



ARBITRATION AWARD

Panellist/s: Bhekinhlanhla Stanley Mthethwa
Case No.: PSHS404-10/11
Date of Award: 10-Aug-2011

In the ARBITRATION between:

Henwood Britter & Caney Att. obo Naidoo V

(Union / Applicant)

and

Department of Social Development: KZN

(Respondent)

Union/Applicant's representative: Mr. B. Donachie.

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Respondent's representative: Ms. HN. Jili

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Details of hearing and representation:

1. The matter was scheduled for arbitration on 11 February 2011 and remained part heard and was heard again on 19 April 2011, 3 May 2011 and 24 June 2011 at the Department of Social Development offices in Durban. Mr. B. Donachie, an attorney represented Ms. V. Naidoo (hereinafter referred to as the Applicant) and Miss. HN. Jili represented the Department of Social Development (hereinafter referred to as the Respondent). The proceedings were digitally recorded.
2. Having presented their respective cases, parties agreed to submit heads of argument by 1 July 2011 and only did so on 15 July 2011. The last day of this arbitration is thus 1 August 2011

Issues to be decided:

3. I am to decide whether or not the respondent committed constructive dismissal against the applicant as defined in section 186(1) (e) of the Labour Relations Act no: 66 of 1995 (“the Act”), as amended.

Background to the dispute:

4. The applicant was appointed as a Principal Social Auxiliary Worker on 1 February 1988 and was earning R92 000.00 in yearly remuneration when she left the employment. She continued in that capacity until the 31st of July 2010 when she resigned and sought reinstatement or compensation as recourse for the alleged unfair dismissal.

Summary of evidence and arguments:

5. All witnesses gave evidence under oath. This is a summary and it reflects all the relevant evidence and arguments heard and considered in deciding this matter. Ms. Veneshree Naidoo testified in her capacity as the applicant. The respondent led evidence of Ms. Chandragasen Moodley and Ms. Yugenthri Pillay. Their evidence may be summarized as follows;

Applicant's case:

The applicant testified on her own and did not call any witness.

6. Ms. Naidoo testified that she was employed as a Principal Social Auxiliary Worker at Ocean View Place of Safety for the past 12 years. She was transferred to Newlands Park Centre on 1 April 2010 without consultation. She resigned on 31 July 2010 with a serious concern in the manner in which the respondent was handling her issues. In the year 2004 she was diagnosed with chest pains and joints

viruses. She was working directly with youth that was in conflict with the law. Amongst others; she was providing therapeutic services to the youth. She would work with the youth in the baths. She was diagnosed with Kikuchis disease in the year 2006. The symptoms of this disease would come and go. Air pollution was the main contributor to her condition. On 5 March 2006 she motivated for a transfer. Three months later she received a response that she may apply for vacant posts and her application shall be considered among other applications. On 13 July 2006 Dr. Randeree motivated for her transfer to a safer environment for medical reasons and stated that she was prone to recurrent exacerbations and was susceptible to viral illnesses.

7. On 15 August 2006 the respondent advised that there was no policy in place on transfers and/or relocations. However, communication was being established with the Human Resources Section in the Regional office to find a solution to her problem. It was her evidence that thereafter she did not receive any feed back. On 21 August 2006 she made a follow up regarding her transfer request. She wanted the respondent to consider that she had other qualifications. Sometime during the year 2007 she received a correspondence that the respondent was waiting for her response before she could be transferred to Excelsior Place of Safety. She responded to that letter and advised that there was misunderstanding with regard to her request for transfer. She stated that her request was to be transferred from a Child Care position to an Administrative or Human Resources position. She also stated that she had Human Resources Management qualification. In response to that letter the respondent advised her that she could only be transferred to the same job category. For any other position she will have to apply when the posts were advertised. In March 2007 she was temporarily transferred to an administrative position.
8. She also requested to be placed on Employee Assistance Programme ("the EAP") and be assessed by a Psychologist. She was told that Dr. Charles did not recommend her transfer to another position due medical reasons. However, she did not have a sight of Dr. Charles's recommendation. Dr. Paruk who was a specialist physician also recommended that she be transferred to a safe environment where she would have minimal exposure to infections. The recommendation was also that her job profile be reviewed. On 9 September 2009 she met respondent officials in Pillay and Moodley in an attempt to find a solution to the problem. They recommended that she should be sent to a state medical doctor for further observation.
9. She also testified that her trade union was during March 2010 in finding a solution to her problem. The final straw was when she received a letter in March 2010 that the respondent had transferred her to

Newlands Park Centre without consultation. That transfer was not going to improve her medical condition and she advised the respondent accordingly.

10. Subsequently, she tendered her resignation when it became clear that there was no co-operation in resolving her problem. She was resigning so that an external person shall be involved in resolving the problem she had with the respondent. According to the applicant she would like to be reinstated to a suitable position.

Respondent's case:

The respondent called two witnesses in support of its case.

First-witness – Chandragasen Moodley

11. Ms. Moodley testified as follows;
12. She was the Facility Manager at the Ocean View Place of Safety. The applicant had repeatedly asked for a transfer to another facility. At one stage there was a meeting which was attended by the Deputy Director. They discussed the applicant's concerns regarding working at the Ocean View Place of Safety. She later dropped the transfer letter to the Newlands Park Centre with the applicant's sister at her place of resident. The applicant was not happy at the Ocean View Place of Safety due to air pollution. Durban south was the most polluted area in the world and it was rated as 5th polluted area in the world.
13. She was aware of the applicant's medical condition. She joined the Ocean View Place of Safety in March 2006. From March 2006 and the time of the applicant's transfer she was not in contact with the children. During November 2006 she assisted the applicant to motivate her transfer from the Ocean View Place of Safety. At one stage the applicant was temporarily transferred to an administrative position due to her condition. The hours of work at Ocean View Place of Safety and Newlands Park Centre were similar. However, previously the hours of work were different. The applicant informed her of Dr. Charles' recommendations regarding her condition.
14. The applicant had a good attendance record prior to her transfer. The applicant refused to go to Thandekile Health Management. She saw Dr. Charles's recommendation after the applicant had refused to go to Thandekile Health Management.

First-witness – Yugenthri Pillay

15. Ms. Pillay testified as follows;

16. She was supervising the applicant's supervisor. She was aware that the applicant had some issues. She then called for the applicant's personal file before meeting her in September 2009. The applicant was not managing to perform all her duties. There was a finding made for the applicant to return to her position. Thereafter, the applicant submitted a second medical report and requested medical assistance. When the applicant requested transfer she made it clear that she had no power to make a decision regarding her transfer.
17. She advised the applicant to follow a grievance procedure if she was not satisfied. She later met with her Manager and considered all the possible options concerning the applicant. They then decided that Newlands Park Centre was the most suitable facility. The applicant accepted the transfer to Newlands Park Centre.
18. In the year 2008 Dr. Charles made a recommendation that the applicant be kept at her position. Subsequent to Dr. Charles's recommendation Dr. Paruk motivated for the applicant's transfer on the medical reasons.
19. During October 2009 the respondent introduced a policy to deal with transfers. In May 2010 there was a meeting to discuss the applicant's concerns. The meeting resolved that the issue had been finalised.

Analysis of evidence and arguments:

20. From the outset I wish to make it clear that I will not regurgitate the whole of the evidence presented but will only refer to relevant parts thereof, although I have considered all of the evidence.
21. Section 186(1)(e) of the Act describes constructive dismissal as termination of contract of employment by employee with or without notice because the employer made continued employment intolerable for the employee. On the other hand, section 192 of the Act places the onus on the employee to prove that the employment relationship was made intolerable by the employer.
22. In discharging that responsibility the applicant should demonstrate in her evidence that (a) her continued employment had become intolerable (b) the circumstances that rendered her continued employment intolerable were of the respondent's making and (c) it was because of these circumstances that she terminated her contract of employment.

23. I must hasten to mention that the use of the word “intolerable” in the Act has been interpreted to have introduced a much stricter test than the one which was applied under the previous 1956 Labour Relations Act. According to Grogan in **Employment Law (9th Ed)** at page 114 the word “intolerable” suggests that constructive dismissal should be confined to situations in which the employer behaved in a deliberate oppressive manner and left the employee with no option but to resign in order to protect his or her interests. There are various situations in which the employer can be said to have behaved in such a manner that that left the employee with no option but to resign.
24. In order to assess the employer’s behaviour an objective test is used in determination of the existence or otherwise of a constructive dismissal claim. Thus the subjective state of mind of the employee is not a critical factor in the assessment of the existence or otherwise of constructive dismissal. In order to succeed with a constructive dismissal allegation the employee must show that he or she resigned because of coercion, duress or undue influence. Failure by the employee to use the internal grievance procedure, although not a determinative factor; is an important aspect in the objective assessment of whether or not the employee was left with option before resignation.
25. This principle was also confirmed by **Van Niekerk et al in Law@work (2008)** where among others it was stated that the application of the objective test means that the employee's perception of the events that establish “intolerability,” due to the employer's conduct, must be viewed in an objective sense. Particularly at page 213 it is stated that: *“The courts have endorsed the principle that that the remedy of constructive dismissal, being one in which the employee seeks to obtain resignation, should be narrowly interpreted against the employee. This implies not only that the test should be objective but that it should be set at a high standard, and that the act of resignation should be an act of final resort when no alternatives remain.”*
26. If I apply the same objective test in the present case, it is my conclusion that the applicant has failed to prove that the circumstances had become so unbearable that she could no longer be reasonably expected to endure them. On a proper conspectus of the evidence led during the arbitration hearing, I agree with the respondent’s representative that there is nothing to substantiate the applicant’s claim that she was constructively dismissed. Indeed, the respondent did everything possible to assess the applicant’s medical condition and place her at the suitably position. At all times the respondent tried to find a solution to the applicant’s medical condition; therefore, it could not be said that the respondent

made continued employment intolerable after placing the applicant at different facilities with a view to minimise the exposure to infections.

27. In my view several meetings that were convened by the respondent prior to the applicant's resignation were clear indication that the respondent had a will and capacity to resolve the applicant's grievance. The respondent was doing that outside the parameters of its grievance procedure. For example, during November 2007 the applicant was transferred from the Ocean View Place of Safety to Excelsior Place of Safety. This was done in an attempt to remove the applicant from the polluted area of Durban south. This was in line with Dr. Paruk's recommendation who had recommended that the applicant should be transferred to a safe environment where she would have minimal exposure to infections. However, the applicant rejected that offer and insisted that she was looking for an administrative position. It was explained to the applicant that if there was a vacant post in administration she may apply. Immediately before her resignation the applicant was transferred to Newlands Park Centre where there was minimal exposure to infections and she complained that there were no sufficient consultations before she was transferred. Therefore, it cannot be true that the applicant had no option other than resignation. Instead, the applicant became subjective and pre-occupied with an idea that she wanted an administrative post; and nothing else. She had grievance procedures to her disposal which would have taken her plight well beyond her immediate supervisors. Instead, she chose to deal with her problems in an informal manner; but despite that she was assisted. Why then we should believe the applicant's representative submission that grievance procedures would have not delivered different results.
28. There was no explanation why the applicant failed to invoke grievance procedures; except that the grievance procedures were meant to bring a grievance of an employee to his/her seniors' attention and in this instance the applicant's seniors were aware of her problems. This is why the respondent's grievance procedures would have not yielded a different outcome. I differ with this view; there was no evidence in this hearing to substantiate that grievance procedures would have not brought a different outcome if it was invoked. In my view the applicant had alternatives available to her but chose to resign.
29. Another classical example, after her resignation, the applicant wrote to the MEC for Social Development in the province asking him to intervene. Why she did not seek that intervention if she did not have confidence in the respondent's grievance procedures. This is why I disagree with the applicant's representative submissions that she had no option except to resign because almost all her senior managers were aware of her concerns. To me it also defies logic why the applicant wanted to be reinstated if the respondent had made continued employment intolerable. How does she hope to change her situation if it is true that the respondent had made continued employment intolerable? For

these reasons the applicant has failed the objective test to establish that it was the respondent's conduct that induced "intolerability," and she had no other option but to resign.

30. Let us take the objective test further; in **Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC)** the court framed the test of proving alleged constructive dismissal as follows, " The enquiry is whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. When an employee resigns or terminates the contract as a result of constructive dismissal such an employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most function, namely to work. The employee is in effect saying he or she would have carried on working indefinitely had the unbearable situation not been created. She does so, on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned."

31. In my view the applicant's testimony did not prove that there was any unfair treatment that could not have been addressed through the respondent's grievance procedures. In this instance the respondent had tried to address the applicant's problems and there is no indication that it would have not address the same sufficiently had she followed the formal grievance procedures. Therefore, the applicant was not constructively dismissed and her conduct proves that she had voluntarily resigned while she had options available to address her problems.

32. Accordingly, I am persuaded that the applicant failed to produce evidence, either orally or in the form of documentary evidence that the respondent made continued employment intolerable and she had no option but to resign.

33. In the circumstances I make the following award:

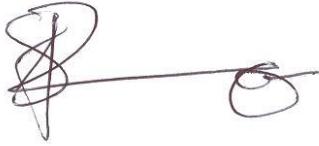
Award:

34. I find that Ms. Veneshree Naidoo was not constructively dismissed, instead she voluntarily resigned.

35. Ms. Veneshree Naidoo's application against the Department of Social Development is dismissed.

36. No order as to costs is made.

DONE AND SIGNED IN JOHANNESBURG ON THIS 1ST DAY OF AUGUST 2011.

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a horizontal line and a smaller, circular flourish at the end.

Arbitrator: Bhekinhlanhla Stanley Mthethwa