



ARBITRATION AWARD

Panellist/s: Leslie Martin
Case No.: PSHS499-11/12
Date of Award: 13-Mar-2012

In the ARBITRATION between:

In the arbitration between:

N.U.P.S.A.W. on behalf of D.D. Jona

(Union / Applicant)

and

Department of Health- Western Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1 The arbitration was held at the Nursing College in Klipfontein Road, Athlone on Wednesday 1 February 2012 and 14 February 2012. The applicant, Ms. Daniswa Dorothy Jona (Jona), was represented by Mr. O. Parker, an official of N.U.P.S.A.W. The respondent, the Department of Health, Western Cape (the respondent), was represented by Mr. X. Nginase, its labour relations officer.

ISSUE TO BE DECIDED

2 Was the dismissal of Jona fair?

BACKGROUND TO THE ISSUE

3 Jona worked for the respondent from May 2008 until 7 September 2011 when she was dismissed.

4 At the time of her dismissal Jona was an enrolled nursing assistant. She was dismissed for 5 counts of misconduct which arose on 18 February 2011 at Michael Mathongwana Community Health Centre in Khyalitssha (the centre).

5 She was charged and found guilty for:

- (a) threatening to assault a patient with scissor in front of her colleague;
- (b) Conducted herself in an improper, disgraceful and unacceptable manner;
- (c) Creating an embarrassment for the state as an employer;
- (d) failed to respect and protect the dignity of a patient and
- (e) showing complete disregard for the circumstances and concerns of the public.

6 In terms of Section 138(7) of the Act, I am required to provide brief reasons with my award. Accordingly, I shall only refer to the evidence I consider relevant to determining the dispute between the parties.

SURVEY OF EVIDENCE AND ARGUMENT

7 Each party handed a bundle of documents into evidence. No objections were recorded.

8 Dr. Suzan Nyema Mukonkole (Mukonkole), the medical officer at the Centre, Julian Ncumisa Koester (Koester), a senior auxiliary nurse at the centre and Nosipho Euginia Jonas (sister Jonas) the operations manager at the Centre testified under oath for the respondent.

9 Jona testified under oath on her own behalf.

THE EVIDENCE:

10 On 18 February Dr. Mukonkole saw from an adjacent room a patient (the patient) trying to throw a chair at Jona. He went around and separated them from each other. He did not see Jona assault the patient.

11 Koester had observed the incident between the patient and Jona during which the patient had grabbed the spectacles off Jona's face and had thrown it on the table. Jona had been sitting and had become angry at the patient as a result.

12 Koester did not see the chair strike Jona but conceded that it could have as it was close to Jona. According to Jona the patient had actually thrown the chair at her, knocking her to the floor, and had kicked and punched her causing bruises to her arm and dislocating her finger.

13 Jona had also given Koester a scissors which Koester had asked her to cut a drip. This was denied by Jona.

14 When the patient was about to leave sister Jonas, who had been attracted by the commotion, called the patient back as she wanted to know what was happening. Jona came closer and wanted to know what the patient was saying to sister Jonas.

15 Koester did not see what Jona had in her hand when she went from the trauma unit to hear what the patient was saying to sister Jonas.

- 16 According to sister Jonas when the security guards were bringing the patient back on her instructions she saw Jona running towards the patient with a pair of scissors in her hand. At that moment sister Jonas shouted at Jona asking what she was doing. Jona told Sister Jonas that she was going to stab the patient and cut out her intestines. Jona denied this, saying that she had heard Sister Jonas shouting, calling her name but did not know why.
- 17 According to Jona she was on her way to buy a cooldrink at the gate as she felt thirsty after Dr. Mukonkole and sister Ntongana had attended to her after the incident with the patient. It was then that she heard Sister Jonas call her name. When sister Jonas was calling her name Jona turned and saw the security guards and sister Jonas walking to the trauma unit with the patient. Jona did not know why Sister Jonas had called her name.
- 18 According to sister Jonas at the time that she was shouting at Jona the latter held the scissors in her fist pointing downwards and her arm at her side bent at an angle of 90 degrees. At that time Jona was very angry.
- 19 Sister Jonas was aware of Jona's having been traumatised by the incident with the patient and that she was stressed at the time she tried to attack the patient.
- 20 Sister Jonas and the patient entered an office and locked the door. When Jona knocked on the door Sister Jonas informed her that she should go.
- 21 After Jona could no longer wait for Sister Jonas she left the sick certificate which Dr. Mukonkole had given her on Sister Jonas' desk and went home with Sister Ntongana who gave her a lift.
- 22 Thereafter Sister Jonas referred Jona to an in-house psychologist but she refused to go, preferring to see her own psychologist. Eventually Jona was booked of by Dr. George, a psychiatrist, for 2 weeks for depression.
- 23 According to Jona the in-house psychologist was a student who suggested she see her own psychologist as she did not deal with staff.
- 24 Jona had not explained anything to Dr. George regarding the incident with the patient. She had also never indicated to the management at the Centre that she had any problems.
- 25 Upon Jona's return to work and as a consequence of her being counseled she was re-referred to the psychiatrist by the facility manager who explained the incident with the patient to the psychiatrist for assessment to establish whether she could work in stressful situations.
- 26 Jona again refused to go to the psychiatrist. Thereafter the respondent initiated disciplinary action against Jona .

- 27 In cases where patients at the Centre provoked nurses the nurse should still treat the patient with dignity. If the problem continues it should be reported to the senior nurse in charge of the ward before being taken to the operations manager.
- 28 It was not uncommon for doctors and nurses to be attacked at the Centre.
- 29 When Jona returned from being off for 2 weeks she was interviewed by the facility manager regarding the incident. Sister Jonas was not sure that Jona had depression but she had not been punished for her depression
- 30 While Jona had had problems with sister Jonas she had not lodged a grievance against her as she did not think things would go as far as this.
- 31 Jona got on well with the other staff at the Centre.

ANALYSIS OF EVIDENCE AND ARGUMENT

- 32 It is clear from the evidence presented at this arbitration that the prime allegation that had resulted in the dismissal of Jona was that of having threatened to stab the patient with a scissors.
- 33 In this regard the evidence pertaining to this alleged incident is the testimony of Koester, Jonas and Jona herself.
- 34 The evidence of Koester does not suggest an attack or attempted attack on the patient by Jona. Her evidence is of Jona's approaching sister Jonas and the patient, wanting to hear what they were talking about.
- 35 It is however clear from the evidence of Jona herself and Sister Jonas that Sister Jonas had shouted at Jona and, according to Jona, had called her a name.
- 36 As Jona had no explanation for this, the only explanation is found in the testimony of Sister Jona viz. that she had seen Jona approaching the patient, scissors in hand, and held in a manner that suggests using it as a weapon to stab. This had caused her to shout at Jona as testified.
- 37 There is furthermore nothing in the testimony of Jona other than her saying so that suggests that she was in the vicinity of the patient because she was on her way to buying a cooldrink at the gate. This had not been put to any of the respondent's witnesses and leads me to conclude that Jona had fabricated this version in order to hide the real reason for her being in the vicinity of the patient viz. in order to harm the patient in retaliation for the earlier incident.
- 38 Given the testimony of Koester and Sister Jonas that locates Jona in the vicinity of the patient for reasons specific to the patient it is consequently more likely that Jona had said that she was going to stab the patient or "cut out her intestines".
- 39 It is therefore more likely that Jona had therefore threatened to stab the patient. This is so especially given the incident between Jona and the patient and Jona's resultant anger.

- 40 In respect of the remainder of the charges against Jona while it is hard to believe that the patient would have attacked Jona without having been provoked the evidence suggests that that which had possibly been the cause of provocation for the patient could hardly be said to have been such. It seems that the issue for the patient was that Jona had not called her by her name when addressing her.
- 41 While it is more professional and appropriate that staff at the centre address patients by their name the failure to do so cannot be considered so serious as to warrant the kind of response meted out by the patient.
- 42 I accept too that Jona had addressed the patient in a manner which cannot be said to have been derogatory.
- 43 The conduct of Jona however, in particular her threatening of the patient with a scissors, is unacceptable. It is conduct which is inappropriate and unprofessional and would have as a consequence the bringing of the respondent into disrepute. Her conduct is completely contrary to that which staff at a medical facility are expected to display.
- 44 Regarding the fairness of the procedure afforded Jona the evidence shows that she had been afforded a fair disciplinary hearing by virtue of her having been afforded an opportunity to state her case. She had been afforded all her rights in accordance with the rules of natural justice in that she had called and cross examined witnesses; she had been afforded sufficient time to prepare for her hearing; she had been afforded representation.
- 45 I must now consider whether the sanction of dismissal imposed by the respondent was too harsh.
- 46 In this regard I am of the view that it would be appropriate to consider in particular the evidence relating to the psychological state of Jona at the time of the threat to the patient.
- 47 The evidence of the respondent shows that sister Jonas concedes awareness of the fact that Jona was stressed and traumatised at the time.
- 48 The further evidence is of the respondent's never having been informed of Jona's suffering depression prior to the incident. Jona also refused ultimately to subject herself to medical scrutiny regarding her suitability for working in circumstances of high stress.
- 49 I am of the view that this ultimate refusal of Jona has left the respondent in a position where it was unable to consider whether Jona could work with people or whether it could place her differently.
- 50 The evidence shows that the respondent had probably wanted to consider alternative solutions in order to accommodate Jona differently in the workplace.
- 51 I am therefore satisfied that the respondent had not simply wanted to get rid of Jona by subjecting her to a disciplinary process for misconduct. The respondent's intention was to consider Jona from an incapacity perspective with a view to retaining her services. Jona's refusal to co-operate with the respondent had then

left the respondent with no alternative but to deal with the matter as one of misconduct.

52 In conclusion regarding the fairness of the sanction therefore, it is clear that the offences that Jona was charged with were serious in nature. The respondent's being a public body and in the area of service delivery cannot be seen to condone the kind of conduct manifested by Jona on 18 February 2011. Such conduct has the effect of brining the respondent into disrepute.

53 In the circumstances therefore the sanction of dismissal cannot be said to have been too harsh.

54 In having considered all the evidence and argument presented at this arbitration I find the dismissal of the applicant to have been procedurally and substantively fair and the sanction appropriate.

AWARD:

55 This application for relief in terms of the provisions of the Labour Relations Act 66 of 1995 as amended is dismissed.

COMMISSIONER: L. MARTIN



Panellist/s: **Leslie Martin**
Sector: **Public Health & Social Development**