COVID-19: What should employers do if employed health professionals such as doctors and nurses refuse to treat COVID-19 patients despite being provided with the required personal protective equipment?

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At some health establishments, doctors and nurses employed there are refusing to treat COVID-19 patients – even when they have been provided with the necessary personal protective equipment. Such conduct would appear to be in breach of the World Medical Association International Code of Medical Ethics, the International Council of Nurses Code of Ethics for Nurses, the Rules of Conduct of the Health Professions Council of South Africa (SA), the SA Nursing Council and some of the provisions of the SA Constitution and of the relevant labour legislation. Guidance is provided to employers on how to deal with the situation based on ethical and legal considerations.

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It appears that some health professionals, such as doctors and nurses employed in health establishments and registered with their professional bodies, are refusing to treat COVID-19 patients – even when they have been provided with the necessary personal protective equipment (PPE). In order to advise employers on whether such conduct is unethical and illegal, it is necessary to consider: (*i*) the World Medical Association (WMA) International Code of Medical Ethics;[1] (*ii*) the International Council of Nurses (ICN) Code of Ethics for Nurses;[2] (*iii*) the Professional Rules of Conduct of the Health Professions Council of South Africa (HPCSA);[3] (*iv*) the Rules of the SA Nursing Council (SANC) setting out the Acts or Omissions in Respect of which the Council may take Disciplinary Action;[4] (*v*) the provisions of the SA Constitution;[5] and (*vi*) the provisions of the relevant labour legislation.

The WMA International Code of Ethics

In terms of the WMA International Code of Medical Ethics:[1] 'A physician shall be dedicated to providing competent medical service in full professional and moral independence, with compassion and respect for human dignity'. Doctors who refuse to treat COVID-19 patients for no good reason will not be 'providing a competent medical service' and will not be acting 'with compassion and respect for human dignity' towards such patients. Their failure to treat COVID-19 patients, when they have been provided with the necessary PPE, is a clear violation of the WMA International Code of Medical Ethics.

What employers should do

Employers should advise the employees who refuse to treat COVID-19 patients for no good reason that they will be violating the WMA International Code of Medical Ethics,[1] and that SA is a member of the WMA. A violation of the WMA Code, together with a breach of the HPCSA Professional Rules of Conduct[2] (see below), could be regarded by the HPCSA as evidence of improper and disgraceful conduct, and result in disciplinary proceedings against them.

ICN Code of Conduct for Nurses

The ICN Code of Conduct for Nurses[2] states: 'Nursing care is respectful of and unrestricted by considerations of age, colour, creed, culture, disability or illness, gender, sexual orientation, nationality, politics, race or social status' (preamble). Thus nurses should not discriminate against patients on account of their 'illness', which would include COVID-19. The Code goes on to state that nurses should advocate 'for equity and social justice in resource allocation, access to healthcare and other social and economic services' (para 1). By refusing to treat COVID-19 patients, nurses would be denying them 'access to healthcare'. Nurses are also required to demonstrate 'professional values such as respectfulness, responsiveness, compassion, trustworthiness and integrity' (para 1), which is not being demonstrated when they refuse to treat COVID-19 patients for no good reason.

Furthermore, nurses are expected to sustain 'a collaborative and respectful relationship with co-workers in nursing and other fields' (para 4). Nurses must also take 'appropriate action to safeguard individuals, families and communities when their health is endangered by a co-worker or any other person [and] to support and guide co-workers to advance ethical conduct' (para 4). It is clear that a refusal to treat COVID-19 patients by nurses would be a violation of their need to sustain 'a collaborative and respectful relationship with co-workers', and to 'safeguard the health' of such patients and 'advance ethical conduct by their colleagues'.

What employers should do

Employers should remind their nursing staff that SA is a member of the ICN and subscribes to the ICN Code of Conduct for Nurses.

Therefore, nurses should follow the ethical guidelines of the ICN. Employers should draw the nurses' attention to the preamble and the relevant provisions of the Code, which are very similar to what the SANC requires of nurses (see below), breaches of which may be evidence of improper and unprofessional nursing conduct.

The HPCSA Professional Rules of Conduct

Similar to the WMA International Code of Medical Ethics,[1] the HPCSA Professional Rules of Conduct[3] focus on respect for the dignity of patients. They also state, however, that: 'A practitioner shall at all times: (a) act in the best interests of his or her patients; (b) respect patient confidentiality, privacy, choices and dignity; [and] (c) maintain the highest standards of personal conduct and integrity' (rule 27A). It cannot be said that health practitioners who refuse to treat COVID-19 patients – despite being provided with the requisite PPE – are respecting the dignity of such patients, nor are they acting 'in the best interests' of the patients, or maintaining 'the highest standards of personal conduct and integrity'. Their refusal to treat COVID-19 patients under these circumstances could be regarded as evidence of improper or disgraceful conduct in any HPCSA disciplinary hearing against them.

The HPCSA's General Ethical Guidelines for the Health Care Professions,[6] which amplify the HPCSA's Professional Rules,[2] provide that registered health practitioners should, *inter alia*:

(*i*) always regard concern for the best interests or wellbeing of their patients as their primary professional duty (para 5.1.1)

(*ii*) not refuse or delay treatment because they believe that patients' actions have contributed to their condition, or because they – the healthcare practitioners – may be putting their own health at risk (para 5.1.7)

(*iii*) guard against human rights violations of patients, and not allow, participate in or condone any actions that lead to violations of the rights of patients (para 5.3.5)

(*iv*) promote access to healthcare (para 5.7.1).

Health practitioners with adequate PPE who refuse to treat COVID-19 patients are not regarding 'the best interests or wellbeing' of their patients 'as their primary professional duty'. They also may not justify refusing to treat such patients because 'they may be putting their own health at risk' – especially as they have been provided with the necessary PPE. Instead of guarding against 'human rights violations of patients', they are participating in them, and are preventing – not promoting – 'access to healthcare' by such patients. All these violations will add weight to the evidence against them in any charges by the HPCSA of improper and disgraceful conduct.

The General Ethical Guidelines[6] also provide that healthcare practitioners should:

(*i*) report violations and seek redress in circumstances where they have a good or persuasive reason to believe that the rights of patients are being violated (para 7.2)

(*ii*) report violations and seek redress in circumstances where they have good or persuasive reason to believe that the rights of patients are being violated and/or where the conduct of the practitioner is unethical (para 10.1.1)

(*iii*) where it is in their power, protect people who report misconduct from victimisation or intimidation (para 10.1.2).

Accordingly, in terms of the guidelines there is a duty on registered healthcare practitioners to 'report violations and seek redress' where 'the rights of patients are being violated' or their colleagues are acting unethically, as in the case of COVID-19 patients whom doctors refuse to treat. In addition, the practitioners who comply with the guidelines and report their errant colleagues must be protected from 'victimisation or intimidation'.

Although it may be ethically justifiable for health practitioners to refuse to treat COVID-19 patients, as a last resort, where they are not provided with proper PPE,[7] such refusal to treat cannot be justified when they are provided with the necessary PPE. In such instances, the HPCSA may well regard a refusal to treat COVID-19 patients – when health practitioners have been issued with the appropriate and necessary PPE – as improper or disgraceful conduct, and in breach of the Ethical Rules[2] (rule 27A) and the General Ethical Guidelines[6] (paras 5.11, 5.1.7, 5.3.5 and 5.7.1). In terms of the guidelines, such a refusal to treat imposes a duty on the employers themselves, or fellow health practitioner employees if they are registered with the HPCSA, to report the conduct of the delinquent practitioners (para 10.1.2).

What employers should do

Employers should point out that a breach of the HPCSA's Ethical Rules[2] and the provisions in the HPCSA's General Ethical Guidelines[4] may be regarded as improper or disgraceful conduct, and could result in disciplinary proceedings against any registered health practitioners who refuse to treat COVID-19 patients without good reason. Employers should also remind employees to bear in mind that a duty is imposed on the employers themselves, or their colleagues registered with the HPCSA, to report violations of patients' rights. Such violations may also be reported by the affected patients or their relatives. Should such employees be suspended from practice or removed from the roll of practitioners, they will lose their jobs with the health establishment. This is because in terms of the Labour Relations Act No. 66 of 1995,[8] the dismissal of employee is fair if the employee does not satisfy 'the inherent requirement of the particular job' (section 187(2)(a)) (see below).

Rules of the SANC setting out the acts or omissions in respect of which the council may take disciplinary action

The disciplinary rules of the SANC state that a nurse may be disciplined if (s)he engages in a '[w]ilful or negligent omission to carry out such acts in respect of the diagnosing, treatment, care, prescribing, collaborating, referral, co-ordinating and patient advocacy as the scope of his [or her] profession permits (rule 3).[4] It is also a disciplinary offence willfully or negligently not 'to maintain the health status of a patient under his [or her] care or charge [through not providing] specific care and treatment [for] the very ill, the disturbed, the confused, the aged, infants and children, the unconscious patient, the patient with communication problems and the vulnerable and high-risk patient' (rule 4(g)).

A refusal to attend to COVID-19 patients without good reason clearly violates the ethical duty of nurses not to willfully or negligently omit to treat or care for such patients within their scope of practice, and could result in disciplinary procedures against them. It is also a disciplinary offence willfully and negligently to fail to maintain the

healthcare of patients by not providing 'specific care and treatment [for] the very ill', as is the case with hospitalised COVID-19 patients. In both instances, the nurse concerned may be found guilty of improper or unprofessional conduct.

What employers should do

Employers should remind the nurses of their ethical obligations in terms of the SANC rules. They should point out that should the nurses wilfully or negligently refuse to treat COVID-19 patients for no good reason, they may face disciplinary action by the SANC for improper or unprofessional conduct, and may lose their right to practise nursing. Should their nursing registration be suspended or they be removed from the roll of nurses, they are also likely lose their jobs with the health establishment because in terms of the Labour Relations Act,[8] the dismissal of employee is fair if the employee does not satisfy 'the inherent requirement of the particular job' (section 187(2)(a)) (see below), in this instance as a registered nurse.

The Constitution

The SA Constitution[5] provides that everyone has the right of access to healthcare (section 27(1)), and children have the right to basic healthcare services (section 28(1)(c)). It also provides that nobody should be unfairly discriminated against (section 9(3)), and no-one should be refused emergency medical treatment (section 27(3)). A refusal by health practitioners to treat COVID-19 patients – despite being provided with the requisite PPE – would be a denial of the patients' rights of access to healthcare, and in the case of children, of their right to basic healthcare. It would also be a violation of the patients' rights not to be unfairly discriminated against if the refusal to treat by the health practitioners is because the patients have COVID-19. Where some COVID-19 patients require emergency medical treatment (e.g. where they need to be placed on ventilators), such a refusal to treat them would be a further violation of the Constitution.[5] In addition, such health practitioners may not use the common-law defence of 'necessity' as a reason to refuse to treat COVID-19 patients, because it would not be reasonable and justifiable in terms of the Constitution[5] (section 36(1)) to deny such patients their Constitutional right of access to healthcare when adequate PPE has been provided for them. It would also violate the constitutional right of patients not to be unfairly discriminated against.

What employers should do

Employers should draw the above Constitutional provisions to the attention of the healthcare practitioners employed by them. They should point out that a failure by the health practitioners to show that their refusal to treat COVID-19 patients is reasonable and justifiable in terms of the Constitution (section 36(1))[5] may result in the practitioners concerned being held legally liable for violating the Constitutional rights of the patients.

Labour legislation

The Emergency Services Committee established in terms of the Labour Relations Act[8] has designated emergency health services, nursing, medical and paramedical services, their supporting services and hospitals as 'essential services'.[9] Such health service providers may not withhold their labour in a manner that puts the lives or health of patients at risk, unless their own lives are at risk – in which case they can rely on the common-law defence of 'necessity'[7] to justify their refusal to work. However, this defence will fail if the employees have been provided with the required PPE and a safe working environment for the treatment of COVID-19 patients.

In terms of the Occupational Health and Safety Act No. 85 of 1993,[10] employees are required to 'take reasonable care for the health and safety of [themselves] and of other persons who may be affected by their acts or omissions' (section 14(a)). Furthermore, they are obliged to 'carry out any lawful order given to them, and obey the health and safety rules and procedures laid down by [their] employer or anyone authorised thereto by [their] employer, in the interest of health and safety' (section 14(c)). These clauses mean that health practitioners will have to ensure that they use the PPE provided by their employers when treating COVID-19 patients, and cannot refuse to wear it in order to avoid treating such patients. If they do so, they can be prosecuted in terms of section 38(1)(a) of the Act. Apart from this, they are likely to lose their jobs, because if they are found guilty of improper or disgraceful conduct by a disciplinary committee of their professional body, they may be dismissed from their jobs, as in terms of the Labour Relations Act, the dismissal of an employee is not unfair if the employee does not satisfy 'the inherent requirement of the particular job' (section 187(2)(a)), in this instance, registration with a professional body.

What employers should do

Employers should mention that if there is little risk of healthcare practitioners who treat COVID-19 patients contracting the virus, because the required PPE is in place, they may not in terms of the Labour Relations Act withdraw their labour, because they are regarded as an 'essential service'. In addition, in terms of the Occupational Health and Safety Act, healthcare practitioner employees must take care of their own health and safety, and obey lawful orders from their employers in the interests of health and safety. Therefore, if they refuse to wear the PPE provided and to treat COVID-19 patients, they will be in breach of the Occupational Health and Safety Act, and liable to prosecution. They are also likely to lose their jobs, because in terms of the Labour Relations Act, the dismissal of an employee is fair if the employee does not satisfy 'the inherent requirement of the particular job' (section 187(2)(a)), in this case, registration with a professional body.

Conclusion

Where health practitioners employed in health establishments and registered with their professional body refuse to treat COVID-19 patients despite being provided with the necessary PPE, such conduct, if unjustified, may be found to be unethical and illegal. Ethically, it is in conflict with the WMA International Code of Medical Ethics,[1] the ICN International Code of Ethics for Nurses,[2] the Professional Rules of Conduct of the HPCSA[3] and the Rules of the SANC setting out the Acts or Omissions in Respect of which the Council may take Disciplinary Action.[4] Employers should remind employees that a breach of the HPCSA Rules of Ethical Conduct[3] or the SANC rules may have to be reported to the relevant professional body, and result in a charge and finding of improper and disgraceful conduct against them. Furthermore, legally, such conduct may be a violation of the patients'

Constitutional rights, and in contravention of the Labour Relations and Occupational Health and Safety Acts, which may result in both criminal and civil actions against the healthcare provider should any COVID-19 patients suffer further harm or death arising from the refusal to treat them. In addition, health professionals who have their registration with their professional body suspended or removed from the relevant roll are likely to lose their jobs, because in terms of the Labour Relations Act, the dismissal of an employee is fair if the employee does not satisfy 'the inherent requirement of the particular job'.

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