



ARBITRATION AWARD

Case No: **PSHS1189-19/20**

Commissioner: **T Erasmus**

Date of award: **8 September 2020**

In the matter between:

ALVERA ANTOINETTE SWARTZ

Applicant

and

DEPARTMENT OF HEALTH- WESTERN CAPE

Respondent

Details of hearing and representation

1. This matter was set down for Arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 186(1)(e) of the Labour Relations Act 66 of 1995 (“the LRA”) and was heard at the offices at The First Floor Boardroom, Western Cape College of Nursing, Klipfontein Road, Athlone, Cape Town on 4 June 2020. The matter was postponed to 30 June 2020 and to 25 and 26 August 2020 respectively, on which dates the matter was finalized by virtual platform. The Applicant was represented by Advocate S Mufamadi, whilst the Respondent was represented by Mr M Ngqame, Labour Relations Officer at Respondent.

Issue to be decided

2. I must decide whether the applicant was subjected to constructive dismissal

The applicant's case

Opening statement

3. The respondent's conduct towards the applicant became so unbearable resulting in the applicant's resignation. The applicant resigned on 21 August 2019. The applicant was employed in the capacity as Deputy Director in charge of the GP Program, level 12, at the Department of Health in Riebeeck Street, Cape Town from May 2011 until date of her resignation. Mr Kruger specifically as well as senior management, failed to make use of alternative dispute resolution as described in the department's code, ultimately placing undue pressure on the applicant, causing her to resign. The applicant seeks retrospective reinstatement in a different department. The applicant earned R64 351.96 gross at the time of resignation.
4. **ALVERA ANTOINETTE SWARTZ testified in support of her own case (hereinafter referred to as "the applicant")**
5. The applicant testified that she was employed on a contract basis by the respondent and permanently appointed during August 2001 on a TB Program as Assistant-Director and she remained in that position for 12 years where after she was promoted to Deputy-Director.
6. Kruger was previously employed in the HIV/TB program in the Cape Winelands and became the applicant's supervisor during 2016, when he was appointed to the vacant position for HAST. The applicant and Kruger had a very good professional relationship, as they worked in the same program, this was the case even after Kruger was appointed as director. A couple of months after Kruger was appointed as the applicant's supervisor in August 2016, he started making an example of her and his excuse was that they were friends and that the applicant should be able to

handle it. The applicant's complaints were not formally pursued, due to her original good relationship with Kruger.

7. The applicant felt uncomfortable and embarrassed. On 19 February 2018, the applicant had a discussion with Kruger, as she felt threatened in her position, due to the manner in which Kruger has treated her. The applicant addressed the issues in writing, but she did not get a response.
8. The applicant outlined the following main issues between herself and Kruger and other senior management in the department:
9. Reference was made to Document 1. The applicant discussed issues with Kruger on the day. The applicant testified that she was appointed by the Chief-Director for a specific task. Kruger walked in and simply announced that he was taking over the task and that he would be the chair going forward and that all previous decisions would be null and void.
10. Kruger told the HOD that the applicant as program manager never informed him about the tests.
11. The applicant had to send the liaison officer of the laboratory, Ms Van der Westhuizen, Kruger and Dr Engelbrecht (HOD), containing all the updates, in order for her to display to the HOD and to Kruger, that she kept him up to date with everything that happened.
12. The applicant also sat down with Kruger after this and asked him why he lied to the HOD and his response was that he panicked.
13. All of the above caused the professional relationship to erode.
14. The applicant also discussed with Kruger the fact that he changed instructions. Reference was made to point 12 and it was difficult for her to understand what Kruger required from her.

15. The applicant was under the impression that although Kruger listened to her, he did not understand what she meant, and he repeated information incorrectly in other meetings.
16. The applicant depleted her sick leave (point 10) due to a number of surgeries she had undergone and pneumonia.
17. Kruger sent an e-mail to the applicant and some of the clerks, informing them that they have depleted their sick leave. The applicant viewed it as a threat, as Kruger said he would give them each 5 minutes to address him on why their sick leave was depleted.
18. The applicant sent Kruger an e-mail after this meeting informing him that sick leave is personal and should not be addressed in a communal e-mail. A heated discussion at a meeting followed between the applicant and Kruger. In the next staff meeting Kruger announced that the applicant got so angry that she almost assaulted him. This was discussed between the applicant and Kruger hereafter. Kruger stated that he would discipline the applicant and that is exactly how the relationship broke down.
19. Reference was made to point 4. The applicant asked for an opportunity to speak in a meeting, and Kruger and some of her colleagues rolled their eyes. The communication between the applicant and Kruger became unsatisfactory.
20. The applicant lodged a grievance which was eventually dealt with by Doctor Kariem, the Chief Director. Prior to the grievance the applicant put up her hand at a meeting in April 2018 to ask questions, Kruger denied the applicant an opportunity to ask any questions. The applicant confirmed that her question was about the restructuring, but that she would direct her question to the correct person. The relationship between Kruger and the applicant deteriorated further after she requested a transfer. Doctor Curry referred the matter back to Kruger, but no discussions ever took place. The applicant wrote to Doctor Mabunda at the same

time asking for a transfer to the nursing college, to which she did not receive a response.

21. On 20 December 2018 the applicant asked Doctor Cloete, the Chief of Operations for the Western Cape, in a meeting for a transfer to the nursing college or Krommeree Training Centre, based on her nursing experience and qualifications, MA in Public Administration, she was appropriately qualified to train nurses. Kruger then asked her how she felt about being transferred to Beaufort West. Her response was that Beaufort West was already saturated with people with her qualifications and that was the last of the discussion.
22. The applicant confirmed that she considered 'early retirement' towards August 2019. The applicant confirmed that she was disciplined at least once a month during 2019, whilst all these cases were unresolved, either on appeal or at the Bargaining Council. At the end of July 2019 was the cut-off date for early retirement when she started considering it. The applicant appealed to the HOD to consider her early retirement, but she received no response.
23. The following disciplinary action was taken against the applicant:
 - Administrative mismanagement of the application process for the conference. She lodged a grievance against Doctor Kariem and Mr Kruger.
 - During October 2018 the applicant learnt that Kruger disclosed her medical diagnosis to staff that reported to her, where after she was disciplined by Kruger. The applicant was found not guilty on 1- 30, but guilty on 1-8. She appealed against the finding of guilty, it was dealt with by Mr J Roman, but the matter was never finalized by the time she resigned.
24. The applicant returned from leave on 28 January 2019. She apologized for not attending the meeting which took place during January, but she was disciplined for not attending the meeting, which was intended to be an important meeting. Kruger did not accept her apology and gave her a final written warning. The applicant was

invited to attend an informal disciplinary meeting on the day. Kruger gave her an opportunity to state her case but told her that he had already decided on the sanction. The final written warning was reduced to a written warning on appeal on 9 April 2019.

25. The applicant laid a criminal charge against Kruger after she went to Human Rights Commission who then referred her to the South African Police Services on 9 April 2019. She laid charges of defamation of character against Kruger, document 6(i). The following day Kruger informed her that he is no longer prepared to work with her and that she would report to Ms Qukula, Document 7. The result of the grievance was that Doctor Kariem found that Kruger did not act inappropriately by disclosing the applicant's sick leave. The applicant appealed to Doctor Engelbrecht who upheld the decision on appeal. The applicant felt trampled on by the fact that Kruger told her staff a few days before her return that she was off with depression and he told her staff not to report to her. The applicant referred the matter to the Human Rights Commission, as she needed someone to listen to her. After the applicant referred the matter to the Public Service Commission, she was told by the PSC to withdraw one of the two cases, as the matters cannot run concurrently.
26. Reference was made to Document 2(a), the psychologist's report, Pieterse and 2(b), Doctor Van Rensburg, her psychiatrist's report. The psychiatrist was of the opinion that the applicant had to be removed from her environment to avoid a re-occurrence of her condition.
27. The fourth charge against the applicant was for not signing the register in respect of which she was found not guilty. Kruger then informed her that he was overturning the charge and gave her a written warning. The applicant was not the only person who did not sign the register, yet she received a written warning, whilst her colleagues were not disciplined.
28. The applicant referred to her appeal on page 23. On 19 February 2019 the hearing was still pending, and she did not receive an outcome. Both informal and formal disciplinary hearings were still running in February 2019. The applicant did not

appear before Ms Lowenherz and she had no knowledge of any of her cases being referred to her. Doctor Kariem ruled that the final written warning would be reduced to a written warning.

29. Reference was made to page 9 of the respondent's bundle. The applicant does not believe that a proper investigation was done, as she was not interviewed. The applicant appealed to Doctor Engelbrecht who in turn referred the matter to Mr Joey Roman. The applicant tendered her resignation in August 2019. Doctor Kariem changed her last working day to that of 10 September 2019 as per page 34, therefore she was only paid for 19 days in September 2019.
30. The applicant's normal salary was between R59 000.00 to R64 000.00 per month. The applicant was due to go on pension at the age of 60 years old. The applicant is currently 58 years old and she would have qualified for early retirement, an opportunity which she lost when she resigned.
31. The applicant confirmed that although she was not forced to resign, her circumstances at that stage was so horrible and she did not have a positive experience at the workplace. The applicant had never experienced these kinds of problems in her career with a colleague at any stage in the past.
32. Reference was made to Document 10 with regards to two conferences that the applicant was supposed to attend, but she was denied the opportunity. The first conference was an international conference in Rotterdam. She required motivation from Mr Kruger. The request goes to the MEC for Health who makes a final decision. Kruger initially indicated that he was in favour of the applicant's attendance where after the applicant submitted the document. Kruger was overseas at the time, Qukula discussed the matter with Doctor Kariem who was in favour and instructed Qukula to sign the document. The applicant there after followed up the process and discovered that the document did not leave Doctor Kariem's office. She lodged a grievance against the administrative disruption process of not allowing the document going to the Minister.

33. The applicant was also meant to attend a conference in Durban. A decision was made that only Doctors will go, whilst the invitation to the Rotterdam was directed to the applicant. She was still on medication, prescribed by the psychiatrist. During 2019 Kruger called her in for underperforming for the first time in her 20-year career in the department. The applicant felt that that it was an unfair assessment. She approached the office for performance management on the 3rd of July 2019 to provide her with all her performance appraisals. Steven van Dyk came to see her and told her that she had poor performance due to her financial management for the past year. Most performance assessments prior to Kruger being appointed as her supervisor, were above average and the applicant performed above her expectation in all the years, even during the first year when Kruger was her supervisor. In the second year her performance was acceptable, but in the third year below expectation. The applicant also did not receive a pay progression for that year
34. According to the applicant, the respondent lost some of their most valuable staff who instantly refused to work with Kruger as their supervisor when he was appointed. There was a lot of turmoil in the organization at the time. She did not get support from Doctor Engelbrecht or Doctor Kariem. She felt frustrated because senior management stood by Kruger, no matter what. The applicant feels that she was blatantly bullied by Kruger.
35. ICAS referral: It is a referral for an employee with a problem e.g. Addiction problem or 2) conflict and relationship problems. Doctor Kariem and Mr Kruger kept on offering to refer her to ICAS. The applicant cancelled the referral to ICAS, as she believed that she was referred to ICAS as the problem. She sat down with Kruger and explained to him that he made the incorrect referral. All her past warnings were declared in the documentation in the ICAS referral. She sat down with Kruger and explained to him that she was seeing a psychologist and a psychiatrist. In 2019 Doctor Kariem proposed mediation, but she knew a mediator would be dismissive of her. Mrs Basson then proposed as the mediator. She was not given a selection of names from which she could choose a mediator, she would have

preferred for both herself and Kruger to be referred to ICAS. It was a shock to everybody at the department when Kruger was appointed to the post.

The following ensued from cross-examination:

36. According to the applicant, she was one of people who was shocked when Kruger was appointed as he was the most junior candidate when he was appointed to the post and he was not in the Western Cape structure. The applicant applied for the post, but she was not considered, because there was a requirement that she did not meet. The applicant was supportive and in agreement with Kruger's appointment, she reassured him when he phoned her to inform her about his appointment. He was uncertain whether he would be able to cope with the work and the applicant undertook to support him. The applicant and Kruger were on the same level at the time. Kruger was a Deputy Director for 5 years at that time, which experience the applicant lacked. Other shortlisted candidates had more than five years deputy director experience at provincial level. The applicant conceded that her experience on deputy director level was the requirement at the time, not a requirement at provincial level, Kruger had met the requirement in terms of the advertisement.
37. The applicant confirmed that she had discussions with Kruger on 19 February 2018, they discussed the issues that she listed in the document and it was at this time that the relationship between them started to deteriorate. According to the applicant, she continuously raised issues that started in 2016, as these issues were still unresolved. According to the applicant these issues led to the bad blood as discussed with Kruger on 19 February 2018, evidenced on document 1 of the applicant's bundle. Not all the items listed on document 1 relate to incidents that took place in 2016.
38. It was put to the applicant that Kruger taking over chairmanship was not the issue in 2019. It was put to the applicant that when Kruger was appointed in May 2016, he was expected to take over the chairpersonship. This was denied by the applicant. According to the applicant it was not the fact of him taking over the

chairmanship, but the manner in which he did it. According to the applicant, there was a new complicated system. She was appointed as chairperson, because she had the most experience in the matter. Kruger said at the meeting that all decisions of the previous chairperson was “off the table” and it was against the directive given to the applicant. According to the applicant, the decision made by Kruger was wrong, as a result of which they are worse off than before.

39. It was put to the applicant that it was she who lodged a personal attack against Kruger and not the other way around. The applicant responded that a lot of what was built up and the fact that 3 years later they were worse off was the problem. It was put to the applicant that she attacked the decisions made by Kruger. The applicant responded that Kruger attended the meeting as deputy director of Cape Winelands, whilst he was aware that the applicant was the chairperson, he should have discussed the change of the course with the applicant which he failed to do. It was put to the applicant that a change in course was not disrespectful towards her.
40. The monitoring of meetings with poor performing areas: According to the applicant, the missing information identified as per page 8 was problematic to her. The request for information came from her, instead Kruger decided to discipline her, because the information was missing. Although Kruger sat in a meeting with all the people who failed to submit the information, he elected to discipline the applicant.
41. “Disclosing the applicant’s medical information”: It was put to the applicant that Ms Basson investigated these allegations as per page 9 of respondent’s bundle and these were the names that the applicant gave to Doctor Kariem to whom Kruger allegedly disclosed her medical information. This was in fact denied by all the relevant employees: Razia Vallie, Marinda Roelofse, Vanessa Mudaly and Jacqueline Voget. Only Ipeleng Sehunelo confirmed that Kruger informed her that the reason for the applicant’s absence was depression and that she would have to stand in for her.

42. Sehunelo confirmed that it was not a meeting, but a one-on-one with Kruger. The applicant responded that although she takes notice of the evidence, she cannot accept how the investigation was done, because she was not interviewed. It was put to the applicant that she was not in the meeting, to which she conceded and that Kruger did not disclose her medical information to her subordinates in the meeting, with which the applicant disagreed. The applicant confirmed that she did not accept the offer for the referral to ICAS, as she does not view herself as the problem. The applicant denies that the ICAS referral was aimed at assisting her, as she had already consulted with her psychologist and psychiatrist offered her support.
43. The applicant was questioned why she would want to return to Kruger's supervision, if she had the opportunity to be supervised by somebody else. According to the applicant, she worked through the issues as she was not transferred at the time when she asked to be transferred to another supervisor. According to the applicant she was both personally and operationally affected. According to the applicant, she chose to take Ms Qukula out of the equation, as she was still resorting directly under Kruger. It was put to the applicant that this was an opportunity for her to be taken away from Kruger's supervision.
44. Reference was made to document 13 of bundle A, being a letter from Kruger, dated 21 June 2019. It was put to the applicant that there is nothing in Kruger's letter indicating that he was abusive towards the applicant. There was also an instruction from Kruger to the applicant to complete the attendance register. According to the applicant, she did not comply with the instruction, because it was not within the policy of the department and other people also did not comply with the instruction. It was put to the applicant that the other people signed at the end of the period. The applicant was challenged on why she did not inform her manager about the irregular completion of the register. According to the applicant she informed Doctor Kariem and HR of the irregularities of the reporting.

45. Reference was made to document 10 on page 1, a letter from Kruger about the non-completion of the attendance register. On page 2 of document 10, point 4, being a letter from the applicant to Kruger, dated 24 May 2019:
- “4. As per the attachment it is clear that the attendance registers are not completed or fraudulently completed by numerous officials and you have not even attempted to discipline them.”*
46. The applicant confirmed that the transfer to Krommeree was only informally discussed with Doctor Cloete, whilst the transfer to the nursing college was a formal application. According to the applicant, she did not turn the transfer to Beaufort West down, it was a casual discussion with Kruger. She responded to Kruger that Beaufort West is saturated, financially it would not make sense to put another deputy director in such a small office. According to the applicant it was not an alternative for her to be considered. She received the information on 19 September 2019 when she went in to Human Resources Department to sign the documents. It was put to the applicant that she did not get approval for leave. According to her it was common practice in the office, to submit your leave form, if it is an emergency, you do not have to wait for approval, as long as you do not leave the office before getting leave approval.
47. According to the applicant she submitted leave to cover herself and the department. She had a sick leave certificate from her psychiatrist for the period from 1 to 29 November 2019. She appealed, which was referred to Mr Roman, the matter was never dealt with. It was put to her that the presiding officer did not accept her explanation and he found her guilty on the charges.
48. According to the applicant, although she laid a criminal charge against Kruger, she did not pursue the matter any further. It was put to the applicant that in terms of document 6.1 the prosecutor said there was no prospect of success and decided not to prosecute. The applicant responded that she spoke to the prosecutor and he said that these cases take too much money and time and he advised her to refer a civil case instead. It was put to the applicant that she referred a discrimination

dispute to the CCMA. The applicant conceded that the respondent did not attend the third date. The Commissioner referred it back to the Bargaining Council as a Constructive dismissal.

49. Reference was made to document 6(g). The applicant confirmed that she withdrew the matter on advice of Commissioner Jacobs and decided to refer the entire case to the Public Service Commission. She was disciplined 4 times over the last 7 months of her employment with the respondent. The applicant was challenged as to her request for reinstatement and what the position would be if she was to return under the supervision of Kruger. According to the applicant, some of her colleagues were moved speedily after a blow up with a manager. This goes to proof the inconsistency and the managing crisis.
50. Reference was made to document 11. It was directed to the director of people management, although Mr van Dyk accepted the document. The applicant was challenged on whether she finds that kind of comment about her supervisor acceptable, whilst it was handed to van Dyk. She confirmed it was appropriate, because it was the truth.
51. It was put to the applicant that she was never subjected to intolerable working conditions by Kruger. Kruger was her supervisor and it is clear from her comments in e-mails and to other people that she never accepted him as her manager. It was put to her that he had to act in terms of the disciplinary procedure insofar necessary. He had to exercise his management role and the applicant did not accept his authority. According to the applicant, she would have expected that to be the case from the beginning, but she had reasons for standing up against his management style. She felt bullied and they ganged up against her. whatever happened was in reaction to his management style and it was unacceptable.
52. It was put to the applicant that the conferences that she wanted to attend in Rotterdam and Durban were not within Kruger's authority to approve or disapprove. According to the applicant, Kruger decided to send only doctors to the Durban conference. She learnt later that some of her non-doctor colleagues went to Durban

as well. With regards to the Rotterdam conference, she stated that the MEC is the only body that can make the decision. Doctor Kariem and Kruger kept the document back and put it on her table. The MEC makes the decision, but it has to be recommended, even if it is not recommended, her past experience is that the MEC has decided to give permission. The person who did not recommend it in writing was Kruger.

The following ensued from re-examination:

53. The shortlist indicated that other people were more experienced for the position to which Kruger was appointed. According to the applicant, she is more experienced than Cloete. They had more than 5 years' experience, although he was a deputy-director. The Public Service Commission was still prepared to investigate as it was in her resignation month. She would have responded to Kruger's offer about the transfer to Beaufort West if it was not in her resignation month. The applicant feels that Kruger bullied her and marginalized her from her colleagues. The referral of constructive dismissal and discrimination to the CCMA was incorrect, she filled in the form herself.
54. **MSOKOLI QOTOLE testified in support of the applicant's case (hereinafter referred to as "Qotole")**
55. Qotole testified that he is the Chief Director HIV/AIDS and holds a BA Hons degree from UCT. Qotole confirmed that he represented the applicant at her disciplinary enquiries. The applicant was invited to an informal meeting and Kruger told him that he does not have to speak, as it was an informal meeting. The applicant failed to attend the Dora meeting, as she had to attend to another work-related meeting in the Cape Winelands district.
56. The applicant faced four (4) charges at another hearing which were the following:

1. Disrespecting of Kruger;
 2. Unauthorized leave which case she appealed;
 3. Unauthorized leave which case she appealed;
 4. Failure to sign the attendance register.
57. The applicant appealed against the final written warning and Doctor Kariem reduced the final written warning to a written warning on appeal. Qotole confirmed that he does not recall for the applicant asking to report to someone else. The applicant was asked to report to Ms Qukula after Kruger was invited to attend to the Police station.
58. According to Qotole none of the hearings were related to poor performance of the applicant. As far as he can remember, the applicant was not charged with insubordination, but he thinks that the one charge is related to the applicant disrespecting Kruger in a meeting, but he did not view that as insubordination. The applicant was found not guilty on the charge of disrespecting Kruger in a meeting.
59. The Rotterdam conference: Qotole confirmed that he was in a meeting with the applicant and Doctor Kariem, the chief director. The applicant wanted to know why her application to attend the Rotterdam conference was not approved. Qotole was the acting director at the time and after Doctor Kariem told them he does not have a problem with the applicant's attendance and if Qotole was satisfied, he could sign it off, which he did. The request then goes to the director and thereafter to the chief director and sometimes event to the MEC or HOD, if necessary. Doctor Kariem did not have a problem with the applicant's attendance at the conference.
60. Changing of reporting lines: according to Qotole the person affected such as the applicant in this case should be invited to discuss the issue and if the resolution is that she has to report to someone else, the new supervisor will have to be involved, as it is a line function. The manager would have to be party to that kind of discussion.

61. Reference was made to an incident in May 2019 when Kruger overturned a not guilty verdict. As far as he is concerned it is not acceptable as management cannot review its own hearing.
62. There were four (4) people who did not complete the attendance register. It was supposed to be signed when one arrives and work and when you leave. One of the charges was “failure to sign the attendance register”. The applicant was found not guilty.
63. ICAS referral: according to Qotole a company was contracted by government to assist employees, if they have an issue, they can consult with them, such as a drinking problem, in which case ICAS can assist you. As far as he is concerned these are issues that HR could have dealt with.
64. Qotole confirmed that he also assisted the applicant at the Bargaining Council on two occasions, the first one the respondent said that he did not have a mandate to change the outcome and the Bargaining Council did not have jurisdiction over the dispute. The matter had to be referred to arbitration, as the conciliation was unsuccessful. The applicant mentioned to him that she approached the Public Service Commission around the issue of Kruger disclosing her status/illness to colleagues and Qotole’s role was to assist her whenever she was called to a hearing, he is not legally trained and therefore could not give her legal advice. She felt strongly about her issues and felt that she was not getting the kind of result she was looking for therefore she referred the issue to the Public Service Commission. The privacy of employees’ health is confidential in terms of the Policy. The time when the applicant had to attend a formal hearing, she mentioned that she was under stress and very uncomfortable at the workplace. She said that James Kruger made matters uncomfortable at work.

The following ensued from cross-examination:

65. Qotole confirmed that he represented the applicant in a number of occasions. He confirms that some of the issues raised in the grievance on pages 1 to 3 on 8 October 2018 went as far back as 2016, as the applicant did not get a response from her manager at the time. She only took the route of the grievance in 2018 as all other avenues have been closed to her.
66. With regards to the Rotterdam conference on 11 July 2018, Qotole confirmed that although the application was recommended by Doctor Kariem, he became aware that it was not approved.
67. Qotole confirmed that although he represented the applicant at matters at the Bargaining Council, he recalls that the matter regarding discrimination / victimization could not be heard by the Bargaining Council due to a lack of jurisdiction.
68. With regards to the allegation that Kruger disclosed the applicant's medical information to her subordinates, as per her grievance on page 7 of bundle B dated 30 October 2018, he confirmed that he was well aware of the investigation.
69. With regards to the Dora meeting which the applicant failed to attend, in spite of receiving an instruction from her supervisor to attend the meeting, Qotole testified that it was wrong of the applicant's supervisor to discipline the applicant, as she had to attend a national meeting at the Cape Winelands and she needed the support of her staff at the meeting. Qotole was challenged on the fact that the applicant was charged with failure to sign the attendance register, whilst the other employees who initially failed to sign the register did not sign the register in the end. Qotole confirmed that he also signs the attendance register.
70. Management's decision that the applicant would no longer report to Mr Kruger was wrong according to Qotole, as she was working with TB and head of community-based services, which had nothing to do with TB where she works. He was aware of the fact that the applicant laid a charge against Kruger at the police at the time

of the appeal hearing at the Bellville Health Park. It was put to Qotole that Kruger was informed by the police that his arrest was imminent, and management made a decision to remove the applicant from Kruger's supervision. I specifically asked Qotole if he thought that it would be conducive for good working relations for applicant to continue reporting to Kruger after she laid a charge against him at the police. Qotole however avoided answering this question.

71. Qotole was challenged as to how the applicant could continue reporting to someone who she alleged made her working conditions intolerable. Qotole could not answer this other than to state that the applicant was working with TB and she wanted to continue working in an area which dealt with TB. Qotole was however challenged on why the applicant would want to continue reporting to Kruger, if their working relationship was so problematic. Qotole confirmed that he is aware of the fact that the applicant refused to participate in the ICAS program which was organised by the respondent.

The following ensued from re-examination:

72. According to Qotole, there could have been a better management plan of dealing with the transfer of supervision of the applicant.

The respondent's case

73. **JAMES ANDREW KRUGER testified on behalf of the respondent (hereinafter referred to as "Kruger")**
74. Kruger confirmed that he is the director for HIV / AIDS, TB and STI and has been appointed as such in May 2016. He was asked to act as Chief Director for the past two years. Kruger confirmed that prior to his appointment as Director he worked as a medical technologist, he is a trained laboratory technologist. He was also the Assistant Director HIV and TB at the time. When he met the applicant in 2004, she was the Assistant Director for TB at the time. According to Kruger he had a very good working relationship with the applicant. The applicant used to represent TB issues at the Cape Winelands and to do representations. The working relationship

was good until he started managing the applicant in 2006. He had to learn how to become a Director and a Chief Director in the past four years.

75. The relationship however deteriorated when he started asking the applicant questions about her performance and TB issues. According to Kruger their relationship started to turn sour the moment he started supervising the applicant. Kruger denies that he took over a meeting of which the applicant was the chair.
76. Kruger also denied that he admitted to the applicant that he lied to the HOD about her. According to Kruger the applicant is very knowledgeable in TB in the Western Cape and he would rely on her knowledge in this respect. With regards to the issues of ME on 26 April 2018, Kruger acknowledged that the applicant raised her hand and that he did not take her question as they had a meeting to the previous day on the ME process where he answered all questions to the best of his ability. He informed everybody present that he was setting up a meeting for the next day with the whole directorate where other directorates and clerical staff should be given the opportunity to ask questions. However the applicant was the first person to put up her hand to ask a question and Kruger told her it is not fair, as he had to allow other people to ask questions as well, the applicant got angry and walked out and disrupted the meeting. The HASS Exec were present and confirmed the meeting that took place the previous day.
77. On 20 December 2018 there was another meeting. He did not offer her a position in Beaufort West. Kruger's senior asked him to look into the applicant's request for her transfer. He asked her what she had in mind. He spoke to Dr Mabuda, the head of nursing and asked him if there was a vacancy, but there was none. She also identified Krommeree as a possibility and it was also confirmed that there was no position available at Krommeree. Kruger is not aware of any position at Beaufort West. He spoke to four directors, none of them had any positions available.
78. The Rotterdam conference: the applicant informed him that she was unhappy that she was not allowed to attend the Rotterdam conference on 11 July 2018. It was

put to Kruger that the form went missing and only resurfaced again in September 2018 and that both Kruger and Dr Kariem did not recommend the applicant's attendance. Kruger responded that Megan and the applicant both applied to attend a conference in Rotterdam. Kruger informed the applicant that he was open to recommending her attendance. When Tracey came and as part of hand over, she told him that there is a circular in the line of supporting signatures that had to be followed for recommendation: One has to be speaker at the conference and contribute to the department and there has to be partial funding.

79. Kruger informed the applicant that he would try to convince Dr Kariem that the applicant should be allowed to attend the Rotterdam conference. He appointed Qotole as acting director whilst he was on holiday, the applicant went to Qotole and he signed the form, which was within his rights. He took the form to Dr Kariem and Doctor Kariem questioned the fact why Kruger did not sign the form. Kariem questioned whether it was a fair decision. The circular had to be implemented. Cloete had been given the delegation to sign off. The applicant was not approved. Megan clearly qualified as she was presenting and she was partially funded, she also had never gone overseas to represent the department in the past. The applicant has gone overseas to represent the department of a number of occasions in the past.
80. Reference was made to page 1 to of bundle R. Kruger denies the allegations made by the applicant of victimization, humiliation and abuse of power as alleged. It is clear from pages 4 and 5 of bundle R that the applicant's grievances were indeed dealt with, as per Doctor Kariem's responses on 5 November 2018 and 20 November 2018 respectively.
81. With reference to page 7 of bundle R, Kruger denies that he disclosed or discussed the contents of the applicant's medical diagnosis and condition with members of staff including subordinates without permission. He only had a conversation with Marinda Roelofse, the Deputy Director Mental Health, (one of the people interviewed by Mari) as he wanted her to investigate how they can support people

with mental illnesses, he did not mention the applicant's name, as he wanted to see how they can assist both the affected staff member as well as the employee's colleagues. Kruger confirmed that all the employees mentioned on page 9 of bundle R report to him, at the time Ipeleng reported to the applicant. Ipeleng's response on the right-hand side supports Kruger intention that it was his intention to support the applicant. She was off for a long time and they had to decide how to manage the situation and how they could take care of the applicant in this space. He did not discuss the applicant's medical condition with Razia Valie, Marinda Roelofse, Vanessa Moodley or Jacqueline Voget, as he had no reason to discuss the applicant's medical condition with any of them.

82. Reference was made to page 10 of bundle R. Kruger confirmed that he instructed the applicant to attend the Dora meeting, as he needed somebody from TB to attend the meeting, but she ignored his instruction and went to the Cape Winelands meeting instead. The Dora template was not new to the applicant, she has done it for years. She could have at least completed the comments and leave the rest blank. Even if she only completed the comments, he could have completed the rest, as he understands enough of TB. Reference was made to page 10 with regards to the audi in terms of which Kruger informed the applicant on 29 July 2019 that he instructed her to attend an important meeting to ensure that the TB comments are covered with the Dora template. She ignored his instruction, did not attend the meeting and went to the DS TB section. The comments section was empty, this is unacceptable. She was invited to provide reasons why she should not be disciplined in respect of the aforesaid by the 1st of February 2019 by 16:00. The applicant did not respond to Kruger's request on page 10 other than to say that she was working through her e-mails. Kruger reminded her as per page 12 on 31 July 2019 that it remains her responsibility to manage her staff. She cannot abdicate her responsibility to the ASD or to her subordinates. The applicant is probably the most knowledgeable on TB in the province and Kruger believes that the applicant was being insubordinate by not adhering to his instructions. Kruger disciplined the applicant as she did not take responsibility and her explanation was unacceptable. Therefore the applicant was invited to attend an informal

disciplinary hearing on 11 February 2019 at 14:00 on the recommendation of the Labour Relations Directorate.

83. Doctor Kariem dealt with the applicant's appeal and he reduced the final written warning to a written warning, which outcome Kruger accepted.
84. Reference was made to page 22 of bundle R, being a written warning addressed to the applicant for failure to sign the attendance register. The applicant failed to sign the attendance register on many occasions. The attendance register was introduced before Kruger's time. The terms of circular H159/2010 was used as his guideline. The options are as follows:
 1. Turn style (Kruger has to phone to find out if the applicant is at work);
 2. Security door at entrance (all staff with a PERSAL number get a disk or can use their finger to clock in);
 3. Attendance register is the preferred option (it is a paper register signed at the entry point in the morning and sign out in the afternoon). This way one would know immediately if somebody is at work.
85. Kruger tried to establish whether there was a rule in place regarding the signature of the attendance register and he established that there was none, therefore he instituted the rule for completion of the attendance register in his department. He went further and established an attendance register for visitors as well, which is still in place at present. Four out of 84 people refused to comply with the instructions, the other three gave him reasons for their non-compliance, where after they then complied, everybody except the applicant complied with the instruction.
86. Ipeleng reported to the applicant. Bongani is not in Kruger's space and Kim was the applicant's clerk. The building is rented from a company. Kruger was not happy

with the turn style option; one has to write a letter to the security company to get the information. In terms of clause 2.3 of the circular:

“2.3 Different measures to control attendance, if at all, have been instituted. These measures are not always adequately enforced or monitored. According to a recent survey done by the Directorate: HRM, the following systems are used within the various institutions:

- (a) Electronic card access*
- (b) Fingerprint sensor system*
- (c) Clock-card system*
- (d) Attendance register, or..*

The systems mention in (a), (b) and (c) can be monitored in a regular and accurate manner, however the installation of these systems has financial implications that cannot always be borne by the institutions. In the absence of electronic equipment, attendance registers are the only record, if utilized correctly, which will comply with the requirements of the BCEA.

3. WAY FORWARD

3.1 In order to ensure compliance to the BCEA and to ensure that the Department of Health as Employer institutes a valid record keeping of working time, the Head: Health has determined that:

The practice of attendance registers be re-enforced at all institutions and Head Office components where electronic card access, fingerprint sensor or clock-card systems are not in use;

With regard to Medical staff who partake in the commuted overtime system, the Clinical Manager must certify on a monthly basis that the working hours comply with the number of hours that the individual is contracted to perform

including his/her 40 hours work-week. (See attached Verification form – Annexure A);

In cases where electronic card access, fingerprint sensors or clock-card systems are in use, monthly reports must be obtained by supervisors who must certify that a 40 hour work-week has been maintained. Where attendance registers are in use, supervisors must certify on a monthly basis that employees have complied with the required working hours.”

87. The measures to be taken with the attendance register was not aimed at the applicant, as she is no longer in the department, yet it is still applicable at present. Kruger’s predecessors did not implement it properly, but it is properly implemented at the moment.
88. Reference was made to page 23 of bundle R, being the appeal against the outcome of the disciplinary hearing by the applicant, held on 19 February 2019, where the applicant appealed on 25 April 2019 against the finding of the sanction of a final written warning. It was found that the final written warning was considered fair and reasonable under the circumstances. The final written warning was in terms of the applicant’s non-completion of the attendance register and the issue of 8 days leave. She was found not guilty on all other charges. She was also found AWOL. The respondent deducted money from the applicant’s salary. The applicant’s argument was that she was on sick leave.
89. It was put to Kruger that the applicant testified that she was disciplined at least once a month during July and August 2019 which prompted her to resign. This was denied by Kruger, as he has to act responsibly, he told Sadie that she can choose her own mediator. The applicant was not opposed to any of the mediators proposed.
90. It was put to Kruger that the applicant stated that he subjected her to intolerable working conditions, therefore she resigned. Kruger responded that the applicant is a very outspoken person and she is not subordinate, she does not take

instructions easily, he did not have a problem with the fact that she is vocal with her opinion, but insolence and insubordination is a completely different story. Kruger denies that he victimized the applicant.

91. Reference was made to pages 20 and 21 of bundle R, the change of reporting lines as a result of the situation. A mediation session was set up by Doctor Kariem, the applicant brought her representative and Annamarie Basson from HR was present, Kruger received a call from the SA Police Service informing him that there is a warrant out for his arrest, he asked permission to speak to his lawyer, alternatively to report to the SAP in Cape Town the next morning at 7:30. He went back into the room and told Sadie about it, he said that he suspected that it was the applicant. Joey Roman said he would get a lawyer. Kruger then went to the SAPS the following day and learnt that it was the applicant who laid a case of victimization against him, at which point he said that he is also going to make a case against the applicant, in which instance the Police said that they would both be arrested and suggested that Kruger dispose to a counter affidavit to the senior prosecutor who decided that it is an internal departmental matter and he decided not to prosecute.
92. On his return, Kruger informed finance that he is no longer prepared to supervise the applicant. Qubeka then agreed to supervise the applicant, but the applicant refused. It made no sense to Kruger at the time as she still wanted to remain in his space although she alleged that he victimized her. At that stage their relationship took a turn for the worst. It is clear from page 21 that the applicant still wanted to report to Kruger, which made no sense to him. Sadie told him that as a senior manager, Kruger has to put his personal issues aside.
93. Kruger confirmed that at the time when he applied for the position of Director, the applicant also applied for the position, with which he did not have a problem. The applicant was not short listed, as she did not have enough experience as a deputy director. It was put to Kruger that the applicant testified that when he was appointed, everybody was shocked. Kruger responded that he started as a medical technologist in 1996 in research. Two and a half years later he was

promoted to laboratory manager at Beaufort West. He then moved to Worcester early in 2000, where he was transferred to the Worcester laboratory and at Worcester hospital as a section supervisor.

94. The National health laboratory amalgamated, and he then applied for the Worcester lab manager position, where he was the manager for 8 to 9 years. He was also Assistance Director for HIV and TB for the Boland Overberg region from 2004 to 2011 and promoted to deputy director in May 2016 and appointed as Director HIV / AIDS, TB and STI (HASS) in May 2016. He has also been acting as Director HASS and Chief Director for Health Programs. He had a solid 22 years of management experience where he had managed staff.

The following ensued from cross-examination:

95. Kruger confirmed that he had a cordial relationship with the applicant when he was appointed as Director in 2016. He also confirms that the applicant called a meeting with him on 19 February 2018 where 14 points were discussed. He told her which issues he could resolve and which he could not. It was not a grievance. He could only respond to the relevant issues, he suggested that she escalate the departmental issues, which did not resort under him. The applicant kept the same issues on the list for years, without ticking them off the list. He told the applicant there were certain issues that he could not resolve, as it did not fall within his responsibility. It was not a counselling session, but a one on one meeting between himself and the applicant. According to Kruger he had a good relationship with the applicant, in spite of the 14 points listed. Kruger confirmed that he tried to improve the relationship with the applicant. Doctor Naledi and Doctor Kariem were his line managers at the time and he told the applicant that mediation was an option.
96. The applicant wanted to work alone, he told her that it is not an option, as she had to work in a team. Kruger also confirmed that he had an open-door policy in that if by chance he missed an e-mail she still had an option to come and speak to him personally. Kruger denies that his relationship with the applicant soured after the discussion of the 14 points listed by her. Kruger maintains that the applicant

became very unhappy when her request to attend the Rotterdam conference was declined, at which point he approached Doctor Kariem to intervene in an attempt to rebuild the relationship, they were talking to each other, but there was a disconnect between them as far as work is concerned.

97. Kruger sought intervention; it was definitely a one-way traffic. As a manager he had a responsibility. Kruger conceded that at present he has a coach who gives him guidance as he too can make mistakes.
98. Intervention by a third party was required as the applicant stated that she struggled with Kruger as a manager, therefore he requested mediation. ICAS was also an option. ICAS is also there to assist in repairing the relationship. It has to be a mutual process for two people, Kruger completed the form, but the applicant refused to fill in the ICAS form as she viewed it as a disciplinary measure against her. It is a dual referral for both of them to go to mediation. Kruger ticked off the insubordination. This was a dual referral form and not an individual ICAS form.
99. Kruger testified that as far as he is concerned that a mediator should be a neutral person, therefore he was not satisfied when Sadie was appointed, as Sadie was his manager. The applicant did not trust the ICAS process. It was certainly not a performance related issue.
100. The conference in Rotterdam: the reason why the applicant's application was unsuccessful was because the departmental requirements were not met, and it had nothing to do with Kruger attending the conference. It would be his seniors, Cloete and Kariem's decision. It does not necessarily go to the MEC. Doctor Beth Engelbrecht was the delegated authority which authority was delegated to Doctor Cloete and Doctor Kariem.
101. Kruger confirmed although the applicant was well versed in TB, she would be an ideal candidate to send to the conference, but budget needs have to be taken into account. According to the circular one has to present; one cannot just attend for the sake of attending and it should be partially funded. The only reason why Megan

was allowed was because she was presenting at the conference and she was partially funded. Kruger confirmed that when the applicant asked to discuss her intention to apply for the conference with him, he told her that although he supports her application, he did not think that it would be successful as she did not qualify, but he would however take it up with his superiors. The applicant informed him that she had not travelled to conferences in a while. Kruger denies that he frustrated the applicant's application to attend the Rotterdam conference as the decision was that of Doctor Cloete who had the delegated authority and he could sign it off directly, he did not have to send it to the HOD or MEC. Megan worked as an audiologist in the facility-based program. Some TB patients lose their hearing and Megan was part of that study.

102. Reference was made to the grievance dated 8 October 2018 as per pages 1 to 3 of bundle R. Kruger confirmed that he was informed about the grievance. Kruger informed the applicant of the financial aspect of her attendance at the Rotterdam conference.
103. As far as her transfer is concerned, he discussed the transfer with her, although he cannot recall anything about a Beaufort West transfer. It was not part of the discussion. It would make no sense as the applicant lives in Brackenfell.
104. Kruger denies that he prevented the applicant from attending the Durban conference in June 2018 as he would have recommended her attendance due to her expertise. A previous attendee would normally get an automatic letter inviting them to attend the conference in future.
105. Change of supervisor: Kruger no longer wanted to manage the applicant as he felt unsafe after she laid a charge against him at the Police. He was angry and he asked Doctor Kariem to appoint another person to manage the applicant. Annemarie Basson, the Director at Labour Relations was sitting right next to Doctor Kariem during the applicant's mediation process at Bellville Health Park to ensure that the process was fair. According to Kruger the applicant had never asked for a change of supervisor in the past. Kruger confirms that the applicant's transfer did

not take place as there were no vacant positions available. Kruger confirms that the department tried to assist the applicant with a transfer as can be reflected by all the e-mails and interactions with the applicant.

106. Kruger denies that he ever discussed the applicant's health with anybody else. As far as the victimization claim is concerned, the Bargaining Council did not have jurisdiction to deal with this allegation.
107. The applicant only returned to work on 26 October 2018. She left the service without informing the respondent of her whereabouts and they had nobody to stand in for TB. She basically went on AWOL. They only received the doctor's letter after the fact. Kruger could not wait for the applicant to return, he had to put measures in place, therefore he told them that he received a doctor's certificate, thus his request to Marinda of how they could support the applicant. After the applicant went on AWOL, the respondent received a certificate from the applicant's psychologist stating that she was booked off work. He did not discuss any issues regarding the applicant's discipline with anyone.

The following ensued from re-examination:

108. Kruger confirmed that he dealt with the matter of the applicant's request for a transfer adequately as she indicated that she wanted to be transferred to the nursing directorate and Krommeree would be an option, he discussed it with the directorate, but there was no vacant position.
109. Change of supervision: he found it strange that the applicant wanted to remain under his supervision although she alleged that she had a problem with him. The applicant remained in his space, which was only 10 steps away from his office, which he failed to understand in the light of the allegation that he victimized her.
110. The Rotterdam conference: the application of the circular was the only reason why the applicant did not go to the conference, because his supervisors found that the applicant did not qualify for the conference. The applicant travelled extensively on behalf of the respondent in the past.

111. ICAS was a mediation referral and not a management referral, but the applicant refused to fill in the form and he found it strange that the applicant viewed it as a disciplinary process, as it has nothing to do with disciplinary action.
112. He did not discuss the applicant's medical condition with any of her subordinates and the discussion with Ipeleng and Kim was about the fact that she was ill and how they were going to fill in for her. With regards to the conference in Durban on 15 February 2018, the applicant would have definitely been allowed to go if she had asked his permission.

The applicant's closing argument

113. The applicant was employed as a nurse and assistant director and director in 2012. The applicant resigned on 19 September 2019 and her salary at date of resignation was R64 351.96 gross. She was employed in 2000.
114. In 2016 Kruger was appointed as Chief Director. The relationship between Kruger and the applicant soured and they would meet from time to time, but nothing was resolved. On 19 February 2018 the applicant requested a meeting, it reflects her state of mind, as she listed a number of issues for discussion between them. Kruger admits to this meeting. There was an expectation for follow-up meetings with Kruger, that did not happen. The applicant attempted to escalate these issues by putting them into grievances.
115. The attitude of the respondent is evidenced on pages 39 and 40 of bundle A, the application of the applicant to attend the conference, it is the failure of the respondent to improve relations at the workplace. The relationship between the applicant and Kruger affected her work.
116. With regards to pages 53 and 54 of bundle A, paragraph 4, on the notes of the meeting: "chief director not ..." as if this was regarded as punishment. ICAS and

all the other issues. What does the law state and what outcome are we seeking? The applicant was later referred to a psychologist and psychiatrist. The applicant sought professional assistance on her own accord. The applicant also went to various institutions, e.g. the CCMA, and the Public Service Commission. The applicant realised she is not getting proper assistance from the respondent therefore she went to the police. The applicant wanted to continue a working relationship, that is why she requested the respondent to make her working conditions more tolerable.

117. Regarding the conduct of the employer: the applicant asked them to stop with the victimization. Qotole testified there was no issue of insubordination or poor performance. The respondent was sabotaging the applicant from attending the local conference in Durban and international conference in the Netherlands. Qotole testified about his discussion with Dr Kariem, instead of allowing the issue of the request to go to the MEC or HOD, it did not happen. Kruger stopped the applicant from going to the conference, instead he went to the conference himself.

118. The applicant's representative referred to the following case law:

Section 186 (1) – **Jooste v Transnet 1995 (16) ILJ (LAC)** – Guidelines when an employee resign, the employer must ensure there is no other reason for resignation.

119. The employer's unacceptable conduct can be defined: hostility, sabotage, falsely creating the impression of misconduct or poor performance. When you change the line of reporting, proper procedures were not followed, Human Resources was not involved. The decision was made on short notice. These issues can make working relations at the workplace intolerable.

120. **Western Cape Education v General Public Service Bargaining Council 2013 (8) BLLR, 8 –**

The employee was employed for 23 years. In 2006 the employee suffered a heart attack and applied for incapacity leave. The employee subsequently resigned; the

applicant indicated the attempts she made to formally sit down with Kruger to resolve the problems. Grievance upon grievance were lodged, without the issues being resolved. The process broke down and the union was involved in going to the CCMA and decided the matter must go to the Bargaining Council as a constructive dismissal dispute

121. **WC EDUCATION DEPT v JULIA AND JOHN GORDON AND OTHERS 2018**
BLLR, page

The Court held that an employee who resigned can be reinstated if he or she can be reinstated if circumstances can be met where the applicant will no longer be submitted to the same intolerable conditions. If the applicant's submissions were put in front of the employer properly, we would not have been here today. The applicant can go back, if Human Resources is informed and look at how the situation can be avoided for a space or location at the respondent where the applicant can be placed suitably. Qotole said there was no issue of misconduct on the part of the applicant, which is something the Labour Court will look at. There is no issue of trust here. The applicant can be reinstated in a position where the intolerable conditions will no longer be present. The applicant can go back to the nursing college. According to the law, if it is found that there were no trust issues, in terms of section 193(1), the employer may be ordered to reinstate the applicant. There was no issue of insubordination, the situation can be made intolerable. Possibilities for the applicant's reinstatement must be explored. The applicant's 20 years of experience cannot be discarded. Doctor Kariem or Mr Kruger cannot decide that. Human Resources must assist in finding a reasonable alternative for the applicant.

122. **GRANCHELLIE SARS 2012 -VOLUME 3 ILJ – P 2481**

There is a need to properly investigate alternatives for employees. A failure to properly investigate alternatives available, can amount to constructive dismissal. In terms of section 193(2)(a) to (d) in this case does not fall under 193. The applicant indicated her desire to continue working. In more than 27 incidences of lodging grievances we do not see anywhere that proper steps taken to include Human Resources to address the problems between the applicant and Kruger.

123. Ms Basson from Human Resources involved indicated that coping mechanisms need to be implemented, when and how Basson will address the matter. If proper procedures are followed, it will be made tolerable for the applicant to be re-instated. In terms of section 193 it is stated that reinstatement must be ordered in all cases. Reinstatement is compatible with the finding of constructive dismissal. Where the conditions really are unbearable where the applicant could not fulfil her duties, they have done so. If the conditions are made tolerable for her, the applicant can continue. They cannot say 100% that they hold the respondent not capably responsible. If the respondent does not show that it takes responsibility of what happened, the respondent must find a way to improve the employment relationship.
124. According to the respondent there was a possibility to improve the working relationship. Therefore, if these small issues are addressed properly by the Human Resources, the working relationship can become tolerable. The reference to ICAS, if properly channelled, can be used.

The respondent's closing argument

Case law

125. **Pretorius society for the care of retarded v Loots 1997 (18) ILJ 981 (LAC) PARA 639** - the Court held that where an employee claims that constructive dismissal occurred, the employee must show her assumption that the working conditions is intolerable and objectively correct.
126. On 10 October 2018 on pages 1 to 3 of bundle B, the grievance is evidenced, where the applicant listed a range of issues as far back as 2016. Yet she did not raise any grievances at the time. Rotterdam conference – the recommendation was not authorised by Dr Kariem. Kruger testified that based on the circular a person must speak at the conference or it must be collaborated and be partially funded and these requirements were not met by the applicant. Megan met the requirements as she had to present a research paper.
127. One of the desired outcomes in the applicant's grievance, was to be transferred. Kruger testified that he approached the College of Nursing and Krommeree, as there were no vacant posts, they could not assist the applicant, it is therefore not correct that the respondent did not try to accommodate her. Kruger testified that to transfer the applicant to Beaufort West, would make no sense. Mediation was recommended as an outcome.
128. Bundle B, page 45, outcome of the applicant's grievances is evidenced on pages 4 and 5 of bundle R. It shows management's involvement to try and cure the problems between Kruger and the applicant. ICAS is an independent council advisory services, employed by the respondent to assist parties with personal issues who suffered work-related issues. ICAS was not only offered to the applicant, both the applicant and Kruger were requested to fill in forms for ICAS so that ICAS can employ the appropriate measures to resolve the issue. Kruger filled in the ICAS forms, but the applicant did not do so. The applicant turned the ICAS

opportunity down. Nobody can be forced to participate in such a process if the person is not willing to participate. Page 5, the outcome letter, shows the manager's willingness to facilitate to resolve the problems between the applicant and Kruger.

129. No evidence was submitted about the referral to the Public Service Commission, the applicant never made such a referral. If an employee is dissatisfied with the outcome of the grievance, she can refer it to the Public Service Commission, which did not happen. Victimization issues were referred to the Bargaining Council, which did not have jurisdiction.
130. There were also referrals to the CCMA, which concluded that it was not necessarily issues of victimization and discrimination. Therefore, the CCMA determined the issue as that of constructive dismissal.
131. Page 7 of bundle B, the allegation that Kruger discussed the applicant's medical condition with other staff members, the outcome is on page 8 of bundle R. It is clearly stated that the applicant's grievance will be dealt with and an investigation will be done, which was done by Basson, the deputy director of people management, who spoke to all the employees.
132. Page 9 of bundle R: only the first staff member indicated there was such a discussion. All other staff members indicated no such discussions took place in front of them.
133. Issues of discipline: If the conditions are intolerable, the employer is obliged to take steps against any employee. The applicant was given a reasonable instruction to attend the Dora meeting as per page 15 of bundle R. The final written warning was reduced to a written warning on appeal as per page 19 of bundle R. The appeal can be evidenced on pages 16 and 17 of bundle R.

134. Disciplinary action: the instruction to sign an attendance register, it was signed by every other employee, even Qotole signed the register. Page 159 of 2010, clause 2.3,2.4.2.5.3.1 explains the importance of signing the register in terms of the BCCEI, to keep record of employees' work attendance. Kruger testified this to be the preferred method.
135. In both cases a workplace rule was broken and the employer had to act in terms of the collective agreement, Resolution 1/2003. An issue has been made that Kruger refused the applicant to attend the Durban conference. Kruger testified that he was not aware of any application, if he was aware, there would be no reason for him to refuse permission for her attendance.
136. Change of supervision: Kruger testified this was as a result of the actions of the applicant, where she laid charges at the SAPS. The police phoned Kruger and told him they want to come and arrest him. He was very stressed about it and he did not know what would come next. Qubeka Qukula was the other director to whom the applicant would report. It was a very reasonable action by the respondent to change the applicant's reporting lines at the time. The applicant complained that Kruger subjected her to intolerable working conditions, but she wanted to continue reporting to him, something that does not make any sense.
137. Kruger testified that he had an open-door policy and the applicant's office was just 10 metres away from him. During the applicant's testimony she made a very shocking statement about Kruger at the time of his appointment. Both of them testified that they had a very cordial relationship up to the time of Kruger's appointment. The applicant also applied for the position. The applicant said everybody was shocked when Kruger was appointed. Kruger had all the experience. Kruger's appointment was never accepted by the applicant and she decided she was not going to make it easy for Kruger to manage her. The tone of the e-mails from the applicant to Kruger sometimes leave less than desired.
138. Page 24 of bundle B, the last paragraph, when the applicant submitted her resignation, the last paragraph stated "it is thus with regret to note that you wish to

resign.” If the applicant retracted her resignation the following day, she would have been favourably considered. The employee was not dismissed by the respondent, but she voluntarily resigned. If one looks at the employer’s conduct as a whole, if judged on a whole, one must ask the question if the applicant is expected to put up with it.

Replication

139. With reference to page 24, reinstatement is the fair and reasonable position to be made. The letter of resignation was already on 21 August 2019. Salary advice will be submitted.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

Facts in dispute:

140. The respondent’s action made continued employment intolerable for the applicant.

141. The applicant had no alternative remedy, other than to resign.

142. The applicant feared for her own health, thus making continued employment intolerable.

143. The applicant’s case is based on constructive dismissal. In terms of the Labour Relations Act 66, 1995 a constructive dismissal is a dismissal which conforms with the definition in section 186 (e):

“an employee terminates a contract of employment with or without notice because the employer made continued employment intolerable for the employee.”

144. The applicant tendered her resignation and despite the request from Kruger for ICAS intervention to salvage the working relationship, which request to the applicant rejected. Applicant made a decision to resign instead.

145. The respondent disputes the existence of a constructive dismissal.

146. The respondent asks for an award that the applicant's resignation does not amount to constructive dismissal.
147. The applicant's case must be dismissed.
148. The facts that are relevant to Respondent's case in their chronological order are briefly tabled as follows:
149. Constructive dismissal: Applicant failed to discharge the onus that Respondent's conduct made continued employment intolerable. The leading case dealing with **constructive dismissals** was dealt with by the Labour Appeal Court in:
150. **JOOSTE v TRANSNET t/a SA AIRWAYS NH 11/2/13129 (LAC)**.
The identifying feature of a **constructive dismissal** is, whether the employer's overall conduct is such that the employee cannot be expected to put up with it. The court placed the onus on the employee, in the case of a resignation, to establish that there was no intention to terminate the employment relationship. The court made the following comment before dismissing the appeal: "The proper course for the appellant to have adopted was to have initiate a grievance in early January concerning the unilateral action on the part of Kleynhans in depriving him of most of responsibilities and to have followed up that grievance. That was not done.....".
151. The Council's function is to look at the employer's conduct as a whole and determine whether its effect is such that, judged on a reasonable and sensible basis, the employee can be expected to put up with it.
152. The applicant avers that although she lodged various grievances nothing came of the grievances, yet it is clear from the documentation submitted before me that Dr Kariem responded to her greivances. Kruger's testimony that he responded to the issues to which he could respond and that he advised her to refer the remaining issues with the department, was not disputed by the applicant under cross-examination. Kruger also tried to assist the applicant in securing a transfer, but his efforts proved unsuccessful, due to the unavailability of appropriate positions.

153. Resignation was not the last resort. It is submitted that it was no option at all.
154. Nicholson JA in **Pretoria Society for the Care of the Retarded v Loots** p.639 A-B). held “Where an employee claims that **constructive dismissal** has occurred, she must show that her assumption that the situation in the workplace is intolerable and will not change, is objectively correct.”
155. In the matter of **Aldendorff v Outspan International Ltd(1997) 6 BLLR 772 (CCMA)** it was said employees could reasonably have lodged a grievance regarding the course of the unhappiness, having failed to do so before resigning, they may be hard put to persuade the court or arbitrator that they had no option but to resign. Employees should not second guess the outcome of lodging a complaint in terms of the employer’s grievance procedure, especially not where the employee is contemplating resignation coupled with an allegation of constructive dismissal and such employee had never raised the issue with the employer before.
156. In the present matter before me, the applicant alleged that Kruger made her working conditions intolerable, she even went as far as to lay a charge of victimization against him at the police, as a result of which Kruger was threatened with arrest, yet the applicant still wanted to be supervised by Kruger. It makes no sense at all that an employee who alleges victimization and intimidation by a manager, objects to being removed from his supervision. It is to be expected that she would welcome such a decision by management. Therefore there is no evidence supporting the applicant’s evidence that she had no option other than to resign, as very reason for her complaint was Kruger’s management style and when she is given the opportunity to be removed from his management, she objects and elects to remain under his supervision. Applicant rejected this alternative arrangement outright and made the decision to resign instead.
157. In the arbitration case of **Outspan International and Aldendorff** it was held that the onus is on the employee to show, on the balance of probabilities, that the alleged conduct of the employer was intolerable and this a ground for resignation, was not discharged. The resignation was held to be freely and voluntarily tendered.

What is required is an objective evaluation of the employer's conduct, rather than the employee's subjective experience thereof.

158. The applicant was employed by the respondent initially since the 2000 on a contract basis and since August 2001 on a TB program as Assistant-Director in the TB program, she remained in that position for 12 (twelve) years, she was promoted to Deputy-Director.
159. Kruger was appointed as Director in 2016 in the HIV/TB program in Cape Winelands, at which point he became the applicant's supervisor. The applicant also applied for the position to which Kruger was appointed. The applicant testified that she was shocked when Kruger was appointed to the position. There was no evidence before me that any of the applicant's colleagues shared her sentiment. Kruger's evidence that their working relationship became strained when he started managing the applicant is supported by the applicant's own evidence that she was shocked when Kruger was appointed to the position of Director. The applicant was clearly unhappy about his appointment, especially since she also applied for the position.
160. The applicant resigned on the 28th of August 2019, due to the alleged intolerable working conditions. The applicant earned R936 177.00 per annum per month at the time of resignation.
161. In the arbitration award of **Loubster and PM Freight Forwarding (1998) 7 CCMA 6.13.13**, the arbitrator Loveday found that:

It is important to be cautious in adopting a wide interpretation of what conduct by an employer would constitute **constructive dismissal** because of the danger of inviting a flood of employees who resign and then repent and want to claim the protection of the Act, especially as the dispute resolution of the Act is still in its infancy in interpreting the new Act. On the other hand, it would be a corruption of the Act to adopt a very restrictive interpretation. The definition in s186(e) was clearly designed to **protect employees** who resign in desperation as a last resort

because of the unlawful or unfair conduct of the employer, which makes a continued employment relationship intolerable. Employers do have a responsibility to avoid acting in a manner that would be likely to destroy or undermine the employment relationship.

162. “Continued “intolerable” employment relationship” was described by the applicant as “poor working relationship with Mr Kruger, her direct supervisor”, yet the applicant elects to remain under Kruger’s supervision, when given the opportunity to report to another manager.
163. Both case law and the Act place the onus on the employee to prove the dismissal. If it is established that there was a **constructive dismissal**, the employer must prove that the dismissal is fair. The employer may well have had reasons, possibly due to circumstances beyond his/her control, which caused him/her to act in such a way that a continued employment relationship became intolerable for the employee but his/her actions were not unfair or unlawful. The onus thus shifts to the employer to prove that his/her conduct was, nevertheless, neither unfair nor unlawful.
164. According to the respondent, the applicant’s resignation was due to her accusations against Kruger of victimization without substantiated evidence. The applicant declined mediation offered by the respondent as an intervention to address the matter. The applicant resigned without giving the respondent a further opportunity to resolve the matters of concern raised by the applicant.
165. The applicant therefore made it impossible for the respondent to remedy the alleged problem,
166. **The principles** and tests that arbitrators and the Labour Court have applied are summed up by **Grogan in *CWIU obo Marele and Glass Centre obo Rudy (1998)***
8 CCMA 6.13.15:

- “1. Did the employee intend to bring an end to the employment relationship? According to the applicant, the answer to the question would be no, had it not been for the intolerable working conditions.
2. Had the working relationship become so unbearable, **objectively speaking**, that the employee could not fulfil his/her obligation to work? The applicant lodged grievances on more than one occasion, listing matters going as far back as 2016. Kruger dealt with the matters within his authority, the remainder of the issues were departmental issues, which he encouraged the applicant to take up with the department, yet applicant maintains that her grievances were not resolved. The applicant had the opportunity to refer an unfair labour practice dispute to the bargaining council if she was dissatisfied with the outcome.
3. The respondent was not given an opportunity to remedy the situation and cannot be seen to have made the applicant’s working conditions intolerable. The applicant challenged the respondent and more particularly Kruger’s authority to take disciplinary action against her in terms of the disciplinary code. Thus clearly challenging Kruger’s authority over her. The applicant did not deny that she disobeyed Kruger’s instruction to her to attend the Dora conference. She gave a poor excuse of not having time to go through her e-mail correspondence. She also did not dispute the importance of her attendance or sending someone in her place. Therefore Kruger was well within his rights to discipline the applicant for insubordination in this case. This can hardly be viewed as victimization, as alleged by the applicant. The applicant was the only employee who continued to ignore Kruger’s instruction to sign the attendance register. Qotole testified that he too signed the attendance register. The applicant clearly defied Kruger’s instruction.
4. Did the employer create the intolerable situation? The respondent was not given an opportunity to deliver on its intervention offered and could therefore not have been a part of making the applicant’s working conditions intolerable. The applicant’s allegation that Kruger was the reason why she was not

allowed to attend the Rotterdam conference, was completely unsubstantiated. The applicant did not dispute Kruger's evidence under cross-examination namely that protocol required:

1. The applicant had to present at the conference;
 2. Had to be partially funded and it was for this reason why her colleague, Megan, was allowed to attend the Rotterdam conference.
 3. The applicant did not produce any evidence that she requested permission from Kruger to attend the Durban conference and that he declined. Kruger testified that the applicant was the most knowledgeable about TB in the province and it would make absolute no sense at all to stop her from attending the conference.
5. Was the unbearable situation likely to endure for a period that justified termination of the relationship by the employee? The respondent provided the applicant with alternatives by instructing her to report to another manager, but this offer was rejected by the applicant, therefore I cannot find that the applicant's resignation was justified under the circumstances.
6. Was the termination of the employment contract the only reasonable option open to the employee in the circumstances? No.
167. I now wish to proceed to assess the facts against the law and the above principles. Has the applicant proved a constructive dismissal? No

It is common cause that the applicant resigned on 28 August 2019, and that the resignation was not as a result of an agreement between the parties. What needs to be determined is whether the resignation was as a result of the respondent having made the employment unbearable. In relation to this I also need to determine whether there was an intention on the part of the applicant to resign.

Did the employee intend to bring an end to the employment relationship?

168. In determining whether, in resigning, the applicant did not intend to terminate the employment relationship, the sequence of events and associated time frames leading up to the resignation are relevant. There must be an immediate and direct link between the conduct the employee finds intolerable and the resignation. Had the working relationship become so unbearable, objectively speaking, that the employee could not fulfil his/her obligation to work? The conduct of the employer as a whole need to be assessed, and I will now evaluate each aspect of the respondent's conduct, as testified.

Did the employer create the intolerable situation?

169. I have identified the above issues that weigh in favour of continued employment being intolerable for the applicant or not.

170. Was the unbearable situation likely to endure for a period that justified termination of the relationship of the employee? I am not convinced by the evidence before me that Kruger indeed made the applicant's working conditions intolerable. The only employee to whom Kruger mentioned the applicant's medical condition, was Ipeleng in a one-on-one session with the sole purpose of accommodating the applicant and ensuring that her work was taken care of. Kruger did not disclose her medical condition to her subordinates in an open meeting as alleged by the applicant.

171. This question needs to be addressed that will be regarding whether the employee resigned in desperation as a last resort. No – there was an alternative available to the applicant and this was confirmed by Kruger.

172. It is likely that the issues I have identified above would have continued to prevail? In determining whether or not this justified termination of the employment relationship by the applicant, the fact that the applicant did not make use or to give the respondent an opportunity to improve her working conditions before resigning, and the next question, need to be taken into account.

173. Was the termination of the employment contract the only reasonable option in the circumstances? No, it would have been more reasonable for the applicant to follow the new reporting line, the fact that she insisted in continuing to report to Kruger demonstrate that there is no basis in the applicant's allegation that Kruger made her working conditions intolerable.
174. While the applicant did raise the issues in question in her grievance, if the issues were not addressed satisfactorily, the reasonable option under the circumstances would have been to pursue the legal remedies available to her, rather than to resign. It is likely that the applicant had adequate opportunity to pursue legal remedies to the issues she raised in her grievance.
175. I find that the applicant's resignation was not the only reasonable option in the circumstances. The applicant had an opportunity to attend mediation and ICAS, yet she failed to do so,

Assessment of the cumulative impact of the respondent's conduct

176. When the questions posed above and the associated findings are weighed up, the evidence weighs against the applicant proving that continued employment was made intolerable.
177. There was not a sufficiently immediate link between the respondent's conduct and the applicant's resignation, with the evidence pointing towards the resignation being voluntary; no evidence that the respondent had closed the avenue of dialogue with the applicant; the termination of the employment contract was not the only reasonable option in the circumstances; and the resignation was not justified.
178. The probabilities therefore are in favour of finding that conditions could not have been so intolerable that the applicant was compelled to resign through the actions or inactions of the respondent. The applicant therefore has failed to discharge the onus resting on her to show, on a balance of probabilities, that she resigned due

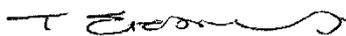
to continued employment being intolerable, and that she was constructively dismissed. It is therefore not necessary to enter the second phase of the enquiry regarding whether the respondent discharged his onus to prove that her conduct was fair.

179. The applicant's fears were in the circumstances blown out of proportion and that led to her demise. It has nothing to do with the respondent. The applicant resigned before the respondent had an opportunity to address her concerns or to improve her alleged intolerable working conditions.

Award

180. The applicant has failed to prove that she was subjected to a constructive dismissal by the respondent. The applicant failed to prove that the respondent made continued employment intolerable for the applicant. The applicant was not subjected to constructive dismissal.

181. In the light of the afore going the applicant's case is dismissed.



COMMISSIONER: T ERASMUS