



# ARBITRATION AWARD

Commissioner: **Khehla Khanyile**

Case No: **PSHS620-21/22**

Date of award: **14 March 2022**

In the matter between:

**SAMATU OBO PHUMLISA SONGO**

Applicant

and

**DEPARTMENT OF HEALTH – KWAZULU NATAL**

Respondent

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## **DETAILS OF HEARING AND REPRESENTATION**

1. This arbitration was scheduled for 07 December 2021, 01 and 02 February 2022, and 03 May 2022. The applicant, Dr Phumlisa Songo, appeared in person and was represented by the Union Official, Mr Modisane Lelaka from SAMATU. The respondent, Department of Health- KwaZulu Natal, was represented by the Assistant Director Labour Relations, Mrs Bonisiwe Shezi. The proceedings were digitally recorded and I also took down notes.

## **ISSUE TO BE DECIDED**

2. I am required to decide whether the respondent committed an unfair labour practice or not.

## **BACKGROUND**

3. The applicant was employed by the respondent as a Medical Manager on 01 December 2017. He was earning R136724.52 monthly at the time of suspension.

4. The respondent preferred 3 (THREE) charges against the applicant as follows:

- a) Derelicted your duties when you refused to accept and admit a patient, Buhle Dlotho.
- b) You endangered the lives of MC Jaca, VA Mbatha and DB Khumalo when you made travel back with a restless patient without sedating the patient.
- c) You were under the influence of alcohol.

5. The applicant argues that the respondent committed an unfair practice. The respondent also argues that the respondent did not commit an unfair labour practice.

### **SURVEY OF EVIDENCE AND ARGUMENTS**

6. The applicant relied on his testimony and Ms Nomsisi Mvana's as well as the documentary evidence. The respondent party relied on the testimony of four witnesses, Dr Thabisile Phungula, Dr Omar Habib, Mr Bongani Khumalo and Ms Mampho Jaca as well as the documentary evidence.

#### **Applicant's case**

##### **Witness 1**

7. The applicant stated that on 23 September 2020, he was on call. He submitted that he saw the patient, Buhle Dlotho when brought to his attention for admission by Mr Mbathatha and the Enrol Nurse, Ms Jaca. He testified that he went through the patient's file to look at the history and discovered the patient's blood results were abnormal. He stated that he then called a referring doctor, Dr Phungula to enquire why she sent him a patient whose C-reactive protein was 24 instead of 10, and the referring doctor advised him that it was an isolated case, the patient had no infection hence there was no document. He further testified that he did not sedate the patient as he appeared to be calm and of a sound mind and he was advised that the patient had already received two injections before him being referred to Umzimkhulu Psychiatric Hospital. He submitted that sedating the patient again would have put his life at risk as neither of the staff accompanying the patient would have been able to resuscitate him should he have complicated. He testified that only EMS staff and the nurse that was pacing around the office whilst he was busy with paperwork. He stated that he was not intoxicated on the day.

Under questions for clarity, he conceded that he saw on the patient's file had a history of aggressive behaviour.

##### **Witness 2**

8. **Ms Nomsisi Mvana (Nursing Sister)** stated that on 23 September 2020, she was working with the applicant. She submitted that the applicant checked the patient's file content and found c-reactive protein was high and called the referring doctor. He testified that the patient was calm and was of sound mind whereas

Ms Jaca and Mr Mbatha appeared to be angry that the applicant refused to admit the patient. She stated that the doctor did not sedate the patient before sending him back to Port Shepstone. She submitted that the applicant was not intoxicated on the day in question.

### **Respondent's case**

#### **Witness 1**

9. **Dr Thabisile Phungula (Senior Medical Officer)** stated that she works for the Port Shepstone Regional Hospital in the Psychiatric Department. She testified that the patient, Buhle Dlotho was kept within the institution for 72 hours. She testified that blood tests were conducted and found no infection, but the patient had a high C-reactive protein of 24 instead of 10. She submitted that when she was sedating the aforesaid patient Mr Dlotho had bruises as he had to be held by five (5) people which elevated his C-reactive protein. She submitted that the patient had aggressive behaviour for 72 hours and sedated the patient before transferring him. She stated that on 23 September 2020, she discussed the patient with Dr Songo telephonically as well as blood test results and agreed to accept the patient. She further stated that the applicant called her to discuss the patient when the patient was already arrived at the Umzimkhulu Hospital and advised him that he could not refer back the patient for his C-reactive protein because it was not a medical condition but refused to admit the patient. She testified that the applicant ought to have sedated the patient before referring him back as he had a history of aggressive behaviour. She further testified that she got a message that the said patient attacked Ms Jaca and Mr Khumalo at Murchison Hospital and jumped out of the ambulance. She stated that on 24 September 2020, the Murchison Hospital admitted the patient and she referred again the same patient to Umzimkhulu Hospital and was admitted by another doctor with the same blood results.

10. Under cross-examination, she stated that the C-reactive protein could reduce itself as well as the bruise could resolve itself. She further stated that on 23 September 2020, she sedated the patient once.

11. Under questions for clarity, she conceded that the applicant called her after referring the patient back to Port Shepstone Hospital.

#### **Witness 2**

12. **Mr Bongani Khumalo (Paramedic Driver)** stated that he is stationed at Umthwalume Community Health Centre. He submitted that on 23 September 2020, Ms Jaca, Mr Mbatha and himself were assigned to transfer a patient, Mr Buhle Dlotho from Port Shepstone Hospital to Umzimkhulu Psychiatric Hospital. He testified that

the referring doctor sedated the patient as he was violent and aggressive. He stated that upon arrival, Ms Jaca and Mr Mbatha escorted the patient to the OPD, after a while, Mr Mbatha and Ms Jaca came back furious that the applicant refused to admit the patient as his documents were not in order. He submitted that the applicant made them travel back with a restless patient without sedating him. He stated that the patient became agitated and aggressive on the way in that the patient attacked him and Ms Jaca and jumped out of the ambulance by Murchison Hospital. He testified that a few days later, he was tasked again to transport the same patient to Umzimkhulu Hospital where another doctor admitted the patient.

### **Witness 3**

13. **Dr Omar Habib (Head of Psychiatric Department)** stated that he is stationed at the Port Shepstone Regional Hospital. He submitted that the management tasked him to compile an incident report that took place on 23 September 2020, where the doctor referred back the patient and attacked the nurse, Ms Jaca and Mr Mbatha. He testified the applicant was obligated to listen to Ms Jaca and Mr Mbatha and that the patient was agitated and aggressive and sedated the patient. He submitted that Dr Phungula fully assessed the patient for 72 hours and found no medical conditions. He testified that the patient could be sedated for each every six (6) six-hourly to eight (8) hourly. He stated that a high C-reactive protein is not a medical condition.

### **Witness 4**

14. **Ms Mampho Jaca (Enrolled Nurse)** stated that on 23 September 2020, Mr Mbatha, Mr Khumalo and herself took the patient Mr Dlotho to Umzimkhulu Hospital. She submitted that the patient was restless and tried to walk out of the Umzimkhulu Hospital. She testified that the applicant was a doctor on call. She stated that the applicant did not assess the patient, but just read his file and refused to admit the patient. She submitted that she and the paramedics informed the applicant that the patient was aggressive and asked him to admit the patient, but refused. She testified that the applicant also refused to sedate the patient before sending the patient back to Port Shepstone Hospital. She stated that the patient became agitated and aggressive on the way in that he attacked her and the driver. She submitted that the driver stopped and the patient jumped out of the ambulance.

15. Under cross-examination, she stated that the applicant did not smell alcohol.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

16. The applicant referred an unfair labour practice dispute to the council. I am required to decide whether the respondent committed an unfair labour practice or not.

17. In terms of section 186 (2) (b) unfair labour practice means any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee. Section 192 the applicant bears the onus to prove that the respondent committed an unfair labour practice.

18. It appeared as common cause that the applicant did not admit the patient. It appeared as common cause that the applicant did not sedate the applicant before sending him back to Port Shepstone Hospital. It appeared as common cause that the respondent issued the applicant with a final written warning and three months' suspension.

19. The applicant argued that the respondent committed an unfair labour practice. I reject the applicant's argument to be less probable than that of the respondent. The applicant discussed the patient with the referring doctor who agreed to admit the applicant. The applicant was advised twice by the referring doctor that all blood tests were conducted and found no infection. The referring doctor also advised him a patient's C-reactive was elevated by bruises which did not require any further medical investigation, but the applicant refused to admit the patient. I find that it was a dereliction of his duties when he refused to admit the patient. The applicant saw the documents that the patient had a history of aggressive behaviour and Ms Jaca asked the applicant to give the patient something to calm him down, but he refused. The referring doctor sedated the patient to avoid any attack by the patient and the applicant should have done the same as Mr Khumalo led evidence was trained to resuscitate the patient and the argument that he did not sedate the patient because he was calm and of sound mind and no one was trained to resuscitate the patient should complication occur stands to fail. The applicant denied that he was under the influence of alcohol. Under cross-examination, Mr Jaca stated that the applicant did not smell alcohol nor did the respondent test the applicant for alcohol. Mr Khumalo and Ms Mvana stated that they did not observe any signs that the applicant was under the influence of alcohol. The argument of Dr Phungula and Ms Jaca that the applicant was stammering or under the influence of alcohol stands to fail as they failed to alert the respondent and test the applicant.

20. I accept the respondent's argument that the respondent did not commit an unfair labour practice. The respondent witnesses Dr Phungula, Dr Habib, Mr Khumalo and Ms Jaca's evidence was credible and reliable.

The respondent witness Dr Phungula led evidence that she discussed telephonically the patient with the applicant that the patient was physical health, but his C-reactive protein was elevated by bruises before referring him and the applicant agreed to accept him. She further led evidence that the applicant called her to discuss the same patient and advised him that the applicant was in physical health as all blood tests were conducted within 72 hours and found no infection. She stated that she appealed to the applicant to admit the patient, but refused. She submitted that a high C-reactive protein reduces itself and no further medical investigation was required. Both the respondent witnesses' Dr Habib and Dr Phungula led evidence that a high C-reactive protein was not a medical condition and their evidence corroborated each other that the applicant should have admitted or sedated the patient before referring him back as the applicant saw that the patient had a history of aggressive behaviour. Ms Jaca led evidence that she appealed to give the patient something to calm down, but refused. Both witnesses Mr Khumalo and Ms Jaca led evidence that the applicant made them travel back with a restless patient without sedating the patient. They further led evidence that the patient attacked them on the way and put his life in danger by jumping off the ambulance. Mr Khumalo led evidence that a few days later, he was transported the same patient to Umzimkhulu Hospital and was admitted by another doctor. The respondent imposed the appropriate sanction of a final written warning and three months' suspension. I find that the respondent did not commit an unfair labour practice.

22. In light of the above, I make the following award.

#### **AWARD**

23. I find that the respondent did not commit an unfair labour practice.

24. The applicant's claim is hereby dismissed.



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Khehla Khanyile