



ARBITRATION AWARD

Case No: **PSHS774-19/20**

Commissioner: **T Erasmus**

Date of award: **12 August 2020**

In the matter between:

SAMA obo GENEVIEVE OLIVIER

Union / 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 17 March 2020. The Applicant was represented by Mr E Simons of Simons Van Staden Attorneys, whilst the Respondent was represented by Mr A Mniki, Labour Relations Officer at Respondent. The matter was postponed until 6 July 2020, due to unavailability of witnesses on both sides, being involved with monitoring of the Corona Virus and again until 22 July 2020 on which date the Arbitration hearing was concluded virtually.

Issue to be decided

2. I must decide whether the applicant was subjected to a constructive dismissal and if whether the dismissal was fair and if unfair, determine the appropriate relief.

The applicant's case

3. Overtime hours that the applicant was required to work by the respondent made the applicant's working conditions intolerable and had an adverse effect on the applicant's health, which led to her resignation. There were no reasonable alternatives to resignation. The grievances lodged by the applicant did not assist. The respondent was in control of the unbearable circumstances.
4. **Gregory John Symons testified in support of the applicant's case (herein after referred to as "Dr Symons")**
5. Dr Symons gave the following evidence regarding the applicant and the impact of the work environment on her health. Dr Symons confirmed his qualifications as follows: he is a Pulmonologist at the Department of Health, Western Cape. He has been a fellow of pulmonology for the past 10 years' experience.
6. Dr Symons confirmed that he consulted with the applicant for the first time on Tuesday 21 May 2019. He diagnosed the applicant with asthma at the time, it was managed appropriately. It is a common medical condition and is not related to her underlying problems. Stress and prolonged working hours can aggravate asthma.
7. Hypertension at the age of 33 years old is however unusual. Although the asthma is not caused by long working hours, the hypertension can most certainly be as a result. She became insulin resistant, which can be the effect of long hours on her health. The working conditions will aggravate the asthma. Significant blood pressure rise could be caused by long working hours. The neuro-psychiatrist effect of the drive cognitive disfunctions after staying awake for more than 18 hours is the same as 0.7 alcohol.

8. The training environment to which the applicant was subjected include significant training hours. The applicant would not be able to perform significantly under such circumstances. It could result in a breach of her attention span, weight gain, high insulin or condosone levels. A lack of sleep has both a neuro-psychiatrist and physical impact on a person. It would not have been reasonable or sustainable for her to continue working under those conditions. More significant morbidity mortality is seen with long working hours.

The following ensued from cross-examination:

9. Dr Symons confirmed that he saw the applicant on 21 May and 30 July 2019. It was not necessary to book the applicant off from work as she was not acutely sick.
10. Dr Symons confirmed that his responsibility is to the patient and it would be unethical for him to approach the patient's employer. The applicant's blood pressure was initially 172/90, which is extraordinarily high for a young woman of 33 years old. Dr Symons advised the applicant that she needs to explore the option with her employer to reduce her working hours. The applicant did not inform Dr Symons whether she tried to explore this in the past? He is aware of the fact that the applicant was hospitalized before she consulted with him, she was admitted to the casualty unit at the Cape Town Medi-Clinic, due to an asthma attack.

The following ensued from re-examination:

11. Dr Symons confirmed that if the applicant could prove that these hours were worked, it could have a detrimental effect the applicant's health.
12. **GENEVIEVE OLIVIER testified in support of her own case (hereinafter referred to as the "applicant")**
13. The applicant resigned from Tygerberg Hospital on 26 August 2019 as evidenced on page 24 of bundle A. The applicant testified that she resigned, due to excessive

overtime which she was required to work by my employer. It resulted in hypertension.

14. The applicant followed the grievance procedure on 17 July 2019, but the applicant did not receive an outcome from the respondent. The applicant's grievance can be found on pages 16 to 21 of bundle B.
15. It was put to the applicant that Dr Maart, the investigating officer concluded that she did not work the hours that the applicant claimed to have worked. (pages 27 to 29 of bundle A). Dr Maart concluded on page 29 of bundle A: *"Dr Olivier did not work excessive COT hours as alleged in her grievance."*
16. Reference was made to the applicant's work rosters on pages 48 to 75 of the bundle A. Overtime calls start at 4pm until 10pm (onsite) and there after the applicant had to be available telephonically until 8am the following morning, due to safety. The following day will be a normal working day. Therefore the applicant had to be available for 16 hours continuously. One is also required to go in if you are called, whilst on standby.
17. The applicant was required to work 24 hours overtime on a Saturday or Sunday. One doctor will be responsible for approximately 30 patients, without any time off the following day.
18. According to the applicant she worked 124 hours during February 2018, which amounts to 44 hours over contract and they only get paid for a maximum of 64 hours per month overtime. During March 2018 the applicant worked 132 hours, being 32 hours above contract. The applicant worked 72 hours overtime, during April 2018, whilst she was working at Khayelitsha, she also took 5 working days leave and that is the only reason why she did not work over and above her contract hours.
19. The applicant returned to Tygerberg Hospital, during May 2018 (page 56 of bundle A). The applicant worked from 16:00 until 8 am the following day, a total of 16

hours, whereafter she went home and had to be available telephonically the following day.

20. Weekend calls also entailed 24 hours' shifts, with no time off. The applicant worked 128 hours, during May 2018, being 48 hours over contract. During June 2018, the applicant worked 96 hours, being 16 hours over contract and during July 2018, the applicant worked 128 hours, being 48 hours above contract, despite taking 5 working days leave. The applicant testified that she worked on a shift system, during August 2018, therefore it is difficult to calculate the hours.
21. The applicant was also required to work in addition to haematology, in the emergency unit. The applicant is of the opinion that doctors should not be punished with overtime, for taking leave, as leave is a contractual right. The applicant rotated in the cardiology unit, during June 2018, which is the most demanding rotation as they were short staffed. The shifts are 32 hours in duration, calls are extremely busy, one does not sleep at all. Time spend onsite amount to 32-33 hours, then one still needs to drive home, putting other people in danger and the following days are normal working days. The applicant referred to page 74 and confirmed that between 5 and 16 July 2018 she worked four 32 hour shifts in a 11-day period, being 142 hours in 11 days. The applicant worked 102 hours in the week of 5 to 12 July 2018, being 46 hours over contract.
22. The applicant testified that in terms of her contract she is only allowed to work 52 hours per week. The applicant took 7 working days leave from 18 – 27 July 2018, being 82 hours worked for the month, only 6 hours above contract. On page 52 of bundle A it is confirmed that the applicant worked 499 hours overtime over and above contract (page 52 – not paid for).
23. In terms of the commuted overtime contract, one is entitled to be paid when you are on annual leave. In terms of the commuted overtime contract, the applicant is required to work between 13 to 20 hours overtime, but not less than 16 hours per week when one is part of group 3. The applicant testified, that although she was required to sign for group 3, but she worked according to group 4. Group 4 makes

provision for not more 32 hours overtime per week, one is entitled to remuneration for every hour worked above 20 hours per week, but only under exceptional circumstances.

24. The applicant testified that the respondent required of her to work much longer hours, without explanation of exceptional circumstances.
25. The applicant testified that the long working hours had a negative impact on her health. The applicant referred to page 76- 78 and page 101, being the report of Dr Christine Tomchick, the applicant's psychiatrist, in terms of which it is stated that the applicant suffered from depression and anxiety. It was also mentioned that the applicant reported that "*she is feeling under considerable pressure at work due to understaffing and excessive working hours.*"
26. Reference was made to page 77, being a letter from Dr Symons:

"To whom it may concern

Dr Genevieve Olivier DoB 20 Jun 1876

1. Asthma J45.9

- *Atopic asthma with good control on ICS / LABA / LTRA combination, good compliance and insight*

2. HPT I10

- *Good control on ARB, minimal clinical target organ damage*

Thank you for reviewing the above patient well known to us here at UCT Private Academic Hospital first seen on the 21st of May 2019; Dr Olivier has the medical problems as outlined above and had attained reasonable control of her disease with good compliance. There is no doubt occupational stress and sleep deprivation will aggravate these underlying conditions and thereby negatively impact her health and quality of life. Your understanding in this matter is greatly appreciated.

Thank you once again for your time and consideration; please do not hesitate in contacting us if any queries.”

27. Reference was made to page 78 of bundle A, being a letter from the applicant’s Clinical Psychologist, Ilse Jordaan, dated 8 October 2019, where the following was stated:

“The demanding nature of her occupation as a medical doctor at this hospital (e.g., working long hours with no sleep, far in excess of contractual stipulations) resulted in this patient suffering severe burnout and major depression, which became very evident at the beginning of 2018.

Recently, Dr Olivier’s working circumstances have become so unbearable that she had no other choice but to resign from her position. Should she have continued in this way, she would certainly have suffered a severe deterioration in mental health, possibly posing a risk to her own life as well as to the lives of her patients.

In summary, it is my professional opinion that Dr Olivier had no other option than to leave her working environment and to seek employment and continuation of her postgraduate studies in Internal Medicine elsewhere.”

28. Reference was made to page 101 of bundle A, which is a confirmation that the applicant was admitted to Cape Town Medi Clinic by Dr Megan Borkum, on 14 April 2019 for asthma and it is stated that her symptoms were aggravated by stress, poor sleep and a chronically demanding work environment. The applicant was also diagnosed with hypertension and high blood pressure. She had a similar episode on 23 February 2019 and was treated as a local ER.
29. The applicant confirmed that she met with Dr Maart, the investigating officer on 14 August 2019. The applicant testified that although she included her health issues in her grievance, Dr Maart failed to make any enquiries into her health. According to the applicant there was no possible solution to her grievance. Dr Maart only

mentioned that her hours were excessive in 2019, although he did not entertain it in his outcome. The applicant worked 124 hours overtime in August 2019.

30. The applicant testified that it became clear to her that the respondent will not improve the working conditions and that they would not rectify the situation.
31. The applicant was challenged on a possible resolution proposed by her, she responded that there was a clear shortage, particularly a shortage of registrars at Tygerberg.
32. Dr Maart recommended that onsite hours in Haematology should be recorded, as they don't keep a record of onsite hours. Although the applicant was allowed to be offsite, one spend most hours onsite, because the patients in Haematology are very ill.
33. The applicant confirmed that she had been able to secure alternative employment, since her resignation, in East-London since February 2020. The applicant was unemployed since August 2019, it is an unpaid post.
34. Reference was made to page 102, being a letter from Professor Raubenheimer at UCT, confirming that the applicant could not be considered for a Registrar post, due to her constructive dismissal case being unresolved.
35. The only resolution for the applicant, was to take an unpaid post in order to complete her registrar time, as it is very difficult to get appointed to a paid registrar post.
36. The applicant testified that she gave up the paid post, because her working conditions were so unbearable. The applicant confirmed that at the time of her resignation, she was aware that it can be difficult to secure alternative employment. She had only completed 29 months at the time when she resigned from Tygerberg Hospital, whilst she is required to complete four (4) years in order to qualify. The applicant testified that her conditions of employment were unbearable and that there was no other alternative to resignation.

37. Reference was made to page 79, being a transcription of a conversation between Professor Moosa (Head of Internal Medicine at the University of Stellenbosch) and the applicant. Professor Moosa was aware that the applicant was recording him, as the applicant informed Professor Moosa at the beginning of the meeting that she was going to record him and he agreed. The meeting took place after the applicant had already resigned, he did not attempt to meet with her any time, before she resigned. The meeting took place on 28 August 2019, whilst the applicant resigned on 26 August 2019.
38. The applicant testified that she discussed the excessive overtime hours with Professor Moosa in October 2018, as she suffered from burn- out. The applicant wanted to take a sabbatical, but Professor Moosa refused to grant her request. Reference was made to page 88 of bundle A and more particularly paragraphs 14 to 19 thereof.
39. Page 89, paragraph 12, Professor Moosa said:
- “I can’t deny the fact that it may have that impact on your health and I .. the rotation if a tight one and yes it may well be I think perhaps in your best interest in terms of health than to..to follow the routes that..that..that you..that you had decided on. So, anyway.”*
40. The applicant informed Professor Moosa from paragraph 18 onwards on page 92 of bundle A, that there are staff shortages in the Cardiology block, as well as other departments, causing registrars to work as much as 184 hours overtime, even if they were doing calls from home, due to the very ill patients in Haematology.
41. Professor Moosa he admitted in paragraphs 6 to 12 on page 93 that: *“all the registrars are working overtime, we are not as if we’re deliberately trying to penalise or to do something to the registrars. We have a service that we need to provide.”*

42. According to the applicant other registrars are suffering from similar conditions, but they refused to testify out of fear for victimization. The applicant confirmed that she would not have resigned had the respondent rectified her working hours.

The following ensued from cross-examination:

43. According to the applicant, the excessive overtime started in 2017, although she only complained about this to Professor Moosa in a meeting between them in October 2018, as she wanted to take time off.
44. The applicant conceded that she is aware of the grievance procedure and that the grievance must be reported within 90 days of the act/omission.
45. It was put to the applicant that when she complained during February 2018 to October 2018, it was already more than 90 days and she only lodged a grievance in July 2019. The applicant responded that she went to see Professor Moosa in October 2018 to try and mediate the matter as she could no longer tolerate the working hours. She tried ways to sort out the problems.
46. The applicant lodged a grievance on 17 July 2019, but the department stated that they only received it on 18 July 2019. Professor Anton de Belle was her direct supervisor at the time at Oncology, whilst Dr Schreuder was her direct supervisor, he signs their performance appraisals.
47. Reference was made to page 24 of bundle B, from which it is clear that Doctor Schreuder only became aware of the applicant's health issues on 16 July 2019. The applicant conceded that her conditions only developed at this time. The applicant conceded that this was the first time that she brought her health issues under Doctor Schreuder, her direct supervisor's attention. The applicant confirmed that she worked excessive hours during the months of April, May June and July 2019, when she was working at cardiology.

48. Reference was made to page 77 of bundle B, being the duty roster in ICU. The applicant confirmed that she was on call on four calls in April 2019. On the 20th of April 2019 she worked a 24-hour shift and was on call as well. She took 5 days leave in April 2019. According to the overtime contract which is signed, she has to work 16 hours per week, with a maximum of 80 hours per month. A call is usually 16 hours and if one is scheduled, you have to work 16 hours overtime per week.
49. It was put to the applicant that during April 2019, she only worked 72 hours, which was not in excess of the contract and that this was the period which was investigated by Doctor Maart. The applicant responded that she worked 108 hours overtime in May and 126 in June. Even if she was onsite or offsite, one has to be available for the full 16 hours.
50. Reference was made to page 53 of bundle B, more specifically paragraph 2.3 thereof, where the following is stated:
- “Notwithstanding the afore-mentioned, of the medical practitioner is off-site and is rostered for 2nd on call, 30% of the time spent at home (**off-site**) will be classified as actual commuted overtime hours. The same principle will apply to individuals who are scheduled to be on 1st call (**off-site**).”*
51. The applicant responded that this applies to someone being second on call, while she was first on call and one still need to work your 40 hours per week, which is 160 hours per month. Normal working hours are from 8am to 4pm. These working hours are not clocked. The registers show the overtime worked, as per page 77 for the period of April, May, June and July. It was put to the applicant that those four months were investigated by Doctor Maart and he found that the overtime was not in excess to contract.
52. It was put to the applicant that with reference to page 79 of bundle B, in terms of the roster for May, there was no prove of the extra hours. The applicant responded that she did not include May 2019, because it was a shift system.

53. The applicant testified that the overtime over a time period had an ongoing effect on her health and that is why she decided to speak to Professor Moosa during October 2018. The applicant testified that she spoke to Professor Moosa about her working hours before health earlier. She went to see Doctor Schreuder and told him about the problems she is experiencing. He advised her to speak to Professor Moosa, as he is the head of department. Doctor Schreuder also advised her to speak to Professor Moosa about a sabbatical.
54. It was put to the applicant that Doctor Schreuder will testify that he explained to her how to go about applying for a sabbatical. The applicant testified that she informed Doctor Schreuder that she is working excessive overtime and that she is not coping, as a result of which Doctor Schreuder referred her to Professor Moosa.
55. Reference was made to paragraph 15 on page 80 of bundle A. The applicant was challenged on whether Professor Moosa asked her whether there was any way in which the hospital could assist her. The applicant conceded to this and said that she testified that nobody contacted her after she lodged the grievance. It was put to the applicant that Professor Moosa will testify that he asked her whether there was anything from her side that he could do to help her to change her mind. The applicant conceded that Professor Moosa was prepared to assist her. It was put to the applicant that with reference to the conversation on top of page 81 of bundle A, where the applicant said that neither Doctor Schreuder or Professor Moosa contacted her is not correct, as Doctor Schreuder contacted her on the 16th of July 2019 via e-mail, which is an acknowledgement of receipt.
56. It was put to the applicant that the grievance procedure is a formal process. She conceded that she met with Doctor Maart on 14 August 2019. She conceded that Doctor Mart asked her for an extension to complete the investigation on the 5th of August 2019, as per page 29 of bundle B. The applicant conceded that she indicated in her report that she wanted the outcome of the grievance on the 18th of August 2019. She did not consider granting the respondent's request for extension to deal with the grievance, as it was clear that it had to be dealt with within 30 days. The applicant confirmed that she resigned before the grievance was specifically

dealt with. The outcome of the grievance is evidenced on pages 31 to 34 of bundle B, dated 29 August 2019, but according to the applicant, she only received it on the 2nd of September 2019.

57. It was put to the applicant that as per page 35 of bundle B, she received the response on 30 August 2019 after she resigned. According to the applicant, Doctor Maart did not tell her why he wanted an extension to deal with the grievance. It was put to the applicant that Doctor Mart informed her that he was the third investigating officer appointed. The first was Doctor Marinus, the second was Doctor Mystery, whereafter Doctor Maart was appointed. The applicant stated that she was not aware of this.
58. It was put to the applicant that the respondent was not aware of any excessive overtime since February 2018 until April 2019. The applicant disagreed with this, because the respondent has all her rosters since she started working for the respondent. It was put to the applicant that she did not bring it under the attention of her employer that she worked excessive overtime from February 2018 until April 2019. According to the applicant she went to speak to Professor Moosa about it. It was put to the applicant that apart from the period from 15 to 19 April 2018 and 23 to 26 February 2019 she did not take sick leave any other time, therefore the respondent was not aware of her health conditions, as she never submitted any documentation to inform the respondent of her medical condition. The applicant responded that she is of the opinion that it is personal and confidential. It was put to the applicant that her claim is directly connected to her health conditions. The applicant conceded that this was included in her grievance.
59. It was put to the applicant that the respondent became aware of her health condition for the first time during July 2019 and that she had a discussion with Doctor Mistry as per page 22 of bundle B in her office, to which she conceded, although she cannot remember the date. It was put to the applicant that Doctor Mistry asked her how she could assist her soon after she lodged a grievance, to which she conceded.

60. It was put to the applicant that her discussion with Professor Moosa during October 2018 was more about asking for time off and not so much about her health condition, as she informed Professor Moosa that her health condition was under control, therefore he had no reason to ask any further questions. The applicant replied that was the reason why she asked for time off.
61. It was put to the applicant that she did not work excessive overtime during April to July 2018, which she denied, as the registers state the opposite. The applicant confirmed that she worked excessive overtime hours during June 2018, as well as July 2018 as per page 81 of the bundle. It was put to the applicant that Doctor Schreuder will testify that the ward rounds are not compulsory, with which she disagreed, as patients have to be handed over to the next shift.

The following ensued from re-examination:

62. The applicant stated that she first tried to speak to Professor Moosa before she decided to lodge a grievance, as the grievance is just one step in constructive dismissal. The lodging of the grievance was not an easy decision to make, as she feared victimization. She went to Professor Moosa to tell him that she was struggling with working hours, therefore she had to ask for time off. After the initial e-mail from Doctor Schreuder where he told her that he was sorry to hear about her health condition, she did not receive any follow-up from Professor Moosa. Doctor Schreuder is the head of clinical medicine and Professor Moosa is the overall head, the final decision lies with him.
63. The applicant conceded that Professor Moosa was trying to assist her, when he met with her after she lodged a grievance. Reference was made to page 86 of bundle A, more specifically paragraph 20 thereof: "*I'm not gonna go into the details of it.*" According to the applicant, this is not confirmation of Professor Moosa trying to assist her.
64. The investigating officer who was appointed could not deal with the matter, as it fell outside the scope of his appointment.

65. The applicant was questioned as to why she was in such a hurry to resign before receipt of the outcome of her grievance. The applicant responded that it was clear that there was not going to be an acceptable resolution and she was at breaking point and when she met with Doctor Maart it did not look like a resolution would be reached. She did not agree to an extension, as the outcome had to be provided within 30 days, which the respondent failed to do. It is the respondent's responsibility to investigate the grievance within 30 days, not that of the applicant. Dr Maart's outcome to the grievance is evidenced on page 27 of bundle A: "*The report is a culmination of telephonic, face- to face and electronic engagements...*" Recommendations would have been made by Doctor Mistry if she tried to help the applicant.
66. With regards to sick leave, the applicant did not easily take sick leave, as it is frowned upon, only when it was absolutely necessary, such as when she was admitted to hospital. It is not her case that she was incapacitated. Excessive hours were worked in Cardiology. There were staff shortages as per paragraph 17 on page 92. There was a problem in cardiology as the remaining doctors had to cover for the shortage. Professor Moosa informed her that it is not a question of staff shortage, he had a service to cover. The applicant responded that Professor Moosa is aware that they are penalizing the registrars, but there is no other way of dealing with it. Doctor Maart ignored the overtime hours in August 2019, whilst he was aware of the issue. She did not think a solution was possible from what the respondent told her. She referred to page 94, more specifically paragraph 12.
67. The applicant conceded that the department of health has an obligation to the general public to provide medical services. They did not fully comply with the responsibility towards her as employee. Reference was made to page 55 of bundle B, being a circular. According to the applicant, she was never made aware of this circular. The circular H12/2013: "*To all Heads of Divisions / Chief Directorates / Directorates / Regional / District Offices and Institutions: Monthly verification of commuted overtime*" in terms of which it is confirmed that the duty rosters must be submitted each month to the HR component for all medical staff at the time.

68. Reference was made to Annexure A on page 56 of bundle A, being the Monitoring of overtime Roster. According to the applicant, she has never seen this document before. Therefore the respondent has no control over her working hours.

The respondent's case

69. There was no constructive dismissal, the applicant resigned. Regarding her working conditions: although overtime was worked, she was in the same boat as all other registrars. She was in a teaching position, where she studied towards becoming a specialist. She was in the same position as all the other registrars. She did not bring her health conditions under the respondent's attention.
70. The applicant only took 6 days sick leave in February – 2 days and 4 days in April 2019 and for asthma. There was no reports to the respondent that overtime was the cause of the illnesses. When it first surfaced in August 2019 that she was going to resign, she had a meeting with Dr Mistry where Doctor Mistry asked her whether there is something that can be done for her. She also had a meeting with Professor Moosa, where he asked her whether anything else can be done to keep her in service. Nothing was done, because she did not bring it under the attention of the respondent, that the overtime was a problem. There was no complaint that one of her supervisors ill-treated her. There is no dismissal, just a resignation
71. **PROFESSOR AMAD RAFIEK MOOSA testified on behalf of the respondent (herein after referred to as “Professor Moosa”)**
72. Professor Moosa confirmed that the applicant was employed as a medical registrar from April 2017 until her date of resignation. The applicant requested a meeting with him on 23 October 2018 to discuss various issues, they talked in general about her time in the department. She was working at Karl Bremer Hospital at the time. Professor Moosa confirmed that the Registrar program is quite intense, one of the more challenging programs in the medical school. They are required to rotate in each sub-specialty and are assessed after each rotation. They get feedback from

supervisors and a variety of things are reviewed, such as how well they manage in the wards and how they get on with staff members and other students. The Registrars spend 3 months in sub-specialties and there is a requirement to work overtime. The Registrars spend 4 to 5 calls per month, depending on how busy each unit is and the size of the unit. It also depends on the requirements of each unit. There are about 9 specialities through which they have to rotate.

73. The applicant's performance was assessed. She did very well, looking at her scores which were 6/7/8/9's. Her general knowledge was very good and her clinical skills very high. She did very well in the scores, performing very well under stress, certainly not someone who came to their attention as someone not doing well in the rotation.
74. Professor Moosa testified that the first time that he heard from the applicant, was during their meeting in October 2018. Her complaints were about the area in which she was working in at Karl Bremer, she also spoke about her medical problems, of which she informed him, she sought professional medical advice. The applicant sought 3 weeks leave. She demanded the leave, because she wanted to go overseas or something in that respect. He cannot however remember the exact details. Professor Moosa confirmed that overtime is part of the applicant's training and that there is no other alternative. She could take unpaid leave if she wanted to sort things out. As far as he can remember there were no other issues. The students were very complimentary of the applicant.
75. The applicant eventually came back to Professor Moosa and she was adamant about the leave. In general, the respondent was happy with the applicant's academic performance and her care of the patients. In the meeting of October 2018, she gave a reason why she wanted the overtime changed, she said she was unwell and she sought medical advice. She did not submit any medical evidence to Professor Moosa at the time.

76. Professor Moosa testified that he runs a huge department with about 70 registrars. They do have staff who fall ill from time to time in which case they advise them to take time off. They look after their staff. He never heard from the applicant again after their one on one meeting in October 2018. There was nothing in her academic performance indicating that there was a problem.
77. Professor Moosa confirmed that he had another one on one meeting with the applicant after her resignation, her grievance only came to his attention afterwards. Doctor Mistry was aware of the grievance and she informed Professor Moosa that the applicant approached her about the grievance, but the applicant refused to engage with Doctor Mistry. Professor Moosa confirmed that he was very disappointed that it had come to this, because if he had known that she was struggling, he probably would have intervened. She did not complain about the issues before, about working too many overtime hours.
78. The Registrar committee distanced themselves from the whole process, when he went to speak to them, that was the final discussion, he hoped that he could convince her to stay, as she would have made a good physician.
79. Reference was made to paragraph 15 on page 80, which is a transcription of the recording. In paragraph 15 Professor Moosa said: *“Okay. Alright. So is there anything that, that I can do from my side that will help...that may get you to change your mind?”* This was after she resigned. Professor Moosa confirmed that he was caught unawares by all of this, as the applicant was a pretty good registrar from his point of view. If he knew there was a problem, he would have gone out of his way to assist her, but it was clear that she already made up her mind. Professor Moosa tried to persuade her before she signed the letter of resignation, but when he got to his office, he noticed that she already signed the letter of resignation. He was disappointed about the way things worked out.
80. Reference was made to page 81. If she had alerted him to the fact that there were issues, he certainly would have done something about it. He would have appointed other people, such as Doctor Schreuder to take up the issues. Professor Moosa

also confirmed that he would have taken the applicant back at the department, as he was hoping to convince her to stay in the department.

81. Professor Moosa confirmed that if the applicant came to him, he would gladly have assisted her, as he had done with other registrars. The medical rotation is extremely strenuous, therefore the department accommodates the registrars. There were all kinds of avenues available that she could have tapped into if she wanted to.
82. Reference was made to paragraph 4 on page 83, where the following is stated by Professor Moosa: “needs to be accommodated I think that wherever possible we do try and accommodate people as much as possible as we can.” The registrars are given time off for sick leave. They hand in a medical report and the applicant never presented any reports to the respondent at any stage. Had she done so, the respondent would most certainly have considered it.
83. Reference was made to paragraph 5 at the bottom of page 84. The applicant indicated that she did not feel that the excessive overtime was discussed. Professor Moosa confirmed that he approached Doctor Titus, the chairperson of the registrar committee and he specifically asked him whether they thought the overtime was excessive. Doctor Titus confirmed that the registrar committee was approached by the applicant to take up the matter with Professor Moosa on her behalf. They however did not feel that overtime was excessive and they therefore declined to get involved. Professor Moosa confirmed that the applicant flatly refused to engage with Doctor Mistry about the grievance investigation. He then learnt that the grievance had been lodged, at which stage it would be inappropriate for him to engage. He knew that he had to get involved at some stage, but it was beyond his control and the process had to be followed.
84. Reference was made to paragraph 10 on page 89, where the applicant stated: “*And it..it’s actually come to a point that it’s unbearable*”. Professor Moosa responded in paragraph 12: “*Okay. Alright. No, look, I can’t deny the fact that it may have that impact on your health and I.. the rotation is a tight one and yes it may well be I think*

perhaps in your best interest in terms of your health than to..to follow the routes that..that..that you had decided on. So, anyway.”

85. Professor Moosa stated that for the applicant to blame her asthma and hypertension on the overtime is strange, as she never supplied Professor Moosa or the respondent with a medical report that she was unwell, he would certainly have accommodated her, if he had known. He cannot help the applicant if he did not know that she needed help.
86. It was put to Professor Moosa that the applicant made the allegation that she was not working according to the legal contractual hours that she was supposed to and she solely blames the department for scheduling her for this amount of hours. Professor Moosa confirmed that Doctor Schreuder and Doctor Maart counted the hours and found that the applicant was within the limits of overtime commitments. As Doctors they are required to work a lot harder than what they should, but if the applicant had come to him and told him that she was not managing, they could have given her an easier or lighter rotation, but at the end of the day, she would have had to do the more strenuous rotation as well.
87. Professor Moosa testified that most other calls are done from home and often registrars are not required to come in. They have to come in if they are on call for surgery and in the applicant’s particular case, he probably would have negotiated with the person responsible for drawing up the roster and try to accommodate her as far as possible. It was put to Professor Moosa that the applicant alleged that in cardiology, she was on duty for 36 hours at once. Professor Moosa confirmed that this could happen from time to time, such as when a registrar is off sick and the applicant was asked to cover for that person. If you average it out over weeks, it falls within the limits. The amount of calls per months changes. If the applicant fell ill, Professor Moosa would have to call out someone else to stand in for her. If she did work such a long shift it would be unusual circumstances.
88. Reference was made to paragraph 15 on page 93 of bundle A. Professor Moosa stated that they did not have enough registrars throughout the country. The

province has a limited budget, they could do with more registrars. They have appointed registrars funded from sources outside of the department, to make the calls lighter. They have appointed approximately 11 extra registrars over and above the 50 appointed registrars (from outside the country in Africa). The applicant would have worked even harder than what she had, had it not been for these appointed registrars. They are making a huge contribution to patients and staff.

89. Reference was made to pages 96 and 97 of bundle B. The applicant stated that the facts in this issues are about working illegal hours and the fact that her health and well-being, to which Professor Moosa responded in paragraph 3: “ *Ja but I mean you consider it illegal. I’m not quite sure what numbers it is that you actually are using. I am not quite sure about the legality*”, to which the applicant responded in paragraph 6 “*Any overtime above 80 hours is illegal according to my contract, because I’ve signed a signed contract to work 15 to 16 ..16 to to 20 hours per week*”, to which Professor Moosa responded “*ja, no I understand, so should I give if we limit the number of people to exactly those hours.*” Then in paragraph 14 Professor Moosa stated “*and I don’t have more staff because I am not going to get any more staff how do you think were gonna what is going to happen to the patient care.*” The applicant conceded that there are also supernumeraries, to which Professor Mossa responded “*yes we will work on we have a pipline of supernumeraries that we have. The point really is that (you know) I think every Department in this county needs more doctors. I thin everybody.. I mean here, around the country. Surgery has gone ... The chances of us getting it are actually very small.*” The applicant: “*And I also understand that the Western Cape is especially, I think the patient population has increased drastically over the past year but the staff hasn’t.*”

90. It was put to Professor Moosa that the applicant is of the view that Professor Moosa did not really want to assist her during the meeting she had with him. Professor Moosa responded that the applicant told him that she sought the relevant medical advice. The second issue raised was the working issues at Karl Bremer Hospital, which he discussed with Doctor Schreuder. He could not help her professionally, because she told him that she had sought medical assistance. She asked him

about overtime and he told her that overtime was an obligation for which she signed up. The other issue was the leave.

91. Professor Moosa did not think the medical issue she alluded to, for which she was getting treatment was a problem, unless she provided him with a medical certificate, so he could assist her, which she did not do. There was nothing in the applicant's academic performance that was of any concern to him. Neither her sick leave or her academic performance indicated anything of concern.

The following ensued from cross-examination:

92. Professor Moosa confirmed the following under cross-examination. It was put to Professor Moosa that the applicant is not claiming that she was incapacitated, but that the excessive overtime hours worked led to health issues. The applicant was divided into group 3 in terms of which she should not be working more than of 20 hours overtime per week. It was put to Professor Moosa that although the applicant was divided into group 3, she should participate in category 4, as per page 45 of bundle A, as she worked more than 20 hours overtime per week.
93. Professor Moosa conceded that although the registrars are sometimes required to work more than 20 hours overtime in one week, in certain weeks they may work more than 20 hours, but other weeks less than 20 hours. In some weeks one may not be required to work overtime at all. The registrars have to provide medical service with demands, which makes them flexible. It was put to Professor Moosa that the applicant avers that she worked 80 hours overtime in one month, as set out in her grievance on page 18 of bundle A. Reference was made to page 47 of bundle A, in which it is stated that a commuted overtime contract signed by both parties, is only valid and binding between an employer and employee.
94. Professor Moosa conceded that other medical personnel also participated in commuted overtime. The Registrar program is intense and challenging with regards to academic commitments, ward rounds and Masters in medical dissertations that they are required to do. He did not refer to overtime when he

referred to “challenges”, he was referring more to the academic challenges. He is not aware of how Doctor Maart calculated the hours. All he knows is that Doctor Maart found that the applicant was within her number of hours until proven otherwise. Calls from home counts differently from when you are doing it on site. It could have been because Doctor Maart was not sure how many hours the applicant spent on or off-site, that may have influenced the counting of the hours by Doctor Maart.

95. It was put to Professor Moosa that Doctor Maart could not calculate these hours on and offsite- because there was no system in place at Tygerberg to determine these hours. Professor Moosa responded that Doctors are expected to work overtime as part of their responsibility. If the applicant is not happy with the hours she works, she qualified as a physician, she will have to be on call every day. It was put to Professor Moosa that Doctor Maart could not determine the actual hours. Professor Moosa conceded that one could be expected to spend a lot of time at the hospital when working for haematology.
96. Reference was made to page 58 of bundle B, being a People Management Tool Kit for the Western Cape Government. Professor Moosa conceded that the applicant fell within this document. Point 1 on page 59: ATTENDANCE REGISTERS: Bullet 2: *“Line managers must ensure that there is an attendance register in place which contains the name of each employee in the section(s) together with the PERSAL number and rank.”* Although it should have been done, he cannot say for sure whether it was indeed done. Professor Moosa confirmed that although there is no actual attendance register by the line manager, that if the applicant say that she worked there hours, she would have to prove these hours, where after it would be accepted.
97. Professor Moosa conceded that if a registrar is off sick it is possible for a registrar to work these long shifts over a period of four months as averred by the applicant. Professor Moosa confirmed that he spoke to Doctor Gideon Titus and he decided to distance himself from these claims by applicant. Professor Moosa confirmed that Cardiology is popular, as there is a lot of work and the registrars gets good

teaching in Cardiology. They have to do more calls and longer hours than other departments where the calls and hours are shorter and lessor demands on the registrars. However, registrars enjoy working in Cardiology, although it is hard work, they benefit immensely from the teaching there.

98. Professor Moosa also confirmed that the commuted overtime contract is a binding agreement. He discussed the contractual hours with the applicant. Professor Moosa denied that he admitted to the applicant that the registrars were working above the contracted hours. He was merely putting it to her that they are not office workers and that they are sticking to what is required to do. Professor Moosa conceded that in general they are probably working more than what they should. It is a reflection of commitment to the profession that they have chosen. It is therefore reasonable to work longer than 80 hours per month, but one must look at the whole program and average it out over a long period of time. They have a commitment to look after the population and have to do more than what is asked of them from time to time. Commitments are there to look after all employees. It is not unreasonable to expect a registrar to do 4 to 6 calls per month. Registrars willingly work long hours, because of their dedication. If the applicant indicated to him that she needed a break, they would have assisted her.
99. Professor Moosa conceded that long hours could have an impact on all health care workers and the same could have applied to the applicant, although an employee is expected to work more than those hours. It is not necessarily a breach of contract, as one has to look at it over a period of time, then one will find that they work within a contractual period.
100. Professor Moosa also conceded that Doctor Maart looked at the applicant's commuted overtime over a particular period. She worked within the contractual hours for the period he looked at. Professor Moosa conceded that he testified that the applicant could have been moved to another rotation in order to assist her, but a requirement of the training programme entailed that you have to go back to this rotation at some stage.

101. Professor Moosa conceded that they have made allowances for registrars in the past who were not coping. In all his time, no registrar has ever complained to him. Professor Moosa conceded they did not think that the applicant worked excessive overtime. They would have done what they could if she came to them and complained. If they reduce the workload of one individual, it puts more pressure on the system on other registrars. The applicant did not complain about her overtime. In October 2018 she told him that the overtime had a negative affect on her, but she sought medical assistance and he was satisfied and there was no cause for complaint, as her academic performance was good and no alarm bells were ringing at the time
102. It was put to Professor Moosa that Doctor Maart was well aware of the overtime worked before the grievance, but he stated that it did not fall in the period of the grievance. Therefore, management was well aware of the problem, but management did not do anything about it. Professor Moosa responded that he could not speak on behalf of Doctor Maart. Many of the other doctors do the exact same, but they do not complain. They do what they have to do, to the job done. They have to look after patients, because they are doctors and do not count the exact amount of hours or demand to get paid. (The applicant did not demand to get paid for the extra hours.)
103. Professor Moosa testified that although he cannot be sure that people necessarily worked 32 hours above contract, he can however confirm that a lot of workers are working longer hours than required. Professor Moosa confirmed that the applicant asked for a sabbatical or whether he overtime can be reduced, to which he responded that it is not possible, as everybody who signs up in the department had to work overtime. He informed the applicant that it is not possible, as it is a requirement. He was aware that the applicant was facing health issues in 2018, but she informed him that she had sought medical assistance. He informed the applicant that he would discuss it with Doctor Schreuder, her line manager. There were no further issues after the applicant informed Professor Moosa in 2018 of her health issues, as she sought medical attention. Yet it was proposed in 2019 on the same facts, as the applicant informed him in 2019 that she was not coping. Other

issues that came up were the environment in which she was working under in Karl Bremer. He was not trying to cover for anyone, as losing a registrar of the calibre of the applicant, was not pleasant and he was trying to do whatever he could to assist her. Had the applicant approached him earlier, he would have assisted her. It was out of compassion and concern that he reached out to her after he heard that she wanted to resign.

104. He also stated that things do change and they are extremely sensitive about their registrars' well-being and had she come to him earlier, he would have taken her concerns seriously. Professor Moosa confirmed that he met with the applicant on the day of resignation. He heard that she was planning to resign and he hoped that he could convince her to reconsider. Professor Moosa confirmed that he was not involved in the grievance process at all, therefore he cannot comment if any enquiries were made by Doctor Maart. He however confirmed that the applicant did not file any medical reports. Health issues are personal and confidential therefore it was up to the applicant to disclose her health issues. Professor Moosa is not in a position to comment on the grievance, as he was not involved, but he can however confirm that Doctor Mistry told him that she reached out to the applicant who was not interested in having discussions with Doctor Mistry.

105. There were no problems with the applicant as she was a good worker and well-liked by her colleagues and students. Professor Moosa conceded that the applicant's decision to resign must have been a serious one as she left her employment in August 2019 and was only re-employed in February 2020 and she is currently not earning a salary. Professor Moosa stated that he is not aware of any other motive why the applicant would have resigned. It was put to Professor Moosa that the applicant had no alternative but to resign, as the department made the working conditions with the excessive overtime hours intolerable for the applicant. Professor Moosa responded that if one signs up at Tygerberg, it is tough, hours are long, but as a department they work well together. He had spoken to other registrars since the applicant's resignation, and they did not feel they had concerns of such serious nature. Professor Moosa confirmed the contents of paragraph 3.5 on page 38 of bundle A, where the following is stated:

“The employer undertakes to be responsible to attend to the health and safety of the employee as prescribed in the Occupational Health and Safety Act, 93 (85 of 1993).”

The following ensued from re-examination:

106. Professor Moosa confirmed that he asked the applicant about the time she spend in cardiology. He could see that she got 4 calls for the month, as per pages 73 for the month of June 2019. He did not see any excessive overtime in ardiology, but although she did 5 sessions over a time during July 2019, which is 80 hours for the month, as per page 74 of bundle A, it is still in line with the contract. There is no indication that the applicant worked 36 hours continuously. The applicant resigned on 26 August 2019 as is clear from page 24 of bundle A.

107. **DR ROSHNI JAGJIVAN MISTRY testified on behalf of the respondent (hereinafter referred to as “Dr Mistry”)**

108. Doctor Mistry testified that she is the medical manager responsible for full time staff as well as students and those in training as far as clinical services are concerned.

109. The applicant asked her for grievance forms, at which point Doctor Mistry offered her assistance. The applicant was not prepared to disclose the contents of her grievance or discuss it with Doctor Mistry at all. She said she would put everything in writing. She made it very clear that she does not want to discuss the matter with Doctor Mistry, in spite of Doctor Mistry offering her assistance at this stage. The applicant wanted to know how she had to go about lodging a grievance as per the e-mail from the applicant to Doctor Mistry evidenced on page 22 of bundle B. She probably called the applicant to her office the following day, but the applicant was not interested in discussing the matter with Doctor Mistry at all.

110. Doctor Mistry confirmed that she was not aware of any challenges faced by the applicant, prior to receipt of the e-mail evidenced on page 22 above. Doctor Mistry confirmed that although Professor Moosa is the executive head of medicine, responsible for the academic staff of students and specializing, patient care and rostering fall within her responsibility. If there was a challenge or problem with the rostering of any staff member, they would direct it to his / her direct supervisor, but when they are working in a sub-speciality, you would raise it to the direct supervisor. Any training related issues would be addressed with Professor Moosa.

The following ensued from cross-examination:

111. Rosters are part of clinical duties and dealt with by the supervisor, it only comes to her attention if there is a problem. Doctor Schreuder had the authority to deal with issues. Doctor Schreuder was made aware of the issues, but did not have jurisdiction over an area where she was rotating at the time. She asked the applicant whether she brought it under the attention of the person with whom she was rotating and she said no, but she would address it in the grievance. Doctor Mistry could not confirm whether the applicant had already lodged the grievance at the time when she came to see her in the office. The applicant however made it very clear that the grievance had nothing to do with Doctor Mistry and that she would put it in writing. Doctor Mistry offered to assist the applicant, but she refused.

112. Doctor Mistry confirmed that she informed the applicant that she could lodge a grievance with Mr Raymond Jafta at Labour Relations and that Mr Wolfaardt is the overall manager and Jafta falls under him. Wolfaardt's office is closer and Jafta is on the 11th floor. Doctor Maart was the investigating officer at the grievance. He consulted with her about the roster, but she said she did not want to get involved, as she offered assistance to the applicant which was not taken up. She told him that the rosters were available.

113. Doctor Mistry confirmed although she was not the investigating officer, she did not get involved as she offered her help before. A grievance was lodged and it was refused, therefore she could not get involved. She could only get involved if the

applicant was prepared to talk to her before she lodged her grievance. She did not even know what the problem was as the applicant did not want to discuss with Doctor Mistry exactly what the problem was. Doctor Mistry confirmed that the applicant followed the correct procedure. She informed the respondent of her health issues in her grievance. Doctor Maart asked her about her interaction with the applicant. She did not have any details, as it was Doctor Maart's role to investigate. Doctor Mistry confirmed that it was not Professor Moosa's place to intervene, as it was the investigation officer, who is unbiased, responsibility to investigate all parties in a fair way.

114. DR NESHAAD SCHREUDER testified on behalf of the respondent (hereinafter referred to as "Dr Schreuder")

115. Doctor Schreuder testified that he is the head of general internal medicine and the recruitment of new registrars and safety of registrars are his responsibility. The applicant was one of the registrars allocated to his division and where he was leading clinical rounds. He met with the applicant long before the complaint was lodged, as she spoke about taking a sabbatical about a year before. As he was not familiar with the process, he referred the applicant to the post-graduate committee. She was working at the Khayelitsha Hospital at the time, where he was also rotating. She said she was feeling tired and he suggested she give her reasons to the post -grad committee. Doctor Schreuder confirmed that he only became aware of the applicant's health issues when she wrote to him about who the grievance officer would be.

116. Reference was made to page 15 of bundle B, being the applicant's grievance form. He confirms that it was signed on 17 July 2019. As per page 16, the applicant was rotating in another division at the time and not in his division, they are accountable to the managers in that division. Doctor Schreuder testified that he was quite taken aback by the contents of the letter evidenced on page 16 of bundle B. He acknowledged receipt of the grievance in writing. He said that he was sorry to hear about her health issues.

117. He first became aware of the applicant's health issues as per the last paragraph on page 17. On page 18 the applicant specifically stated "*Please note that a verbal response shall not be considered adequate unless fully contained in writing, thereafter and within the stipulated response time.*" The applicant was not working in his division at the time, he was not aware of her working hours at the time when he responded to her as per page 24 of bundle B: "*I have received your grievance indicated to your head of the department medicine, Professor MR Moosa. I am awaiting a reply from the HOD as to who the grievance officer who may approach with your documents. Have you approached the head of the unit that you are currently working in about your work conditions?*"
118. Doctor Schreuder confirmed that after he forwarded the grievance to the head of the department, the hospital manager contacted him to establish who the investigating officer was and he was referred to Mr Wolfaardt. Doctor Schreuder confirmed that he was happy that in general internal medicine, the applicant's hours were well within the required hours and no different to any other registrar. Doctor Schreuder confirmed that at no stage since February 2018 was he aware of the applicant's allegation about excessive working hours. He would have discussed it with the roster consultant, if he had been made aware of that and he would look at the circumstances at the time and find out how the matter is dealt with and if they are aware of the issue, taking everybody's needs into account, he would communicate with the registrar to make sure there is as much fairness as possible. He does not deal with other divisions' rosters and he was not approached specifically to deal with any roster issue of the applicant.

The following ensued from cross-examination:

119. Doctor Schreuder confirmed that he was not aware of any health issues that the applicant may have. Doctor Schreuder confirmed that the applicant approached him about a sabbatical in 2018 and he referred her to the post-grad committee. He did not advise her to go to Professor Moosa, the post-grad committee would have advised her to go to Professor Moosa. She said she was tired and wanted to go

to Ireland for a while to do locum work. She was asking for advice and part of the advise was to go to the post-grad committee. Some calls are onsite and some are from home.

120. At the time when he spoke to the applicant, she was at Khayelitsha and her calls were from home. She was not required to be onsite. Some registrars ask to swop their rotations, because of the hours they are onsite. He was asked whether she was tired due to a late-night shift or whether it was a burn out due to long hours. Doctor Schreuder testified that she did not expand, she said she was tired, but she was also thinking of going to Ireland to do some locum work. Therefore Doctor Schreuder did not think she needed time to recover, as she was talking about working abroad. Doctor Schreuder confirmed that the applicant did not inform him of her health issues, other than that she was tired. It was not mentioned to him in 2018.
121. Doctor Schreuder confirmed that the hours worked by the applicant were not excessive. Doctor Schreuder confirmed that it does happen from time to time that a registrar in group 3 can work up to 20 hours per week. As long as it averages out, one can expect if from a registrar. It used to be a monthly period, but the rule changed and it is now calculated over a 3 month period. There are times, where a registrar does not work the 16 hours.
122. During annual leave period, the registrar will still be entitled to full payment and one is not penalized for the calls you missed during annual leave. A registrar would not be required to work over 80 hours in the first 2 weeks and he is not aware that the applicant worked over and above 80 hours per week.
123. Reference was made to page 49 of bundle A where the applicant stated that in the Tygerberg Hospital, Nephrology during June 2018, she worked 96 hours which is 16 hours over contract. Doctor Schreuder responded that he would asked the question whether the calculation is correct as in Nephrology you are not expected to come in. According to HR when one is offsite it counts for 30% of working hours. He can however not comment on nephrology, as he did not draft the rosters. They

normally compensate a person in another way, if services have to be covered due to unforeseen circumstances by assisting with shorter hours on another day or a day off. He can speak on behalf of the general internal medicine unit. The other units are run by other heads. Some of the haematology, their registrars due some of their rosters in general medicine. Haematology is not onsite hours. You are not expected to sleep in the hospital when you are on call for Haematology.

124. It was put to Doctor Schreuder that in haematology the patients are usually quite sick and that they need constant medical attention. This was agreed to by Doctor Schreuder, but he stated that they have an intern on call that work across divisions. Doctor Schreuder conceded as per Professor Moosa's testimony that there is a possibility for registrars to spend a lot of time at the hospital to attend to these patients.
125. Reference was made to page 27 of bundle A, where Doctor Maart stated "*offsite until proven otherwise*". He said that because of the rule that 30% off site is seen as hours. Doctor Maart would not have been aware of which days she was on site. It was not part of the investigation. The head of that unit would know if there was a sick patient who required a registrar onsite when the applicant was on call. There were two specialists in that division.
126. Reference was made to page 27 of bundle A, where the following was stated:
- "This report is a culmination of telephonic, face- to face and electronic engagements with Dr Olivier, Prof Moosa, Prof Doubell, Dr Mistry and Dr Schreuder."*
127. The fact that he did not consult with them, is this not an indication that he did not take this grievance seriously. It was put to Doctor Schreuder that the applicant's case is that this grievance was not attended to as it should have been and that Doctor Maart failed his obligation in investigating the grievance. Doctor Schreuder responded that he does not do the roster in Cardiology. Five registrars would be operating from the platforms and sometimes 4 juniors. It used to be 5 and became

4 over time, if there weren't enough registrars to go around, there is also an emergency registrar.

128. Doctor Schreuder conceded that the applicant mentioned her health issues in her grievance. It was put to Doctor Schreuder that Doctor Maart never enquired into the applicant's health and therefore he did not comply with his obligation towards the applicant. Doctor Schreuder responded that he is not sure what Doctor Maart expected of him. The health issues are much more of a personal nature and would be dealt with by someone with whom she has a trust relationship. Doctor Schreuder confirmed that he was quite taken aback by the tone of the applicant's grievance and the ultimatums therein, as it is not conducive for someone who wants the health issues to be dealt with.

129. This grievance states all the conditions. It stated that he needs to know who the grievance officer is, so that he can report it, yet the applicant did not want to discuss it the matter and as soon as he received the grievance, he forwarded it to the management team. It was put to Doctor Schreuder that the health issues were not attended to by the employer. Although the 30 days are enough to attend to the health issues, Professor Moosa asked the applicant to come and see him. Doctor Mistry also asked her to come and see her, but she refused. Doctor Schreuder confirmed the applicant's contract of employment as per pages 36 to 44. He is comfortable that Doctor Maart investigated this grievance to the fullest possible.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

Facts in dispute:

130.1 The respondent's action made continued employment intolerable for the applicant.

1302 The applicant had no alternative remedy, other than to resign.

1303 The applicant feared for her own health, thus making continued employment intolerable.

1304 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.”

130.5 The applicant tendered her resignation and despite the request from the head of the Department Professor Moosa's request to the applicant to reconsider her decision to resign, she persisted with her decision to resign.

130.6 The respondent disputes the existence of a constructive dismissal.

130.7 The respondent asks for an award that the applicant's resignation does not amount to constructive dismissal.

130.8 The applicant's case must be dismissed.

131. The facts that are relevant to Respondent's case in their chronological order are briefly tabled as follows:

132. 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:

133. **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.....".

134. 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.
135. In the same manner the applicant had no reasonable ground to sidestep the internal grievance procedure. The applicant avers that although she lodged a grievance on 16 July 2019, nothing came of the grievance. She did not take any steps to follow up on her grievance either. The applicant did not dispute the respondent's evidence that she resigned before the respondent could deal with her grievance appropriately. The applicant confirmed that the respondent asked for an extension of the 30 (thirty) day time period, within which the respondent had to deal with the applicant's grievance, but the applicant refused this request, as she didn't believe that the investigation would lead to a favourable outcome. Therefore the respondent was not given an opportunity to complete the investigation of the applicant's grievance, prior to the applicant's resignation
136. Resignation was not the last resort. It is submitted that it was no option at all.
137. 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."
138. 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.

139. In the present matter before me, the applicant too second guessed the outcome of the grievance lodged by her, therefore there is no evidence supporting the applicant's evidence that she had no option other than to resign, as she didn't afford the respondent an opportunity to put alternative options on the table for the applicant to consider, prior to making the decision to resign.
140. 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.
141. The applicant was employed by the respondent initially since the 1st of April 2017 as a Registrar at Tygerberg Hospital in terms of a fixed term contract until 31 March 2021.
142. The applicant resigned on the 26th of August 2019, due to the alleged intolerable working conditions. The applicant earned R96 750.78 per annum per month at the time of resignation.
143. 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.

144. “Continued “intolerable” employment relationship” was described by the applicant as “excessive overtime hours worked”, yet the applicant did not bring her dissatisfaction under the respondent’s attention. Professor Moosa confirmed that the applicant requested a sabbatical or less overtime hours, during October 2018. She mentioned that she had health issues, which was appropriately addressed by an external medical practitioner. The applicant did not lodge any medical reports with the respondent outlining her medical problems and/or requesting for assistance. Professor Moosa testified that the respondent was more than satisfied with the applicant’s performance on both academic level and her interpersonal skills, as she was well liked by her fellow-students and staff. There was no reason for the respondent to suspect that the applicant was not coping, in the light of the aforesaid and also as the applicant did not take excessive sick leave at all.
145. 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.
146. According to the respondent, the applicant’s resignation was due to something that the employer is not aware of. It was not because of her work environment. It is common cause, that the applicant never complained to the respondent about her overtime hours or that it had an impact on her health, on the contrary she testified that her health issues are private and confidential. The applicant therefore made it impossible for the respondent to remedy the alleged problem, as the respondent was never made aware of the problems experienced by the applicant. The applicant attended to Dr Symons to assist her with her health related problems, but Dr Symons testified on behalf of the applicant that it remains the patient’s

responsibility to inform her employer of the negative impact that her working hours had on her. Ethical considerations make it impossible for him to inform the applicant's employer of her condition. Dr Symons confirm that he was never requested by the applicant to issue a medical certificate for the applicant. The applicant, being a medical doctor herself should reasonably have been aware of the fact that it was her own and not Dr Symons's responsibility to report her health issues related to her working environment to the respondent, or to request a medical certificate from Dr Symons for this purpose.

147. **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? There was no evidence before me that the respondent was made aware of the applicant's complaint before she lodged her grievance on 17 July 2019, therefore the respondent was not given an opportunity to remedy the situation and cannot be seen to have made the applicant's working conditions intolerable.
3. Did the employer create the intolerable situation? The respondent was not made aware of the alleged intolerable working conditions and could therefore not have been a part of making the applicant's working conditions intolerable.
4. Was the unbearable situation likely to endure for a period that justified termination of the relationship by the employee? The respondent had not completed the investigation of the grievance and had not been given an opportunity to discuss alternatives with the applicant, therefore I cannot find that the applicant's resignation was justified under the circumstances.

5. Was the termination of the employment contract the only reasonable option open to the employee in the circumstances? No.

148. 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 26 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?

149. 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?

150. I have identified the above issues that weigh in favour of continued employment being intolerable for the applicant or not. The applicant complaint of excessive overtime hours which led to her health issue, yet she did not provide the respondent with a reasonable opportunity to remedy the situation. According to the applicant, the intolerable working conditions were present, since 2017, yet she waited until 17 July 2019, prior to lodging a grievance. There was also nothing in the applicant's conduct or performance that alerted the respondent to possible work related or any other problems experienced by the applicant. The applicant

confirmed that she was aware that she had to lodge her grievance within 30 days of the date of omission, yet she waited until 17 July 2019 to lodge a grievance, whilst she averred that the intolerable working conditions commenced in 2017. I find that the working conditions could not have been intolerable, if the applicant managed to put up with these conditions until July 2019, without complaining.

151. Was the unbearable situation likely to endure for a period that justified termination of the relationship of the employee? No – Dr Mystral tried to assist the applicant before she lodged her formal grievance, but the applicant made it clear that she was not interested in having any discussions with Dr Mystral about the contents of her grievance. Professor Moosa attempted to persuade the applicant to change her mind and retract her resignation, but to no avail.
152. 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 Professor Moosa. He testified that had the applicant brought her problems to his attention before, he most certainly would have intervened and assisted the applicant.
153. 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.
154. 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 wait for the outcome of the grievance and if she was dissatisfied with the outcome of her grievance, she had the option to elevate her grievance to the next level in terms of the respondent's internal grievance policy.
155. 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.

156. I find that the applicant's resignation was not the only reasonable option in the circumstances. The applicant had an opportunity to inform Professor Moosa of her health related problems allegedly caused by her working conditions, during their meeting in October 2018, yet she failed to do so, other than to mention that she has sought external medical assistance, thus bringing Professor Moosa under the impression that everything is under control. The applicant failed to hand in any medical certificates in a cry for help. She could have relied on both Dr Mistry and her Clinical Psychologist, Ilse Jordaan, for medical reports in support of her claim, but this was not even part of her official grievance form. At this time, the applicant also approached Dr Schreuder, her direct supervisor, who in turn referred her to the post-grad committee, who in turn referred her to Professor Moosa, regarding her request for a sabbatical. The applicant did not dispute Dr Schreuder's testimony that she informed him that she required a sabbatical as she wanted to do locum work in Ireland at the time. Dr Schreuder testified that although she told him that she was tired, he didn't view it in a serious light, as she wanted to work elsewhere, instead of asking for time off in order to rest and/or recover.

157. **Assessment of the cumulative impact of the respondent's conduct**


158. 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.

159. 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.

160. 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.
161. 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 investigate her grievance or to improve her alleged intolerable working conditions.

Award

162. 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.
163. In the light of the afore going the applicant's case is dismissed.



COMMISSIONER: T ERASMUS