



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Commissioner: **KM Moodley**

Case No: **PSHS709-19/20**

Date of award: **23 July 2020**

In the matter between:

**DENOSA obo Silindile Bezana**

Applicant

and

**Department of Health- KwaZulu Natal**

Respondent

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## DETAILS OF THE HEARING AND REPRESENTATION

1. The arbitration was held over several sessions at the boardroom, Prince Mshiyeni Hospital, in Umlazi, Durban and was finally concluded on 3 July 2020.
2. The Applicant, Ms. Silindile Bezana, was represented by Mr. M Shabangu of DENOSA. The Respondent, Department of Health- KwaZulu Natal, was represented by its official, Mr. SC Nene.
3. The proceedings were mechanically recorded and all witnesses testified under oath. I am satisfied that the parties have been correctly cited and that the PHSDSBC has jurisdiction to hear this matter. No points *in limine* were raised by either of the parties.
4. The parties tabled bundles of documents, i.e. Bundle A was tabled by the Respondent and Bundle B was tabled by the Applicant. The contents of the bundles were accepted by both parties as being what they purported to be. Both parties presented their closing arguments in writing.
5. No objection was raised to me as the Commissioner presiding over the Arbitration.

## **ISSUE TO BE DECIDED**

6. The issue to be decided is whether the dismissal of the Applicant was unfair, and if so, what the remedy should be.

## **COMMON CAUSE ISSUES**

7. The following were issues of common cause.
  - 1) On 2 August 2018, a meeting by senior officials Gabela, Mbambo, and Mnguni on behalf of Management, and all staff of Folweni Clinic was held to discuss staff matters of concern.
  - 2) The Applicant was present at this meeting.
  - 3) Following an impasse, the staff decided to walk out of the meeting.
  - 4) Immediately afterwards, a meeting of all Professional Nurses of Folweni Clinic was called by Mbambo, to discuss the staff roster of the clinic.

## **ISSUES IN DISPUTE**

8. The substantive fairness of the dismissal is in dispute.
9. The procedural fairness of the dismissal was not challenged by the Applicant

## **BACKGROUND TO THE DISPUTE**

10. At a disciplinary enquiry held on the 5 March 2019 the Applicant was charged with the following:

### **Charge 1**

*"1) Gross dereliction of duty*

*1.1 You were allocated to work on the 4<sup>th</sup> and 5<sup>th</sup> of August 2018 and you intentionally did not report for duty which led to the closure of the Folweni Clinic*

*1.2 Your action of not reporting for duty as per duty roster to work 4<sup>th</sup> and 5<sup>th</sup> August weekend denied all patients who wanted to access patient care over 2 days*

## **Charge 2**

2) *Insubordination and Insolent Behaviour.*

2.1 *You were given a direct, lawful and reasonable instruction on 2 August 2018 at the meeting held between all Professional Nurses at Folweni Clinic, in the presence of Ethekwini District Management Team, where the duty roster was changed, and you were allocated work on 4 and 5 August 2018. You did not adhere to direct and reasonable instruction and misled management that you were sick and later submitted statement dated 10 August 2018 stating that your absenteeism was intentional.*

11. The Applicant was found guilty of the charges and was dismissed. She then lodged a dispute with the council. The matter was then set down by the Council for arbitration.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

12. As the proceedings were mechanically recorded, reference will only be made to that evidence which bears relevance to my findings.

## **RESPONDANT:**

### **WITNESS 1: Dumisani Gabela (Labour Relations Official)**

13. Gabela was the Labour Relations Officer in the Ethekwini District. The Folweni Clinic was one of several clinics that reported to the Ethekwini district.

14. He testified that the Folweni nursing staff were not willing to work over weekends as they believed that this decision was made by the Respondent in 2013, unilaterally.

15. On 2nd August 2018 he, together with management represented by Mbambo and Mnguni, met with the staff of the Clinic to discuss this matter. However, the staff of the Clinic decided to walk out of the meeting without any discussions taking place.

16. He further testified that Mbambo, immediately thereafter, called a meeting of all the nurses of the Clinic to discuss the matter of working over weekends.

17. He testified that the Applicant was present when Management told her that she must work over the weekend of 4 and 5 August 2018. Mbambo told them that *“you will be working that weekend, we are not asking you, we are instructing you”*.

18. Therefore, the Applicant was fully aware that she was to work on the weekend of 4 and 5 August 2018. (hereinafter referred to as the weekend)

**Witness 2: Stufile Mbambo (Deputy Director – Clinical and Programmes)**

19. Mbambo testified that she was responsible for the supervision of the Folweni Clinic which was one of many clinics that she supervised.

20. On 2 August 2018, she, together with Gabela went to the Clinic to address issues of concern at the Clinic. Together with Mnguni they met the staff to discuss the issues concerning the staff working over weekends. Soon after the meeting commenced, the staff chose to walk out.

21. Immediately thereafter she called a meeting of all the Professional Nurses at the Clinic.

22. When she noticed that no staff were rostered to work at the Clinic over the weekend she called for volunteers from amongst the Professional Nurses. As there were no volunteers, she instructed Mnguni to record the names of the Applicant and nurse Mthethwa onto the duty roster for the weekend. The new roster was then drawn up by Mnguni in the presence of all the Professional Nurses, including the Applicant.

23. The Applicant was made aware that she was required to work over that weekend. *“It was communicated loudly and clearly”*.

24. . At no stage did the Applicant object to this.

25. However, the Applicant did not report for duty on that weekend. As a result, the Clinic could not open to patients. This led to patients being turned away from the clinic and complaints being received about its closure.

**Witness 3: Mumsey Mnguni (Retired Nurse – Folweni Clinic)**

26. Mnguni previously held the post of Acting Operational Manager at Folweni Clinic at the time of the incident and was responsible for all aspects pertaining to the running of the Clinic. She is now retired.

27. She testified that there were many problems at the Clinic, the chief of which was that the staff were not happy to work over the weekends.

28. She testified that on 2 August 2018 Mbambo and management attended a meeting at the Clinic, to discuss the matter of staff working over weekends.

29. Mbambo had noticed that there was no one rostered to work the weekend of the 4<sup>th</sup> and 5<sup>th</sup> of August and pointed out that this was not acceptable, and that the staff would be charged if they did not work over that weekend.
30. Mbambo then asked for volunteers to work over the weekend. When nobody volunteered. Mbambo then identified the Applicant and nurse Mthethwa to work over the weekend. Mnguni, on instruction from Mbambo, then wrote these names in the roster book.
31. She further testified that as she did not make the changes to the roster it was not her responsibility to inform the nurses of the changes. However, it was the responsibility of the person who made the changes on the roster to tell the nurses. Therefore, she did not inform the Applicant and nurse Mthethwa of the changes to the roster as it was the responsibility of Mbambo to do so.
32. On 3<sup>rd</sup> August 2018, she received a message from M N Dali, another nurse at the Clinic informing her that the Applicant was unwell and that she was going to see the doctor.
33. On 4<sup>th</sup> August she received a message that no staff were present at the Clinic and that the clinic was not open.
34. On 6<sup>th</sup> August Mnguni received an application for sick leave from the Applicant for 3 days i.e. 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> August 2018. Mnguni duly approved the sick leave.

## **APPLICANT**

### **WITNESS 1: Silindile Bezana**

35. The Applicant was a Professional Nurse employed at Folweni Clinic since 2014. She testified that there was a shortage of staff at the Folweni Clinic since 2015 and therefore there was not enough staff to work over weekends.
36. The management had tried to address the matter. The first meeting was held on 13<sup>th</sup> July 2018 where it was resolved that clinic staff will stop working weekends. It was for this reason that the Professional Nurses who compiled the roster did not allocate any nurses to work on the weekend.
37. She further testified that she was not present at the first meeting of staff held at the Clinic on 2<sup>nd</sup> August 2018 but that she was present at the meeting held with the Professional Nurses immediately thereafter. About 10 Professional Nurses from the clinic were present at this meeting.

38. She testified that at this meeting the management had asked for the Professional Nurses to volunteer to work on weekends but that no volunteers came forward. It was then that Mbambo had asked to look at the previous months rosters records.
39. It was at this point i.e. at about 4pm that she left the meeting as she needed to fetch her daughter. She had spoken to Mbambo about leaving the meeting early but as Mbambo did not respond, she decided to leave the meeting when she saw the door open.
40. For the duration of the time that she was present at the meeting neither Mbambo nor Mnguni told her that she was required to be on duty for the weekend. She expected Mnguni, her supervisor to call her to tell her that she was required to work on the weekend. However, she received neither a message nor a call from Mnguni.
41. On 3rd August she phoned the Clinic and left a message with Dali, her colleague, that she was sick and would not be attending work. As the previous roster showed that she was not rostered to work on the weekend, she did not deem it necessary to report to her supervisor that she was sick for that weekend as well.
42. She was also of the view that as she was not told that she needed to work on that weekend, she was therefore unaware of such an instruction. Consequently, no direct and lawful instruction was given to her to carry out. She knew that she was to be on duty on 3<sup>rd</sup> of August 2018 but she didn't know she was supposed to be on duty from 4<sup>th</sup> to 5<sup>th</sup> August 2018.
43. It was for this reason that she did not report for work over the weekend.
44. She argued strongly that she could not be found guilty of failing to carry out an instruction when she was unaware of such an instruction.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

45. I found Mbambo to be both a credible and reliable witness. She presented her evidence clearly and with such certainty that it left no doubt in my mind as to what transpired at the meeting held at the clinic on 2nd August 2018.
46. As a Senior Manager in charge of the Folweni Clinic she was faced with a problem over staff unhappiness at having to work weekends and so she decided to address the matter immediately, and out of a genuine concern, in my view, for the patients who would be turned away should the clinic be closed over the weekend.
47. She, together with Gabela, convened a meeting with the staff at the Folweni Clinic on 2nd August 2018.

48. Although the staff walked out of the meeting, Mbambo was undeterred. Immediately thereafter she convened a second meeting i.e. with all the Professional Nurses from that Clinic.
49. She was extremely unhappy when she discovered that no professional nurses were scheduled on the roster for the weekend, as this meant that the clinic would be closed over the weekend. She then decided to rectify the situation by calling for volunteers from amongst the professional nurses, but none of the nurses volunteered.
50. Mbambo then instructed Mnguni, in the presence of all the nurses including the Applicant, to place the names of the Applicant and Mthethwa on the roster for the weekend of 4<sup>th</sup> and 5<sup>th</sup> August.
51. Mbambo and Mnguni then informed the meeting of this decision.  
*“Me and Mnguni informed the meeting of this decision”*
52. She then testified that:  
*“The Applicant was present at the meeting when the roster was changed. The Applicant was present and made aware that she is due to work that weekend. She did not object”*
53. This version of Mbambo was duly corroborated by the evidence of Gabela who also testified that:  
*“The Applicant was present when this decision was taken”, and that:  
“The Applicant was present when the meeting of the managers told her that she will be working weekends”.*  
He also testified that,  
*“The staff were told that you will be working on that weekend-we are not asking you; we are instructing you.”*
54. I therefore have no hesitation in accepting the version of Mbambo.
55. Mnguni on the other hand, came across to me as someone who clearly did not understand nor appreciate what was expected of her in her role as Acting OPS Manager at the Clinic. Her testimony left much to be desired so I was unable to place much reliance on her evidence.
56. As Acting Ops Manager, it was her duty to draw up the staff roster at the Clinic as it was part of her supervisory duties. Instead she allowed the Professional Nurses to draw up the roster and she simply countersigned it thereafter.

57. Mnguni was fully aware that the the Folweni Clinic was opened over weekends since 2015 and that the clinic staff were opposed to the Clinic being opened over weekends.
58. By allowing the Nurses to draw up their own roster and in the process not allocating any nurses to work over the weekend, Mnguni acted irresponsibly, knowing full well that the Clinic would be closed.
59. Mnguni failed to appreciate that Mbambo and Gabela were forced to intervene in the matter as Mnguni had failed to solve the problem herself. It was Mbambo and Gabela who had found an immediate solution to the problem.
60. In addition, Mnguni was of the mistaken belief that as Mbambo issued the instruction that the Applicant and Mthethwa be rostered for the 4<sup>th</sup> and 5<sup>th</sup> of August, it was therefore Mbambo's responsibility to inform them of the changes to the roster.
61. Her reasoning in this regard is absurd. She clearly did not understand her role as the responsible senior manager at the clinic.
62. When Mnguni was informed on the morning of 4th August that the Clinic was closed as the Applicant and nurse Mthethwa had not reported for duty, she chose to do nothing.
63. She knew full well that the Applicant and Mthethwa were rostered for duty that weekend. As a senior manager, she could have contacted the Applicant and Mthethwa to enquire from them as to why they were not on duty, and as to why the Clinic was not opened, but she chose to do nothing. Instead the Clinic remained closed, much to the detriment of the public and the annoyance of the patients.
64. To aggravate matters, when the Applicant and Mthethwa reported for duty on Monday 6 August 2018, Mnguni failed to ascertain from them, the reasons why both Nurses did not inform Mnguni that they would be absent from work. Instead Mnguni simply approved the Applicant's sick leave for these 2 days without question.
65. It is for these reasons that I was not able to place much reliance on the evidence of Mnguni.
66. I also found the Applicant to be neither a credible nor a reliable witness.
67. She testified that at all material times, she was neither aware that she was on the roster, and nor was she informed that she was due to be on duty on 4th to 5th



August. She was merely following the previous roster which showed that she was off duty on that weekend.

68. If this was true and if the Applicant was indeed following the old roster which shows that she was not on duty on 4th and 5th August, then there was no need for her to apply for sick leave for the 4<sup>th</sup> and 5<sup>th</sup> of August.

69. Why would anyone apply for sick leave for days on which you are not on duty?

70. Instead, she applied for sick leave for 4th and 5th August and her leave was subsequently approved. No evidence was led by the Applicant to show that she had withdrawn her application for sick leave for these two days.

71. The only likely conclusion that I can draw from this is that the Applicant was fully aware that she was rostered to work at the Clinic on 4th and 5th August.

72. The Applicant also testified that she left the meeting before the names of the nurses working that weekend were announced. She tried to get permission from Mbambo but as Mbambo did not respond she then left the meeting when she saw the door open.

73. The Applicant was fully aware that the meeting was convened to discuss the matter of working over weekends at the Clinic, a very important matter that she would have been interested in the outcome of.

74. One would have also expected that the Applicant would have attempted to contact her supervisor or any of the other Nurses present to find out the outcome of the meeting. I found it surprising that she made no attempt to enquire about the outcome of the meeting.

75. I also found it very significant that the Applicant in her letter dated 10 August 2018 did not advance her being sick on 4-5 August 2018 as a reason for her non-attendance, when called upon to do so by the Respondent.

76. Instead she advanced several other reasons for her non-attendance.

77. One of the reasons she mentioned was that

*“we already lodged a grievance and we cannot do what we grieved about; we are awaiting the outcome of the grievance”*

thereby implying that she was not willing to work over weekends as it was currently the subject of a grievance and she was still awaiting the outcome of the grievance.

78. Another reason advanced by the Applicant was that

*“Working weekends was implemented unlawfully...”*

by the Respondent, and

*“So, we cannot continue to be treated like we don’t have rights as workers”.*

79. Another reason she advanced was that

*“I was also implementing a resolution that was taken in a meeting to suspend the weekends and public holidays work until the employer do consultation with organised labour regarding changing the terms of employment”.*

80. By saying this the Applicant is confirming, in writing, that she was simply implementing a resolution to suspend weekend work at the clinic. The only likely conclusion that one can draw from this is that the Applicant was aware that she was supposed to be on duty on the weekend but instead she chose to implement the ‘resolution’ to suspend weekend and public holiday work.

81. It was not in dispute that the Applicant together with other nursing staff at the clinic were extremely unhappy to work over weekends and public holidays. This was also evident when they drew up their own rosters to exclude the working of weekends. It was even more evident when Mbambo called for volunteers to work over the weekend and none of the nurses volunteered.

82. The Applicant initially relied on producing a medical certificate in order to justify her absence from work for that weekend. For some reason she decided not to pursue this route.

83. Similarly, she decided to abandon most of the reasons recorded in her letter dated 10 August 2018. Instead she chose to rely primarily on the argument that no legitimate instruction was issued to her to be on duty on the 4<sup>th</sup> and 5<sup>th</sup> of August 2018.

84. Therefore, I could not place much reliance on the evidence of the Applicant.

## **CONCLUSION**

85. From all of the above I find, on a balance of probabilities, that the version of Mbambo is more probable than the version of the Applicant.

86. I therefore accept the version of Mbambo.

87. I therefore conclude that the Applicant was aware that she was rostered to be on duty on 4-5 August 2018. As she was unhappy about being forced to do so by Mbambo, she then decided to absent herself from duty.

88. In matters of this nature, the onus is on the Respondent to prove on a balance of probabilities that the Applicant is guilty of misconduct.

89. I am convinced that the Respondent has discharged this onus satisfactorily on a balance of probabilities.

90. I therefore find the Applicant guilty of misconduct and I propose to rule accordingly.

## **AWARD**

91. I make the following award:

92. The dismissal of the Applicant, Silindile Bezana, procedurally and substantively, is not unfair.

93. This matter is dismissed.

94. I make no order as to costs.



COMMISSIONER: KM MOODLEY

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