



ARBITRATION AWARD

Case No: **PSHS1314-19/20**

Commissioner: **Kelvin Kayster**

Date of award: **17 March 2021**

In the matter between:

Iolinthia Cordom

Applicant

and

Department of Health- Western Cape

Respondent

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing in this constructive dismissal dispute was conducted on a virtual platform on 09 November 2020, 22 January 2021 and 26 February 2021.
2. The applicant is Ms. Iolinthia Cordom, a former employee in the service of the respondent. She was represented at the arbitration hearing by Mr. Eben Simons of Simons Van Staden Attorneys.
3. The respondent is the Department of Health- Western Cape. Mr. Ayanda Mniki represented the respondent.
4. The parties agreed to submit closing arguments in writing by not later than 05 March 2021.

ISSUE TO BE DECIDED

5. I am called upon to determine whether or not the applicant's termination of service constituted a constructive dismissal.

BACKGROUND TO THE DISPUTE

6. The applicant was employed by the respondent as receptionist/admissions clerk in October 2006. After incidents involving a Mr. Gert Skippers on 10 July 2019 and 08 January 2020, she tendered her resignation on 13 January 2020, supposedly due to the respondent's alleged failure to address her complaints relating to the incidents.
7. The applicant contends that the respondent's omission made her working conditions intolerable and her resignation therefore constituted a constructive dismissal. She subsequently referred a constructive dismissal dispute to the PHSDSBC.

SURVEY OF EVIDENCE AND ARGUMENT

8. Both parties submitted bundles of documents that were accepted as what it purports to be. Hereunder follow very brief summaries of the parties' respective cases. Evidence not specifically mentioned was also taken into account in reaching my findings.

Applicant's case:

9. The applicant, Ms. Iolinthia Cordon testified that on 10 July 2019 Mr. Gert Skippers launched a verbal attack on her in the reception area in the presence of some patients, and accused her of spreading rumours about him doing private jobs at work. She denied the accusation, but he carried on swearing at her for a while. She was upset and reported it to Ms. Malgas, who suggested they go to Mr. Skippers to resolve the issue. Upon their arrival at his workstation, he carried on shouting at her. Ms. Malgas called for help, and a Mr. Gantsho came to drag Mr. Skippers away from her. She called her husband in tears. Ms Malgas later told her that she reported the incident to Ms. Brink, who was Mr. Skippers's supervisor, as well as to the Deputy Director. Her union representative advised her to wait for feedback. Ms. Brink later reported back that she addressed the issue with Ms. Links, for whom Mr. Skippers apparently did private jobs. Apart from this feedback, there was no further action from the respondent in relation to the incident.

10. On 08 January 2020 she came across Ms. Skippers and Mr. Strauss at the reception area. She ignored him and he accused her of having a “shit” attitude. It happened in the presence of Ms. Smith and Ms. Links. Ms. Links later called her and Mr. Skippers to her office. Ms. Smith and a Mr. Sunder also attended. She was allowed to explain the reason for her unhappiness, but Mr. Skippers became agitated, swore at her and approached her in a threatening manner. Ms. Links had to intervene quickly to prevent any physical incident. She left the meeting and called her husband, who then came to the workplace and confronted Ms. Links about the incident.
11. Ms. Cordon testified that due to her ill-health and depression, she eventually gave notice on 13 January 2020 of her intention to resign. She intended to leave on 29 February 2020, but was still hoping that the respondent would address the issue.
12. Ms. Cordon further testified that on 03 February 2020 her husband drove her to work. Mr. Skippers later approached her and asked if they could put the past behind them. She later learned that her husband confronted Mr. Skippers at the gate, whereafter Mr. Skippers laid a complaint.
13. Only after the complaint against her husband, Mr. Peters of the labour relations unit made an appointment with her. He was new in the position, and was surprised that management has not addressed the issue earlier. She was also contacted by the HR Assistant Director Ms. Van Buuren, who sounded surprised to hear her report. Ms. Van Buuren asked her to withdraw the resignation, but she declined because her earlier requests for a transfer had been ignored. Instead, management referred her to the ICAS wellness programme, but it was not successful at all. She would not have resigned if management addressed the issue promptly.
14. In cross-examination the applicant conceded that she did not inform her supervisor, Ms. Links about the incident of 10 July 2019, and was also not sure whether Mr. Links was aware of it. She also conceded that she did not ever follow up with management whether the incident was being investigated. She agreed that Ms. Links immediately reacted on the second incident. She conceded that she did not submit a formal grievance after the first incident, but argued that it would not have served any purpose as her supervisor had dealings with Mr. Skippers. She also did not report it to Ms. Brink, because Ms. Malgas undertook to do it. She conceded that Ms. Van Buuren encouraged her to

withdraw her resignation, but she felt that she could not keep up with the situation any longer. She denied that she ever told Ms. Van Buuren that she was leaving to pursue fulltime studies. She explained that she said she was unhappy at work, and might as well go study. She insisted that she was not entirely open about it, because she felt humiliated. She denied that she ever discussed her studies with Ms. Links. She conceded that she pushed through with her resignation, even though Mr. Petersen assured her on 11 February 2020 that the issue was enjoying attention. She however insisted that she did not hear from him since their meeting on 11 February 2020 until she left employment on 29 February 2020. She also did not have any further dealings with Mr. Skippers since 08 January 2020. She conceded that her mental illness existed before any of the incidents, and that she unilaterally decided to stop taking medication contrary to the medical practitioner's prescripts.

15. The applicant's husband, Mr. Peter Cordon testified that she called him at work on 10 July 2019. She was upset and reported that Mr. Skippers accused her of being a whistleblower about private work he allegedly performed. He advised her to report it to management. He was concerned about her health, as she still suffered from depression and the consequences of a serious injury on duty in 2016. The incident with Mr. Skippers happened at a time when she was positively regaining her health. She decided not to pursue a grievance in the interest of her health. However, she called again on 08 January 2020 to report on another incident involving Mr. Skippers. He went to the applicant's workplace and confronted Ms. Links, who was not helpful and also refused to call for Mr. Skippers. On 03 February 2020 he drove his wife to work. Mr. Skippers was in the vicinity, and he confronted him after his wife went inside. He was surprised to see that Mr. Skippers was an elderly man. Mr. Skippers did not react to the confrontation. He left, and his wife later called to report that Mr. Skippers laid a complaint about the incident.

16. Mr. Cordon testified that he initially did not want his wife to resign, but she was miserable and depressed all the time. He conceded that management cannot be blamed if the incident was not reported. He conceded that despite his advice, the applicant did not lodge a grievance after the first incident because of her mental state. She also stopped taking medication, because she was not allowed to work under the influence of anti-depressants. He insisted that she had been off the medication for 2 years and was in good health before the incidents. He also denied that she wanted to study fulltime,

because they simply could not afford to lose her income. She resigned out of desperation. The investigation only started after he confronted Mr. Skippers.

Respondent's case:

17. The HR assistant director, Ms. Melanie van Buuren, testified that she became aware of the incidents when the CEO, Mr. Human came to discuss an email from Ms. Brink with her. It related to the confrontation between Mr. Peter Cordon and Mr. Skippers. She then instructed Mr. Petersen to conduct an investigation. As she has just returned from leave, she also became aware of the applicant's resignation. She called the applicant, who explained that she wished to further her studies.
18. Ms. Van Buuren explained that she was not aware of the earlier incidents, but only learned of it during the investigation. She did not receive any report or grievances in relation to it. She and Mr. Steve Petersen tried to discourage the applicant from resigning, but she was adamant. They even advised her to approach the wellness programme. Had the applicant disclosed that her reason for resigning were the incidents with Mr. Skippers and her unhappiness about how the respondent handled it, she would have intervened and looked for alternative placement.
19. In cross-examination, Ms. Van Buuren reiterated that the HR unit was never informed of the incident of 10 July 2019. She only returned from leave late in January 2020. She called the applicant on 03 February 2020 about the resignation. The applicant did not mention the incidents, but merely indicated that she was going to further her studies. Later the same day that they became aware of the incident between Mr. Cordon and Mr. Skippers. Mr. Petersen went to meet with the applicant on 11 February 2020. She conceded that no disciplinary action was taken against Mr. Skippers, but explained that they were not aware of the two earlier incidents. The applicant left employment before any disciplinary action was taken against Mr. Skippers.
20. Mr. Steve Petersen testified that Ms. Van Buuren instructed him to meet with the applicant and to investigate the complaint against Mr. Cordon. He met with the applicant and Mr. Skippers separately on 11 February 2020. The applicant explained that the working conditions were unbearable and management did not intervene in the situation. She also wanted to further her studies. She confirmed that she would not resign if the

matter is investigated thoroughly. He also encouraged her to approach the wellness programme. She however went through with the resignation. She never submitted a grievance. Mr. Skippers was not disciplined, because they are still investigating.

21. In cross-examination Mr. Petersen explained that he became aware of the incident involving Mr. Cordon on 04 February 2020. Until his meeting with the applicant on 11 February 2020, he was not aware of the incidents between the applicant and Mr. Skippers. He reported back to Ms. Van Buuren, who later said that she spoke to the applicant about it. He could not tell whether Ms. Van Buuren had any other communication with the applicant. In re-examination, he could not confirm whether Ms. Van Buuren meant that she called the applicant on 11 February 2020, or on an earlier date. He conceded that the respondent did not gather information from all the eyewitnesses, and failed to discipline Mr. Skippers timeously. The CEO put the investigation on hold after the applicant left.

ANALYSIS OF EVIDENCE AND ARGUMENT

22. I am called upon to determine whether or not the applicant proved on a balance of probabilities that her resignation constituted a constructive dismissal. It is not in dispute that the applicant resigned from employment. In *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) the Labour Appeal Court suggested the following requirements when considering whether a constructive dismissal took place:

- the employee must have terminated the employment contract;
- the termination must have been because the employee believed that a continued employment relationship had become intolerable;
- the employer must have conducted itself in a manner so as to damage the employment relationship without reasonable or just cause;
- the effect of the employer's conduct must be such that the employee cannot reasonably be expected to put up with it;
- terminating the employment relationship must have been a measure of last resort for the employee;
- the employer must have taken no or inadequate steps to address the employee's grievance justifying a conclusion that the employer will never reform or abandon the pattern of creating an unbearable work environment.

- In exceptional cases an employee is not required to follow internal grievance procedures or statutory dispute resolution mechanisms provided the employee can prove that it would not have changed the situation to such an extent that the employee could reasonably have been expected to continue with the employment relationship.

23. In *Strategic Liquor Services v Mvumbi NO & others* 2010 (2) SA 92 (CC); (2009) 30 ILJ 1526 (CC) the Constitutional Court summarized the test by explaining that it did not require that the employee had no choice but to resign, but only that the company should have made continued employment intolerable.

24. Importantly, the Labour Court, in a recent judgement of *Gold One Ltd v Madalani & others* (2020) 41 ILJ 2832 (LC) noted that three requirements had to be met to establish constructive dismissal, namely that the employee must have resigned under circumstances where she would not have resigned but for unfair conduct on the part of the employer towards the employee which rendered continued employment intolerable for the employee. The Court explained that “*the first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee’s employer who had made continued employment intolerable. 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.*” The Court further emphasized that it is “well-accepted that intolerability is a high threshold, far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter an obnoxious rude and uncompromising superior who may treat employees badly...intolerability entails an unendurable or agonising circumstance marked by the conduct of the employer that must have brought the employee’s tolerance to a breaking point.”

25. It is common cause that the applicant submitted her letter of resignation on 13 January 2020, indicating her intention to leave employment on 29 February 2020. There is accordingly no doubt that the applicant has terminated the contract of employment.

26. The applicant did not state any reasons for resigning in her resignation letter. In this arbitration hearing, she attributed her resignation to the respondent's failure to address the incidents that have occurred between Mr. Skippers and herself. Even after she gave notice of her resignation, she did not advise Ms. Van Buuren that her resignation was related to those incidents. She conceded in cross-examination that she was not "open" with Ms. Van Buuren about the reason for her resignation. She conceded that she never reported the incidents to her supervisor or any higher authority. She never followed it up, and also never lodged a grievance.
27. The respondent did not dispute that the incidents happened. The first incident took place on 10 July 2019 when Mr. Skippers launched a verbal attack on her in the reception area in the presence of patients, and later closer to his workstation when Ms. Malgas accompanied her there. Mr. Skippers accused her of spreading rumours about him doing private jobs at work for Ms. Links, who was the applicant's supervisor. The incident was serious to the extent that a Mr. Gantsho had to physically hold Mr. Skippers back from accosting the applicant. The applicant called her husband, but she conceded that she did not personally report the incident to anyone. Ms. Malgas promised to report it to management, but the applicant was not present when it was reported. Ms. Brink (Mr. Skippers's supervisor) later reported back that she spoke to Ms. Links and Mr. Skippers about performing private jobs at work. Unfortunately, Ms. Malgas was not called as a witness to explain the nature of her report, but from the feedback it seems that the focus was on the private jobs rather than Mr. Skippers conduct towards the applicant.
28. The applicant's husband, Mr. Peter Cordon, confirmed that he encouraged his wife to lodge a grievance after the first incident, but for health-related reasons she decided against it. She was on the road to recovery from her injury on duty (in 2016) and depression. She has also taken herself off her prescribed medication. It is also common cause that her performance rating was below satisfactory for the last two assessment cycles. The respondent suggested that the applicant's decision to stop taking her prescribed medication and her substandard performance were instrumental in her decision to resign, and that it was not a failure on the part of the respondent. This is especially so if considering that she failed to lodge grievances or at least report the incidents to management.

29. The second incident occurred six months later on 08 January 2020 when Mr. Skippers allegedly accused the applicant of having a “shit” attitude after she ignored him in the reception area. Their supervisor, Ms. Links called them to her office to mediate the conflict situation. During the meeting, Mr. Skippers lost his temper and once again approached the applicant in a threatening manner until Ms. Links intervened. They all left. She called her husband, who came to the workplace and confronted Ms. Links about it. Ms. Links reiterated that her hands are tied if the applicant would not lodge a grievance. The applicant tendered her resignation a few days later on 13 January 2020. She conceded that Ms. Van Buuren called her and encouraged her to withdraw her resignation. She further conceded that she did not tell Ms. Van Buuren that the incidents with Mr. Skippers caused her to resign. The issue came to the attention of the HR unit when Mr. Skippers laid a complaint against Mr. Cordon who confronted him on 03 February 2020. The HR unit dispatched Mr. Petersen to meet with her on 11 February 2020. Even Mr. Petersen assured her that the matter will receive attention. He even advised her to approach the wellness programme. Despite his reassurances, the applicant still did not withdraw her resignation.

30. The test whether an employment relationship had become intolerable is an objective test. It cannot be determined from the state of mind of the employee alone, as emphasized in *Smithkline Beecham (Pty) Ltd. v CCMA & others* (2000) 21 ILJ 988 (LC). The Supreme Court of Appeal considered the test of intolerability in *Murray v Minister of Defence* 2009 (3) SA 130 (SCA); (2008) 29 ILJ 1369 (SCA). The Court noted that the onus rests on the employee to prove that the resignation constituted a constructive dismissal, i.e., that the resignation was not voluntary and that it was not intended to terminate the employment relationship. Once this is established, the enquiry is whether the employer had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the Court asked whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The Court emphasized that the intolerable conditions must have been of the employer's making and that the employer must be culpably responsible in some way for the intolerable conditions.

31. The applicant conceded that she did not report or lodge a grievance after the first incident. Neither did she lodge a grievance after the second incident. Had she lodged a

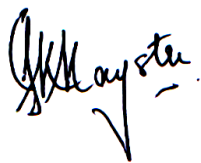
grievance, it would have received attention much earlier, especially since the HR unit visits the workplace on a weekly basis. She resigned only a few days after the second incident. Mr. Petersen assured her that the matter will receive attention. Ms. Van Buuren encouraged her to withdraw her resignation. Despite their attempts, she elected to push through with the resignation. In those circumstances, I am not convinced that the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the applicant. Objectively considered, it cannot be said that her working conditions became intolerable to the extent that it could not be remedied, especially since the HR unit showed its intention to address it. The applicant's claim for constructive dismissal fails on this aspect alone.

32. I am therefore not convinced that the applicant succeeded to prove that her resignation constituted a constructive dismissal.

AWARD

33. The resignation of the applicant did not constitute a constructive dismissal.

34. The applicant's claim is dismissed and she is not entitled to any relief.



Signature: _____

Kelvin Kayster