# ARBITRATION AWARD

**PHSDSBC**
**PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL**

Panelist/s:**Advocate Ronnie Bracks**
Case No.:**PSHS1-10/11**
Date of Award:**7th June 2010**

**In the ARBITRATION between:**

***Bouwer Cardona Inc obo Dr. Chetty D***
**(Employee)**

and

***Department of Health- Gauteng Province***
**(1st Respondent)**

| | |
|---|---|
| **Employee Representative:** | ***Bouwer Cardona Inc*** |
| Employee's address: | ***P.O. Box 158*** |
| | ***Parklands*** |
| | ***2121*** |
| Telephone: | ***011 795 0940*** |
| Telefax: | ***011 795 0979*** |
| E-mail: | |
| **Company/Employer representative:** | ***Department of Health- Gauteng Province*** |
| Company's address: | ***Private Bag X 916*** |
| | ***Pretoria*** |
| | ***0001*** |
| Telephone: | ***012 354-1690*** |
| Telefax: | ***012 354-3750*** |
| E-mail: | |

## DETAILS OF HEARING AND REPRESENTATION

A. The Arbitration was scheduled for hearing at the Respondent's premises at the Tshwane District Hospital in Pretoria on the 19th May 2010. The Employee was represented by Mr Adam Keatley a legal representative from Bouwer Cardona Inc. Mr Siphiwe Mazibuko the Labour Relations Officer of the Employer represented it. *The proceedings were recorded both manually and electronically.*

## ISSUE TO BE DECIDED

B. Whether or not the Applicant was constructively dismissed.

## BACKGROUND TO THE ISSUE

C. The Applicant was employed by the Respondent on 1 January 2006 as a Grade 2 Medical Specialist earning R554 100 per annum. After a dispute between the Applicant and Respondent he lodged a grievance on 11 December 2009 after the Respondent had refused to allow the Applicant to proceed on his annual leave. On 11March 2010 he was charged with misconduct after which the Applicant resigned. The date of the resignation is in dispute.

D. The dispute was referred to Council on 19 March 2010. It was set down as a Con/Arb on the 19th May 2010 when it remained unresolved and proceeded to Arbitration. The Parties agreed that the closing arguments are to be submitted by 28 May 2010 .

## SURVEY OF EVIDENCE AND ARGUMENT

### EVIDENCE

### Documentary

E. A bundle of documents was submitted. The Applicant's bundle is marked "A" and Respondent's "R".

### Employee's Evidence:

### The Applicant, Dinoshan Namasivayan Chetty, briefly testified as follows:

F. He had been in the Respondent's employ since 1 January 2006 having been a State employee since 1998 with a clean disciplinary record. He gave a detailed explanation of the position when he joined the Department of Radiation as Senior Specialist.

G. According to the witness he resigned on 17 March 2010 and was referred to A44 to A49. The letter was sent on 18 March 2010. From page 45 onwards the various incidents which caused him to resign are set out and for the purpose of the award will not be repeated.

H It became unbearable to work at the Respondent. The issues started in October 2009 and despite alerting the Respondent to his concerns it failed to address them. He followed the internal grievance procedure and also addressed his concerns with the people directly. A meeting was held with all medical specialists in October of which he was not aware. At the particular meeting various accusations were made against him including amongst other unprofessional behaviour. As far as he was concerned he was senior and did not have to report to anyone except the head. There was also the issue of leave. On both of these he sought legal advice.

I In respect of the meeting he then sought legal advice and sent a legal letter to the Respondent requesting that all the allegations made against him at the meeting should be withdrawn. Regarding his time off he said that on joining the department he had an arrangement with the head at the time that he would be entitled to 1, 5 days off to do private work. No paper work was done to formalize this even after others had joined the department. At the said meeting he was the only one questioned about this practice. He concluded that they had "ganged" against him.

J He received a response to his letter advising him that a meeting was to be held. This was chaired by Prof. van Rensburg. According to him the issue was the withdrawal of the accusations made at the previous meeting. He questioned why he was the victim. No apology came from the meeting. He agreed to their demands but felt nothing was achieved (seeA3&4). After the meeting none of the senior doctors spoke to him. He felt his confidentiality was breached and comment was passed.

K Regarding the issue of leave he applied for leave on 25 October 2009 to avoid forfeiture of outstanding leave. He also needed leave to be away from the workplace as he had to take sick leave before that. The Respondent did not respond but instead he received a letter of objection. He responded with A14 expressing his concerns that leave had been denied and stating that he would proceed with his leave. In response (A16) the Applicant was informed that his leave was not approved and that he was expected to be in the department on 9 December 2009.

L After this notification, according to him, he was called by Mr Motsweni who enquired from him what the issues were relating to the leave. He explained the issues to him. At the end of the meeting Mr Motsweni told him to proceed with the leave and should there be problems he would call him. He also responded to the department via A17.

M On 10 December 2009 the department wrote to the Applicant advising him of his unauthorized absence and that it was a final written warning informing that he should report on 11 December 2009. He did not view his absence as unauthorized since Mr Motsweni had told him he could take leave. He was aggrieved at being given a final written warning. The Applicant decided to lodge a grievance as he felt that his side was being ignored because he had informed the Respondent that he required the leave to attend to personal matters .He also instructed his attorneys to write to the Respondent.

N No response was received from the Respondent until 10 March 2010 when he was served with misconduct charges. He went to Mr Motsweni to inform him that the charges were baseless; he did not want to work there anymore. On 18 March 2010 he requested his attorney to send his resignation letter; here he dealt with the content of the letter in some detail. He further dealt with the advert for the position in Radiation Oncology - Chief Specialist.

O According to the Applicant there had been a complete breakdown in relationship as he had lost complete faith in the system. He once again referred to various issues which caused his dissatisfaction and various allegations made against him. This included a letter addressed to Dr Tanner.

P During vigorous and lengthy cross-examination the Applicant confirmed that approval of leave is the prerogative of the supervisor. When asked if Dr Hocepied had approved the leave, the Applicant stated that he had objected and they had had a breakdown. The leave was approved by Human Resources. The witness conceded that Hocepied had not approved the leave and said that this was the reason why he had lodged a grievance. When the Applicant was asked if Motsweni had approved his leave verbally, the Applicant stated that he had assumed him it was approved.

Q The witness stated that at the time of his resignation he was also paid a salary from the Wits Health Consortium doing private work for them. The Applicant stated that the letter from Hocepied stated that he objected to him taking leave. This was ambiguous as it was not an outright refusal.

R In respect of the grievance he acknowledged that at the time of lodging his grievance he was on leave and that he only returned from leave on 1 February 2010. He also acknowledged that he was away on leave during September 2009. When asked if the Respondent had no basis to charge him he stated that he needed the leave urgently. He was then asked if taking the leave that had not been approved did not tantamount to insubordination; the Applicant said that the leave was approved so he was insubordinate.

**Employer's Evidence:**

**The Respondent called two witnesses who testified after having been duly sworn in:**

**Piet Makhabeni Motsweni, Director, testified as follows:**

S He came to know about the Applicant after the Acting Head of the department he worked with had written a letter complaining about his conduct. They were also furnished with certain documentation relating to the Applicant's absenteeism. He was appointed to investigate the same as well as the Applicant's conduct in the department.

T In terms of the leave protocol the supervisor had the authority to approve any leave and if the supervisor declined the leave the Human Resources department could not override it. If the supervisor persisted in his refusal the remedy available to the Applicant was to lodge a grievance. His only role in respect of the leave is to process the same.

U If his memory served him he thought that he had seen a copy of the grievance. The witness explained that in the event that of a deadlock in discussions between the parties they would follow the laid down procedure and if there was still a problem as a last resort it could be referred to the relevant Council for intervention. He reiterated that he had not approved the Applicant's leave because when he called the Applicant on 9 December 2009 he was already on leave.

V Under cross-examination the witness stated that as part of the investigation he called the Applicant to discuss the issues in the documentation with him. The witness said he could not state if the Applicant was insubordinate except to state that when he called him he came. The witness said if any employee wanted leave they would have to approach their manager. Once the leave was approved it was sent to HR who captured the leave. If the leave form was not approved it would not be captured. When it was put to the witness that he had seen the leave form and did nothing about it he stated that the Applicant was already on leave as it was pointed out to him by the Applicant and he did not want to disturb him. He was waiting for him to return.

**Alain Hocepied testified as follows:**

W He gave a detailed explanation of his relationship with the Applicant. The Applicant was absent from work most of the time. He spoke to the Applicant about this as did Prof. Wilson. He confirmed that a meeting was held by the senior medical staff to address the issue of the Applicant's absenteeism. At that meeting the Applicant became aggressive; the Applicant told him that he did not take orders from him.

X After the death of Wilson the witness told the employees that all that was required of them was to do their work and be present. He confirmed the evidence regarding the exchange of letters between the Applicant and the department. He denied that there was ever an attempt to "gang up" against the Applicant. All they were interested in was to do things professionally.

Y He was referred to R8 which was the letter he had addressed to the Applicant to inform him to return to the workplace and that it was his final written warning. He said the letter was written after he had not reported for duty and was aimed at ascertaining his whereabouts. According to him the leave was not granted because there was a shortage of staff. In addition the Applicant had been away at congresses prior to that.

Z He was referred to R18 which was a letter to Dr Tanna. The letter was written to her to inform her of the problems they were experiencing with the Applicant. According to him he could not take disciplinary action and the best he could do was to refer the matter to Human Resources.

AA He was referred to R9 and explained that this was another letter to Dr Tanna when he had objected to the Applicant taking leave. The Applicant had phoned the Respondent to state he was sick and provided a doctor's certificate to state that he was booked off until 4 December. The witness phoned the Applicant's private rooms just to be informed by his secretary that he was working. He informed Tanna about the fact that despite the witness objecting the Applicant proceeded to take leave. The witness said that initially when he told the Applicant that he objected to him taking leave hte Applicant told him to put it in writing. He referred to R16 and said it was Applicant's leave form to which he objected.

BB Under cross-examination the witness testified that the procedure relating obtaining leave was not always properly followed; it was too lax and the witness had decided the proper rules should accordingly be enforced. The witness said they had raised the issue of the Applicant's absenteeism in the past and that is why they had the first meeting. These concerns were addressed in the meeting they had with Prof. Van Rensburg. The witness said he had seen the Applicant's grievance and that the hospital had tried to solve the grievance internally. He wrote to Dr. Tanna to get support. With regard to the leave the witness said that the leave was not granted because it was impossible to have a person away on leave for a period of two months. In most cases the Applicant was in and out of the office on a regular basis. The Applicant could have come to see him to resolve the issue. He said further that a specialist was allowed to do outside work as long as it did not compromise the state.

**ANALYSIS OF EVIDENCE AND ARGUMENT**

1. The principles and accepted test requires where an employee is constructively dismissed that he/she must show that:

    a. ***there was no voluntary intention to resign***

    b. **the conduct of the employer was so serious that there was no other option than to resign.**

    In ***Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 Part 5***, the Labour Appeal Court (*Myburgh JP, Froneman JP and Nicholson AJP*) stated as follows:

    *"When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee can not fulfill what is the employee's most important function, namely to work. The Employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. He does so on the basis that he does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If he is wrong in this assumption and the employer proves his fears were unfounded then he has not been constructively dismissed and his conduct proves that he has in fact resigned."*

    Also in ***Old Mutual v Dreyer (an appeal from the Industrial Court) NHK11/2/4 752 (unreported 30 March 1999) Conradie JA*** guided by ***Jooste v Transnet t/a SAA (1995) 16 ILJ 629 (LAC) 638B-639A*** held that just as dismissal of an employee for misconduct or poor performance is justifiable as a last resort, so too resignation by an employee is a last resort for an *intolerable* work situation.

    *"Dit is nie vir 'n werknemer maklik om aan te toon dat 'n werkgewer die voortsetting van sy diens **onuithoudbaar gemaak het nie**. Hy kan hom nie maar net op frustrasies en irritasies verlaat en hom bekla oor reëls wat vir alle werknemers geld, maar hom nie aanstaan nie. Net soos onstlag is **gedwonge bedanking 'n allerlaaste opsie**. Dit is 'n uitweg wat 'n werknemer nie mag volg terwyl daar nog ander uitweë oop is nie." [paragraph 18].*

2. Again in ***Solid Doors (Pty) Ltd vs Commissioner Theron & Others (2004) 25 IIJ 2337 (LAC)***, the court laid down three requirements that need to be present (for the Applicant) to establish constructive dismissal. The employee must have terminated the contract of employment. Secondly, the reason for the termination of the contract must be that continued employment has become intolerable for the employee. Thirdly, it must have been the employee's employer who had made continued employment intolerable. The Court also said that, "…All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. …There is also no constructive dismissal if the employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer." (**See page 2345 at paragraph 28 B-C).**

3 Grogan in his Workplace Law 4 ed at 105 states that : " The requirement that the prospect of continued employment be intolerable... suggests that this form of dismissal should be confined to situations in which the employer behaved in a deliberately oppressive manner and left the employee with no option but to resign in order to protect his or her interests.". Moreover in the case of ***Goliath v Medscheme***

***(Pty) Ltd (1996) 5 BLLR 603 (IC)*** the court held that a constructive dismissal can only exist where the employer intended to drive the employee to resign. The court further held that where there is no coercion on the part of the employer there is no constructive dismissal. (my emphasis and underlining)"

4 In addition it is accepted jurisprudence as stated that the applicant therefore has an onus to discharge. He has to prove that he was constructively dismissed. Thereafter, the onus will be on the respondent to prove that the dismissal was fair. Not any dismissal caused by the intolerable conduct of the employer will entitle an employee to claim compensation. The dismissal must in fact be unfair. *(See* ***Smithkline Beecham (Pty) Ltd vs CCMA & others (2000) 9 LC 6.13.1****)*

5 From the evidence presented to me it is clear that the Respondent had addressed the issues and concerns of the Applicant. In fact the undisputed evidence was that the Applicant was satisfied with the outcome of the first meeting (albeit reluctantly). This is supported by the minute of that meeting (A5) at point 15 which states "When pressed to exercise one of the options, Dr. Chetty reluctantly agreed to fall in with the others. He also agreed to waive his insistence on an apology."

6 Furthermore, it became apparent during the hearing that the main problem between the Applicant and the Respondent was that the Respondent required the Applicant to abide by the rules of the institution. Hocepied stated that under the previous dispensation the rules were too lax and he wanted to ensure that they are properly applied. It became clear that this was a problem for the Applicant. I do not believe that one can simply resign because your manager expects you to follow the rules of the institution whether or not you are in agreement with them. In any case it is clear from our case law that it is evident that an employer is entitled to set standards of conduct for its employees and a court or arbitrator should not lightly interfere in such standards unless they lead to unfairness or is applied inconsistently – see Empangeni Transport (Pty) Ltd v Zulu (1992) 13 ILJ 352 (LAC) and Eskom v Mokwena (1997) 214 (LAC)..Also in **Miladys (a Division of Mr Price Group (Ltd) v Naidoo & others (2002) 23 ILJ 1234 (LAC)**, the court stated "*the stringent managerial style imposed for an adequate commercial rationale, irked her because she was anxious to have more time for her own activities, …Once she had resigned she regretted the step and tried to concoct a case of constructive dismissal*." It is my view that this can safely applied to the Applicant with the exception that he resigned after he was charged with misconduct

7 This leads me to the next point that is the fact that it is difficult for me to ignore that the Applicant was facing the possibility of disciplinary action. Our case law has ruled that resignation to avoid disciplinary action can hardly be construed as constructive dismissal because the employee can always challenge the fairness at a later stage. (***see Cimma vs Blick South Africa (Pty) Ltd (2000) 9 CCMA 6.13.1***; ***Campher vs Redgewoods (1999) 8 CCMA 6.13.2)***.

*8* Finally the principle in the *Pretoria Society for the Care of the Retarded* case requires that resignation must be the act of last resort [see ***Smalberger v AN Barret t/a AB Electronics (2001) 12 (7) SALLR 67 (LC) and Old Mutual v Dreyer (supra)]***. Also in ***Coetzer v Citizen Newspaper (2003) 24 ILJ 622 (CCMA) at page 643*** it was stated that "*The case law indicates that an employee is expected to try and resolve a grievance whatever way he can before resigning. He must give the employer a reasonable time to address the grievance and must not be too impatient to want the outcome of the employer's attempt to find a solution to the perceived intolerable situation*". The Applicant failed to convince me that he had done everything possible before resigning especially since the evidence was that the Applicant had the further option of obtaining intervention. The Applicant expected the Respondent to deal with his grievance yet he chose to take unauthorized leave and tried to defend this by stating that he did not understand what Hocepied meant when he said he objected. But at the same time the Applicant in a letter dated 30 November 2009 wrote (A15) "*Given the aforementioned I believe your refusal of leave which I don't appear to be abundantly clear about is accordingly in my perception both vexatious and*

*smacks of victimization".* He knew exactly that he was denied leave and took it regardless and when charged chose to resign. It is clear therefore in the words in **Smithkline Beecham (Pty) Ltd v CCMA and others** *the Applicant may be hard put to persuade the court or arbitrator that he had no option but to resign.*

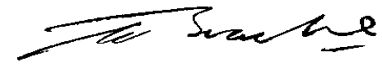
9 In ***Kruger vs Commission for Conciliation, Mediation and Arbitration & Another (2002) 23ILJ2069 (LC***), the Court held that*: "When there are remedies available to an employee which had not been exhausted, as in this case, the employee has not discharged the onus of proving that she was constructively dismissed." There are a number of decisions of the CCMA which uphold the above sentiment expressed by the Court. (See* ***Zolezzi v BTI ConnexTravel (Pty) Ltd [2004] 1BALR 130(CCMA)).***

10 In the light of the above cases the Applicant has also failed to persuade me that the Respondent's behaviour would have continued in the future as he ended the relationship prematurely.

11. On the balance of probabilities I do not accept that the Applicant has discharged the onus of showing that he was constructively dismissed.

**AWARD**

The Applicant's case is hereby dismissed.



**Adv. RONNIE BRACKS**

**PHSDSBC Senior Commissioner**