization had to be sought from his (the applicant) supervisor.
22. Under cross-examination, the witness testified as follows:
23. His relationship with the applicant around June 2009 was purely professional and he dealt with him on a daily basis with the knowledge of the HOD. When he gave an instruction to the applicant, he personally told him (the witness) that he is not going

to work in casualty section. It was not the first instruction as he used to ignore instructions in the past. He personally went to the casualty on 04 January 2010 with 3 other doctors and the applicant was not there.

24. When reference was made to the attendance register with no signature of the applicant being seen, the applicant's representative put to the witness that the applicant will testify that he forgot to sign, the witness's response was that the applicant had been with the respondent for 17 years and that he knew that he was supposed to sign (page 21 bundle A). The witness also made reference to overtime registers which the applicant signed to prove that he (the applicant) was aware of the policy regarding signing of attendance register.
25. The witness testified further that when he arrived at the rape crisis centre on 04 January 2010 there was one trained Nurse as Doctor Moodley and the applicant were transferred to casualty section. The casualty could not operate on 04 January 2010 as the applicant did not report for duties. When it was put to the witness that the applicant will testify that he was phoned by a junior doctor to work at rape crisis centre and he swapped with him (the applicant), his response was that the applicant was roosted at the casualty section not at rape crisis centre.
26. The applicant did not sign the attendance register and no one saw him at casualty section on 04 January 2010. The applicant had permission to do sessional work at Dora Nginza Hospital but could not have been there in all the hours he claimed for. There is no way that the applicant was on straight shifts for 36 hours in spite of the ill health (page 6 bundle A) . The applicant was paid for all the hours claimed and Doctor Snyman was not physically on site.
27. When it was put to the witness that the applicant will testify that he used to ask doctors to stand for him and claim for the sessions, the witness's response was that he could have requested permission from HOD or himself and to check if he was allowed to do sessions outside Dora Nginza Hospital. The list of doctors which appears on page 6 was doing sessional work at Dora Nginza Hospital. They were all investigated and some had permission from the HOD to do sessional work outside Dora Nginza Hospital or PE Hospital Complex.

28. When a question as to why were charges drawn 9 months after the allegations were committed, the witness's response was that all doctors who were doing sessional work were investigated. The investigator was an official from Bhisho and he cannot comment about the period of investigation.
29. The applicant in his letter dated 29 December 2009 (page 23 bundle D) stated that casualty work is stressful but chose to work in casualty section at Letitia Bam for overtime.
30. With regards to charge 3, the witness stated that if an instruction is not followed, efficiency of the department is affected and speaking to media is misconduct.
31. Under re-examination, the witness stated that he gave an instruction to the applicant to report at casualty section as from 04 January 2010. He (the applicant) verbally indicated to him that he is not going to follow the instruction.
32. In causality you see the same type of patients regardless of whether it is Letitia Bam of Dora Nginza Hospital. (10 September 2009 shifts) These shifts are physically impossible due to the applicant's health condition. Swapping of shifts is not permissible and this also applies to the applicant as he would work in Dora Nginza Hospital and swap Letitia Bam shifts. He saw the applicant in rape crisis centre and he did not see patients.
33. The second witness Ms. Lindiwe Grace Nonzube testified as follows;
34. She was at Letitia Bam Health Care Centre from 09 September 2009 to 21 September 2009 and was occupying a position of Facility Manager. She was responsible for making sure that there is enough staff, treatment, services record and keeping records for patients so that the next person can see that a particular patient was seen.
35. In 2009 patients kept the record wherein examination history and treatment are contained. The witness made reference to Exhibit E wherein the applicant saw the patient on 10 September 2009 and on 17 September 2009. When a statement to the fact that the applicant said he did not work at Letitia Bam Health Centre was posed, the witness's response was that there is no way that his (the applicant) name

can appear in the register if he was not on duty. The witness stated further that it is not possible for the doctor to be on duty from 19h00 to 24h00 and his name would not appear in this register.

36. Under cross-examination, the witness testified as follows:
37. She did not complete the patients register. From the 11th entry of 10 September 2009, the applicant and Doctor Tom were on duty and it means that the patient was seen by both Doctors since their names appear in the entry on the same date and time. Medication is prescribed by doctors or persons who saw the patient on the date and time in the folder which is presented at the dispensary for the provision of treatment.
38. Doctors examine patients and write medication in the patient's cards/ records and register. The patient's record is in a form of a folder which they are supposed to bring or present on the next visit to the hospital. When it was put to the witness that the applicant will testify that patient's folders were kept by the hospital with registers, the witness's response was that she is not aware of such. The patients, who happen to lose the folder, are given a new blank one as they are being kept by the institution.
39. The witness stated further that on 10 September 2009, the applicant's name appears on the 24th to 28th as well as on 30, 31 to 37th entries. On 17 September 2009, the applicant's name appears from patient 16 to 29 at 22h30.
40. In closing Advocate Dala argued as follows:
41. With regards to charge 1, the applicant did not dispute having claimed for sessional work and when hours were duplicated. Under cross-examination he stated that he used to ask Doctor Ujodon who was also employed as a Principal Medical Officer or sometimes request junior doctors to work in his place and claimed the money and pay back the Doctor whom he requested.
42. Swopping sessions is against the respondent's policy and this was also confirmed by the applicant and his (the applicant) witness, Doctor Snyman who was his direct

Supervisor. Doctor Snyman emphasized that swapping sessions is not allowed and it amounts to sub-contracting.

43. It is not true that the applicant was the only employee who was investigated and dismissed for fraud allegations. Doctor Vehbi testified that all doctors were investigated and in the end Doctor Jones and other doctors were dismissed.
44. On charge 2, the applicant failed to report at casualty section on 04 January 2010 according to Doctor Vehbi's testimony. He (the applicant) failed to sign the attendance register and he was seen at rape crisis centre. This was a defiance of the instruction to report at casualty.
45. With regards to charge 3 both Doctor Vehbi and Doctor Snyman confirmed that speaking to the media amounts to misconduct. The facts surrounding this charge are illustrative of Doctor Bhatti's total disregard for any rule or standard.
46. Doctor Snyman testified that the criticism of what was happening at the rape crisis centre and PE Hospital Complex would have brought the Department of Health into disrepute. It is common cause that the applicant had spoken to the media and that he had broken the rule of not speaking to the media and clearly, he brought the administration an efficiency of the department into disrepute.
47. It is clear that a doctor of the applicant's stature would have reasonable been aware of the rule. Advocate Dala finally submitted that on a balance of probability, the respondent has demonstrated that the applicant is guilty of the 3 charges and rendered the employment relationship intolerable and that the dismissal is an appropriate sanction considering the seriousness of the charges.

The applicant's evidence

48. According to Mr. Van Zyl's opening statement, the applicant will testify that he claimed for the hours he worked for at Dora Nginza. There was a clash at Letitia Bam and a colleague worked on applicant's behalf. He (the applicant) claimed and paid the money to the colleague. The respondent was not defrauded.

49. With regards to charge 2, the applicant will admit that he was instructed to work in casualty at Dora Nginza. He reported that he will swap with a junior Doctor who was on Internship who was to work at rape crisis centre and later on the same day, the applicant was in casualty. The rape crisis centre forms part of casualty in Dora Nginza Hospital.
50. With regards to charge 3, the applicant admitted being involved in the media and this is a reason why he pleaded guilty at the disciplinary hearing. The applicant does not agree that the respondent was prejudiced. He is challenging the procedure and substance of the dismissal. The respondent delayed in charging the applicant (period between when the offences were allegedly committed and when he was charged or disciplinary hearing was conducted). The applicants seek retrospective reinstatement as a remedy.
51. The applicant, Doctor Mohammad Yusuf Bhatti testified as follows:
52. He was employed as a Principal Medical Officer and was based at Dora Nginza Hospital in trauma and emergency sections. Doctor Snyman was his supervisor and the Head of PE hospital complex. He was also working at rape crisis center as it was part of casualty department. Doctor Snyman was reporting to Doctor Vehbi. Doctor Moodley was also reporting to Doctor Snyman.
53. Roosters for Dora Nginza Hospital were drawn by Doctor Snyman. With regards to charge 1, he did not commit fraud as he was permitted to work sessions as overtime. On 10 September 2009 he worked his normal shift from 08h00 to 16h00 at Dora Nginza Hospital and from 19h00 to 24h00 at Letitia Bam. He then drove to rape crisis centre/Dora Nginza Hospital from 24h00 to 08h00. The Letitia Bam facility is not chaotic. There are trauma and emergency cases which they usually transfer them to Livingstone Hospital when they are serious. It takes about 15 to 20 minutes to move between the centers (Letitia Bam in Uitenhage and rape crisis centre in Dora Nginza).
54. He would leave from one facility to the other 15 or 20 minutes earlier and phone the sister in charge alerting him/her that he is coming. The applicant stated that he worked all the 8 hours that are reflected on page 8 of bundle C at Dora Nginza

Hospital from 24h00 to 08h00. The 5 hours he worked at Letitia Bam are reflected on page 7 of bundle C.

55. On 17 September 2009, page 6 of bundle C reflects that he worked at Dora Nginza Hospital from 16h00 to 24h00 and from 24h00 to 08h00 at Dora Nginza Hospital. From 19h00 to 24h00 he worked at Letitia Bam. He stated that he organized another Doctor (Doctor Ojodon) to work for him at Letitia Bam from (19h00 to 24h00) as it was a common practice for doctors to cover for each other in another centre when the other one is busy. He also claimed for 8 hours he worked at Dora Nginza Hospital on 17 September 2009 (page 8). On page 7 he claimed for 5 hours at Letitia Bam because Doctor Odojon asked him (the applicant) to claim and pay him.
56. On 21 September 2009 he worked at rape crisis Center from 08h00 to 16h00 and from 24h00 to 08h00. The 08h00 to 08h00 reflected at Letitia Bam rooster is a typing mistake because he worked from 19h00 to 24h00. She claimed for 5 hours for Letitia Bam and 8 hours for rape crisis centre (pages 7 and 8 of bundle C). Doctor Syed was aware of the swapping as it was a common practice.
57. Page 26 reflects his contract to do sessions at Letitia Bam. He also signed another contract to do sessions at Dora Nginza as well. Other Doctors who were full time employees at Dora Nginza were also doing sessions in the 2 facilities but he is the only one who was charged for fraud.
58. Doctor Ojodon was a Principal Medical Officer having the same skills and level like him (the applicant). The claims he made on behalf of other doctors were of the same level and did not prejudice the respondent.
59. With regards to charge 2, he did not refuse to work at casualty. He was taken from rape crisis centre to casualty department. The applicant made reference of a letter which he addressed to the CEO (pages 9 to 12 Annexure C) detailing how his health will be negatively affected due to his age (being over 50 years) suffering from stress, heart and diabetic and also taking medication for the ailments.
60. The applicant stated further that it was very stressful for him to work in casualty and he was making a plea to be transferred to rape crisis centre but the response from his supervisor (Doctor Vehbi) and CEO was negative. He reported in casualty section

on 04 January 2010 at 08h20 and met with Senior Medical Superintendent, Doctor Vehbi in the corridor. He saw some patient but between 10h00 and 11h00 a Community Medical Doctor requested him to go see a patient at the rape crisis centre and he agreed and went back to casualty section at 16h00.

61. The applicant stated further that he signed an attendance register at rape crisis centre but he did not sign at casualty section as he was not aware that there was an attendance register. He started signing from 05 January 2010. Doctor Moodley was also instructed to work at casualty section on 04 January 2010 but Doctor Moodley only reported at casualty 3 days later but he was never charged.
62. With regards to charge 3, he did speak to the media as he was not aware that he was not supposed to speak to them. While he was attending to a lady in casualty section, a lady who happened to be a Journalist asked him questions and he reported his situation and the Journalist told him that the information will be taken to the higher authorities. He did not prejudice administration of the respondent. The applicant testified further that Doctor Vehbi victimized him and their relationship was not good.
63. Under cross-examination, the applicant testified as follows:
64. The applicant confirmed that he still suffers from his medical conditions like heart problem, diabetes, anxiety, depression and high cholesterol. Even in 2009, he had the similar conditions and he cannot properly work under stress and it was more but he has since adapted his life and he is now better.
65. The applicant stated further that in 2009, his lifestyle was different as he was working and appointed at Casualty as a Medical Officer. He was seconded at rape crisis centre before together with Doctor Moodley. He was also doing sessional work in rape crisis center and Letitia Bam centre as overtime, getting paid on hourly basis together with other doctors.
66. With regards to charge 3, he confirmed that he pleaded guilty for speaking to the media during the disciplinary hearing (P.1 para10). He pleaded not guilty during arbitration because he did not know that it was wrong to talk to the media. He spoke to the media because he was being moved from rape crisis centre to casualty

and he was very depressed because he was being moved to a stressful position. He told the lady that he did not want to work in casualty department. The lady just wanted to speak to her while she was in hospital casualty department. It was a coincidence that the journalist was in hospital, he did not call her. The lady told him that his story will be publicized and his problem will be resolved.

67. The applicant stated also that he did not file a grievance but wrote letters advising Doctor Vehbi that he was sick. When a question as to how did he (the applicant) managed to do sessional work at rape crisis centre and at Letitia Bam health centre despite of his condition was posed, his response was that he wanted to get extra money and that he did seek permission from his Supervisor and that Doctor Vehbi knew about his medical condition. When reference was made to the rosters in respect of 10 September 2009 wherein the applicant worked from 08h00 to 16h00, from 19h00 to 24h00 in Uitenhage and from 24h00 08h00 of the next morning, the respondent's representative posed a question to the fact that this was not good for his (the applicant) health. The applicant confirmed that it was not good for his health but stated that at Letitia Bam he deals with OPD patients which are light and that trauma patients are very few. At rape crisis centre, there were very few patients and he was doing this to get more money.
68. Reference was also made in respect of 17 September 2009 wherein he was roosted from 08h00 to 16h00, from 16h00 to 19h00, from 19h00 to 24h00 and from 24h00 to 08h00, the applicant's response was that he spoke to another doctor to work in his place from 19h00 to 24h00. He claimed and paid the other doctor the money.
69. When a question as to why did he not phone Doctor Snyman to put another Doctor at Dora Nginza Hospital, he stated that Doctor Snyman could not answer his phone and then he asked another Doctor to work on his behalf. The applicant conceded that this was just an arrangement which was not the respondent's policy. He submitted further that other junior Doctors used to work for him and claimed and paid their monies back.
70. Fraud in his understanding is to deceive somebody for financial gain. On 21 September 2009, he did not ask another Doctor to work for him. He managed on his own and that anybody should have understood working in two centers at the same

time. Doctor Vehbi was not allowed to change rosters or duties. He (the applicant) was swopping without informing Doctor Vehbi because it was his own time and he wanted extra money.

71. The applicant stated further that other Doctors (Snyman and Syed) could not answer their phones when he tried to advise them about his double booking.
72. Doctor Bhatti stated that he used to leave 15 to 20 minutes early from one centre to the other. When it was put to him (the applicant) that on 10 September 2009, he worked for 21 hours and that how was that affecting his medical history, his response was that this was not happening every day.
73. He was appointed at Casualty and rape crisis centre is part of casualty department. They were told as Doctors that after working at rape crisis centre they should return to the casualty department. He heard that the rape crisis centre was NPA's initiative and was named as Tutuzela Centre. The applicant later agreed that the transfer from rape crisis centre to causality section by Doctor Vehbi was not victimization.
74. The applicant stated further that he did report at casualty on 04 January 2010 but he did not sign because he was not aware that there was an attendance register until he was made aware about it on 05 January 2010. Doctor Moodley also did not report at casualty on 04 January 2010.
75. When it was put to him (the applicant) that Doctor Vehbi testified that he was not in casualty section during the morning session, the applicant's response was that Doctor Vehbi can say whatever he likes, he (the applicant) knows that he was in casualty at 08h20 and he saw him and he does not know his motive about lying about him. Doctor Vehbi phoned the Sister in charge who told him (Doctor Vehbi) that he was not in casualty. Doctor Vehbi saw him at rape crisis centre after he (the applicant) realized that there was no doctor at rape crisis centre and he went back to casualty department afterwards.
76. The applicant disputed that he defied Doctor Vehbi's instruction because he went to rape crisis centre when he was requested by an Internship Doctor and went

back to casualty. The Intern was not supposed to be working alone at rape crisis centre.

77. With regards to working very long hours on 10 September 2009 despite his health conditions, the applicant stated that he was doing very light duties at rape crisis centre and Letitia Bam Health Centre. He stated that the charges were fabricated and that he is innocent.
78. The applicant confirmed that the fraud charge levelled against him relates to the fact that he worked sessions at Dora Nginza and Letitia Bam Clinic and when there is a clash or double roosting he would ask another Doctor to work for him at Letitia Bam. He (the applicant) would claim for the hours worked by the other Doctor and pay him/her later after the claim has been paid.
79. Doctor Syed used to compile the rooster for Letitia Bam while Doctor Snyman compiles rooster for Dora Nginza Hospital. At Letitia Bam, no consultation is done before the rooster is compiled. When the applicant was reminded that Doctor Vehbi testified that roosters are issued at the beginning of the month and that he (the applicant) could have advised the institution when he is double roosted, the applicant's response was that does not help until he could swap with the other doctors. The swapping was not regulated by the respondent's policy and the HOD is aware about that.
80. The applicant stated further that in emergency situations Doctor Vehbi used to authorize swapping of shifts/duties but he (Doctor Vehbi) does not have insights of what happens in clinics (Letitia Bam Health Centre). The work done at Letitia Bam was light and it was not as busy as Dora Nginza Hospital. The applicant confirmed speaking to the media but stated that he never read the article as it is written in Afrikaans which he does not understand. He did not seek someone to interpret the article since he knows what he told the journalist. He was not aware that he was not supposed to speak to media as an employee of the department of Health (page 25, bundle C).

81. The applicant confirmed that one Doctor Jones and other doctors were investigated as per Doctor Vehbi's testimony. The applicant stated also that his dismissal was unfair and that the charges were fabricated. He seeks reinstatement as a remedy.
82. Under re-examination, the applicant stated that the Journalist added issues which he does not know in the article that appears on page 25 of bundle C and that it was incorrect for Mr Van Zyl, his former representative to submit that everything that is in the article is true. He is aware about the last paragraph of the article.
83. Doctor Christian Jacobus Snyman, the applicant's witness, testified as follows:
84. He works for the respondent as the Chief Medical Officer and during 2009 to 2010, he was occupying a position of a Principal Medical Officer, in charge of casualty and rape crisis Centre in Dora Nginza Hospital. He was reporting to Doctor Vehbi and the rape crisis centre was part of casualty department. The applicant was working under his direct supervision. He was also responsible for drawing roosters in Dora Nginza and the applicant together with Doctor Moodley were permanent Doctors who were specifically allocated at rape crisis centre. The applicant and other employees were not signing the attendance register. The applicant was also entitled to do sessional work with Dora Nginza Hospital and at the primary health care center.
85. Doctors were allowed to swap when there is an emergency e.g. personal problem like illness or any family problem. The applicant was always willing to help with doing extra work/sessions in casualty and he had a good relationship with him. He had rumors that the applicant was charged and he has no knowledge of the charges. After the applicant's dismissal NPA complained about lack of experience in Doctors who are now working at rape crisis centre.
86. Under cross-examination, the witness testified as follows:
87. After the respondent's representative read charges which led to the applicant's dismissal, a the witness was afforded an opportunity to read charge 3 and the article issued by the Burghers, he (the witness) stated that he can understand why the

applicant was charged for speaking to the media as no employee can be allowed to bring issues like this to the media (bundle A page 24 to 25).

88. The witness confirmed that Doctors were allowed to swap their normal shifts when there is an emergency and that the rape crisis centre was part of casualty department. Doctor Snyman stated that he was not aware that the applicant used to be booked for 21 consecutive hours and be double booked at Dora Nginza for sessional work and swap other sessional work at Letitia Bam with other Doctors. He (the witness) emphatically stated that swapping sessions is not allowed as that is tantamount to sub-contracting. With regards to the charge relating to insubordination, the witness testified that he had no knowledge of it.
89. Under re-examination, the witness stated that he had no knowledge of what was happening at Letitia Bam Clinic and that a Doctor cannot be roosted twice as he could not even sign those claims when there is double roosting.
90. In closing Advocate Mnyani argued as follows:
91. With regard to charge 1, the applicant pleaded not guilty and stated that the hours claimed were worked but since there was a clash between Dora Nginza and Letitia Bam Clinic, he used to request a colleague, Doctor Ujodon to work those hours on his behalf. He claimed for both hours and paid over the colleague. The respondent was not defrauded. This clash of hours occurred on 17 September 2009. When he reported the clash to Doctor Syed he told him to ask another Doctor to swap the sessions. This means that the applicant was authorized by Doctor Syed to swap the sessions as this was a common practice among Medical Practitioners.
92. The applicant's representative argued further that no element of fraud was proved in respect of this charge during the arbitration. The applicant had permission to do sessional work at both Dora Nginza Hospital as well as at Letitia Bam Clinic. The respondent could not prove that the hours claimed were not worked by the applicant or someone on his behalf.
93. On charge 2, the applicant disputed that he defied Doctor Vehbi's instruction as he did report for duties at Casualty section at 08h20 but later went to rape crisis centre

when he was asked by a junior doctor to swap around. The respondent did not prove that the applicant refused to be allocated at casualty.

94. The applicant conceded that he did not sign the attendance register on 04 January 2010 because he was not aware about it until he became aware of it on 05 January 2010 and he then signed. There was no register at the rape crisis centre and this evidence was corroborated by Doctor Snyman.
95. On charge 3, although the applicant admitted to speaking to the media, he did not know that it was against of the respondent's policy to speak to the media. No policy was submitted by the respondent to prove that there was a rule in existence. Advocate Mnyani argued also that the evidence of Doctor Vehbi, as a single witness demonstrated clear evidence of biased behavior against the applicant. During cross-examination, he was evasive, argumentative and speculative and that his evidence should be approached with more caution and even suspicion. The applicant seeks retrospective reinstatement as a remedy.

ANALYSIS OF EVIDENCE AND ARGUMENT

96. With regards to first charge, the applicant was charged for fraud, in that he claimed payment of remuneration in respect of hours worked in circumstances where those hours were not actually worked and/or were duplicated.
97. In all instances where the sanction of dismissal is imposed the respondent has a duty to show that the requirements of the Code of Good Practice have been satisfied namely to show:
- That a work place rule or standard has been contravened;
 - That the rule was a valid or reasonable rule or standard;
 - That the employee was aware or could reasonable have been expected to have been aware of the rule or standard;
 - That the rule or standard has been consistently applied by the employer, and;
 - That dismissal was an appropriate sanction for the contravention of the rule or standard.

98. It is common cause that the applicant had contracts to do sessional work at both Dora Nginza Hospital in Port Elizabeth and Letitia Bam Clinic in Uitenhage. Both contracts require a Doctor to be physically present to attend to patients.
99. It is also common cause that the applicant claimed for hours which were worked but duplicated by requesting his colleague, Doctor Ojodon to work on his (the applicant) behalf and claim and pay him (Doctor Ojodon). It is also the applicant's evidence when there is duplication of hours, he used to ask junior doctors to work on his behalf, claim in his capacity and pay whoever had worked on his behalf.
100. It is the applicant's evidence that Doctor Ojodon worked on his behalf on 17 September 2009 at Letitia Bam for 5 hours and on 21 September 2009 another doctor worked on his behalf for 5 hours. He did not divulge the name of the doctor.
101. Swapping sessions according to the applicant's evidence was a common practice among doctors and that Doctor Syed was aware about it and he authorized him to do the swapping. The applicant conceded his awareness that swapping sessional work was against the policy of the respondent.
102. According to the applicant's evidence under cross-examination, swapping of sessions is against the respondent's policy. This was corroborated by his witness, Doctor Snyman as well as Doctor Vehbi. Doctor Snyman further referred to swapping of sessional work as being tantamount to sub-contracting. This clearly means that the applicant was fully aware of this rule but decided to contravene it.
103. It is significant to mention that although the applicant testified that Doctor Syed was aware about swapping sessional work and even gave him authority to swap with other Doctors, he (the applicant) failed to call him (Doctor Syed) to corroborate his version.
104. For the purpose of this charge, it is important to look at the definition of "fraud" Fraud can be defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another see S v Myeza 1985 (4) SA 30 (T) and Burchell and Milton, Principles of Criminal Law 523.

105. I disagree with the applicant's representative contention to the fact that the respondent was not defrauded and or prejudiced because the applicant was not supposed to swap sessional work and he was not supposed to have claimed payment of remuneration for hours which were worked but duplicated under his name at all.
106. The applicant should have reported duplication of sessional work to the responsible Doctors who were dealing with rosters ie; Doctors Snyman and Syed. When the applicant was confronted with that question under cross-examination, his response was that both Doctors did not answer their cellular phones. I am not convinced by the applicant's response as he could have explored other avenues to contact the Doctors. It must be noted also that Doctor Snyman was the applicant's immediate supervisor and he testified during arbitration but this issue was not raised by the applicant.
107. It must be noted that the applicant testified further that he used to request junior doctors to work on his behalf and claim according to his (the applicant) own rate. It is my view that the respondent was defrauded as the applicant claimed payment of remuneration for hours worked but duplicated. I find the applicant guilty of this charge.
108. With regards to the second charge, the applicant disputed that he is guilty of failing to follow a lawful instruction as he contends that he reported at casualty at 08h20 and left for rape crisis centre to assist a junior doctor and later came back to casualty.
109. It must be noted that although it is Doctor Vehbi's evidence that the applicant failed to report at casualty section, Doctor Moodley was issued with the same instruction and he failed to report at casualty on 04 January 2010 as well. Under cross-examination, Doctor Vehbi had no issue that Doctor Moodley had not attended to his duties at casualty section. An attendance register was submitted as proof. It is common cause that rape crisis centre is part of casualty section.
110. It must also be noted that it was the applicant's evidence that he had been treated differently from Doctor Moodley and that he (Doctor Moodley) was never charged for not reporting at casualty section on 04 January 2010, I accept the applicant's

evidence and as such I cannot find him guilty on this charge. Doctor Vehbi's evidence clearly shows that he (Doctor Vehbi) was inconsistent in the application of the rules of the respondent.

111. In *Cape Town City Council v Masitho and Others* (2000) 21 ILJ 1957 (LAC) the court held that:

“Employer is required by consideration of fairness to act consistently in the application and enforcement of its disciplinary rules and management policies designed to instill discipline”

112. On charge 3, the applicant did not dispute having spoken to the media but his defence was that he was not aware that he was not supposed to speak to the media and even denied that his actions brought the administration and efficiency of the department into disrepute.

113. Furthermore, it must be noted that Doctor Snyman, the applicant's witness corroborated with the respondent's evidence that the applicant's criticism of the happenings at the rape crisis centre/ PE Hospital complex would have brought the department of Health into disrepute. He further reiterated that the applicant was not supposed to speak to the media as it is against the respondent's code of conduct. It is common cause that the applicant had 17 years of service as an employee of the respondent when the offence was committed. This means that he is reasonable expected to be aware of the rule.

114. I concur with the respondent as well as Doctor Snyman's contention that the applicant's conduct brought the name of the department of Health into disrepute and as such contravened the code of conduct of the respondent. I find the applicant guilty of this charge.

115. Doctor Vehbi further stated that trust relationship between the respondent and the applicant has been irreparable broken down as a result of his (applicant) conduct.

116. Regarding procedural challenge, I am satisfied that an attempt was made by the respondent in compliance with the provisions of Item 4(2) of Schedule 8 Code of Dismissal: Misconduct.
117. On the basis of the above evidence, I found that the respondent's evidence is probable. I therefore find that the dismissal of the applicant was procedural and substantively fair.
118. I am satisfied that the respondent has discharged its onus in terms of Section 192(2) of the LRA and has followed a fair procedure in dismissing the applicant. I am also of the view that the sanction of dismissal was appropriate.
119. The conduct of the applicant justified dismissal and therefore his dismissal was both procedural and substantively fair.
120. I therefore make the following award:

AWARD

121. The dismissal of the applicant, Doctor Mohamad Yusuf Bhatti by the respondent, the Department of Health-Eastern Cape was procedurally and substantively fair.
122. The applicant's claim is dismissed and he is not entitled to any relief.
123. There is no order as to costs.



Ncumisa Bantwini