



ARBITRATION AWARD

Case No: **PSHS370-22/23**

Commissioner: **Mr Anand Dorasamy**

Date of award: **28 October 2022**

In the matter between:

PSA OBO IDIKA SUNDAY FRANCES

Applicant

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration proceedings commenced at 10H00 on the 12 October 2022 at the Vryheid hospital in Vryheid. After the evidence was completed, the parties agreed to submit written closing arguments on the 20 October 2022. The applicant's representative submitted his written closing arguments on the 25 October 2022 because of his work schedule. The applicant lodged a dispute in terms of section 186(2) (b) of the LRA challenging the sanction arising from the disciplinary action taken against him.

ISSUE TO BE DECIDED

2. I am required to determine whether the Respondent (employer) had perpetrated an act of unfair labour practice against the applicant in respect of his disciplinary sanction. Should I find in favour of the applicant, I am to determine what relief should be granted to him.

BACKGROUND TO THE DISPUTE

3. The applicant was disciplined for misconduct and the disciplinary hearing chairperson found him guilty and recommended a sanction of demotion from medical manager grade 2 to medical officer grade 3. He seeks to be re-instated to his post as medical manager grade 2. The respondent prays that the application be dismissed.

SUMMARY OF EVIDENCE

APPLICANT'S CASE

Dr FRANCES SUNDAY IDIKA

The salient aspects of the witness' testimony are recorded below:

4. He was employed by the Department of Health in 2009 as medical manager grade 1 and then promoted two years ago to grade 2. He was the medical manager grade 2 at the hospital.
5. He was demoted after a hearing to medical officer grade 3. This was not the first time as he was previously demoted and re-instated some two years ago.
6. In bundle B page 5 are the charges he faced at the disciplinary hearing. Most of the charges fell away because it was badly formulated, In bundle A are the charges that remained. The charges and sanction are recorded below:
7. In terms of the Disciplinary Procedure that was held under your name Dr F S Idika that sat on various dates regarding the charges which were levelled against you are as follows:
 - 2.1. Gross negligence act or omission that has or may detrimentally affect the health of clients/patients and bringing the hospital into disrepute and medico-legal litigations.
 - File 1988-03-29 ruptured ectopic

The presiding officer of your disciplinary hearing found you guilty on the abovementioned charge and imposed the sanction of Permanent Demotion from Medical Manager to Medical Officer Grade 3 and Final Written Warning which will last for six months and after six months it will be removed from your personal file.
8. He is not aware of any litigation or complaint by the public. He feels bad because he was demoted for reasons he does not know. The hearing was not fair.
9. He saw the patient Ms Xulu Xolile (patient) at 00H45 and the nurses saw her thereafter.
10. He completed certain sections on page 9 of bundle A (15 February 2020). The patient was pregnant. She came with a drip and with other patients from the clinic. The nurses attended to her. When he saw the patient and examined her he found her pale and in pain which he documented. She had low blood

pressure and high heart rate. He recorded that she was 22 years old and having abdominal pains. She was on ART (anti-retroviral therapy) He got her history from the nurses.

11. She was in the hospital for the first time. Her temperature was within normal. Her saturation was not recorded by the nurses. He examined her and found her to be pale, her chest was clear and she had pain in her stomach. He examined her twice.
12. She was frail and he took blood and sent it to the laboratory. The nurses were present when he did a vaginal inspection and she had a discharge for some time. He gave her pain medication.
13. He looked for any sign of rupture and did it three times. There was no blood inside her abdomen. He filled the forms and the blood results came in and her results were within the normal range.
14. On page 30 he went to see the patient. The nurses wrote at 07H00 handing over time.
15. He was in casualty and if the patient was unstable he could be called from casualty.
16. He told the mortuary attendant that in terms of the policy a post mortem must be done. He was told that the family had refused to do a post mortem.
17. Dr Gabella testified at the disciplinary hearing.
18. On page 31 the readings are not properly recorded. He responded to the allegations because he documented his findings. The file is not complete. He examined the patient for a second time and there was no blood in the abdomen and no ruptures and the discharge was smelling. The patient was having pain. He has treated more than ten ectopic patients.
19. There was no sign of shock. The nurses asked her (deceased) to go to the toilet to bring urine samples. The patient did not complain. She took off her clothes and put on hospital clothes. He never missed any diagnosis.
20. The nurses did not monitor the patient. The patient was stable when she went to the ward. At 3 am the patient was examined and he looked at her blood results ect.
21. He took his time to do the examinations. He is not a specialist but a general practitioner and does not do ultra-sounds. At 7 am he wanted an ultra-sound done.
22. Some of the recordings on the file were done after the patient passed away. The patient was not discharged, the form on page 23 was filled later.
23. He was delaying because he wanted to be sure before operating on the patient.

Under cross examination he stated as follows:

24. He checked the patient and she was not critical. The patient was transferred from the clinic. On page 10 of bundle B is his handwriting, the patient was not vomiting.
25. On the day casualty was full.

RESPONDENT'S CASE

KHULEKHULEKANI JEREMIA GABELLA

The salient aspects of his testimony are recorded below.

26. He is a manager Medical Services in Greytown hospital since June 2019 and in the Department for 24 years.
27. The vital signs were taken by the nurses and doctor. The Patient had an infection and was pregnant.
28. The forms on pages 11 to 13 are not completed properly. The applicant did the examination. On page 26 the patient came in after a short onset of lower abdominal pain.

Under cross examination he stated as follows:

29. He testified at the Disciplinary Hearing on all charges.
30. He does not know if there is any litigation.
31. He can comment that the doctor saw the patient and diagnosed her.
32. He did not see the patient.

CLOSING ARGUMENTS

33. The parties agreed to submit written closing arguments on or before the 20 October 2022. The arguments were considered when I made my determination.

ANALYSIS OF EVIDENCE AND ARGUMENT

34. This matter was cited as an unfair labour practice dispute in terms of Section 186 (2)(b) of the LRA.
35. I have taken cognizance of the decision in Sweeney/Transcash [2000] 6 BALR 712 (CCMA) where the commissioner held that arbitration hearings constitute a rehearing *de novo* on the merits.
36. The award must accordingly be based on evidence led at the arbitration
37. In the present case during the disciplinary hearing the applicant faced a battery of charges, many of which he was found not guilty.
38. At the arbitration the respondent persisted on one charge only being as follows. It is repeated for completeness and clarity for my findings.
 - 1.1. Gross negligence act or omission that has or may detrimentally affect the health of clients/patients and bringing the hospital into disrepute and medico-legal litigations.
 - File 1988-03-29 ruptured ectopic
39. The respondent called Dr Khulekhulekani Jeremia Gabella who gave his medical opinion in the matter.
40. It is important to note that Dr Gabella did not see the patient but based his evidence of the patient's file notes. He criticized the notes as being incomplete or the relevant portions not completed or incorrectly recorded. He did not comment on whether the applicant was negligent and was not aware if the allegation

that he brought the hospital into disrepute or whether there were any medico-legal litigations against the applicant or the hospital or the Department of Health. He was not prepared to comment on crucial aspects that needed clarity because the file notes were not properly done.

41. The patients were brought in from the clinic. The applicant did not see the patient (Ms Xolile Xulu) when she was brought into the hospital. He saw her later after the nurses took her vital signs. When he saw her she was not in a critical condition. He did the routine examination and recorded same in the patient's file. He had recorded what the nurses had to do with the patient. The patient was pregnant and had pain in her stomach. Thereafter he had to attend to other cases and the patient
42. It was not possible to do an ultra-sound investigation on the patient because the ultrasound is only available during working hours and the sonographers are not on call after hours, The issue of ectopic pregnancy was not established as the ultrasound was not done.
43. The charge, File 1988-03-29 ruptured ectopic was not traversed by the respondent. The applicant had done a vaginal investigation and found that the patient had an infection as there was smelly residue on his glove used in probing the vagina. When the applicant examined the patient there was no bleeding present. He had concluded that since there was no blood present there was no rupture. Dr Gabella did not confirm if there was any rupture resulting in bleeding.
44. At the arbitration the applicant defended the allegations against him.
45. Therefore, at the arbitration a finding of not guilty would be appropriate. Hence there would not be a need to look at a sanction.
46. The respondent committed an act of unfair labour practice against the applicant when it imposed a sanction (demotion from Medical Manager to Medical Officer Grade 3 and a final written warning which will last for six months).
47. It would be appropriate to order that the sanction to be set aside.
48. The respondent is ordered to reinstate the applicant to his former position of Medical Manager Grade 2.
49. The respondent must comply with this order by no later than 11 November 2022.

AWARD

50. The sanction imposed at the Disciplinary Hearing is hereby set aside.
51. The respondent is ordered to reinstate the applicant to his former position of Medical Manager Grade 2.
52. The respondent must comply with this order by no later than 11 November 2022.



Anand Dorasamy