REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 388/16

In the matter between:

WEST COAST COLLEGE	First Applicant
THE DIRECTOR GENERAL of the DEPARTMENT OF HIGHER EDUCATION AND TRAINING (DHET)	Second Applicant
and	
LINDA BRINK	First Respondent
GPSSBC	Second Respondent
C M BENNETT	Third Respondent

Heard: 12 October 2017

Delivered: 28 November 2017

SUMMARY: Review – constructive dismissal – LRA ss 145 and 186(1)(e).

JUDGMENT

STEENKAMP J

Introduction

[1] Ms Linda Brink[1] was employed by the West Coast College. She resigned and claimed constructive dismissal. Commissioner C M Bennett[2] found that she was constructively dismissed; that the dismissal was unfair; and ordered the Department of Higher Education and Training to pay her compensation equivalent to six months' salary.

[2] The applicants – West Coast College and the Director-General of the Department of Higher Education and Training – seek to have that arbitration award reviewed and set aside under s 145(2) of the Labour Relations Act.[3]

[3] At the beginning of the hearing, I granted condonation for the late filing of the applicants' supplementary and replying affidavits.

Background facts

[4] The background facts are usefully summarised by the arbitrator. It need not be repeated in detail.

[5] The employee's problems began in August 2013 and culminated in her resignation on 30 April 2015. She and her husband both worked for the college. In August 2013 the college's deputy CEO, Ms Rhazia Hamza, accused Ms Brink of being jealous of her, because she, Hamza, could sit on Mr Brink's lap and there was nothing that his wife could do about it. Mrs Brink was understandably upset and sent Hamza an email in which she expressed her unhappiness:

> "Goeiedag Rhazia
>
> Ek verwys na jou uitlating gister dat ek "jaloers bokkie" is, en blykbaar jaloers is op jou. Ek wil dit duidelik stel dat hier niemand in hierdie kantoor is op wie ek jaloers is nie. Ek is hier om my werk te doen en ek probeer om dit na die beste van my vermoë te doen. Ek dink dit is uiters swak smaak van julle om my en my huwelik te bespreek en van my 'n bespotting voor

[1] The first respondent.

[2] The third respondent, a panelist of the General Public Service Sectoral Bargaining Council (the second respondent).

[3] Act 66 of 1995 (the LRA).

> my mede kollegas te maak. Ek vertrou dat julle julle tyd beter sal benut deur dit aan julle werk te spandeer en my persoonlike lewe met rus te laat."

[6] The next day, Mrs Brink's manager, Abrahams, called her in and told her that Hamza wanted her dismissed. She explained what had happened and Abrahams, in the words of the arbitrator, "backed off".

[7] Two months later, Mr Brink was suspended. A disciplinary hearing ensued. Hamza was the initiator. She made allegations about Mrs Brink.

[8] Mrs Brink submitted a grievance about Hamza to D Rossouw, the HR manager. The college did not convene a grievance hearing.

[9] In February 2015 Mrs Brink resubmitted a grievance against Hamza and her own manager, Abrahams. Still the college did not convene a grievance hearing.

[10] In March 2015 Mrs Brink submitted a third grievance against Abrahams, Rossouw, Kelly and Mbulawa (Rossouw's line manager). She sent emails to the CEO, Joose-Mokgethi, to ask for a meeting. She did not have the courtesy of a response.

[11] On 1 April 2015 Mrs Brink was transferred from the College to the DHET. But her position and salary remained the same. On 24 April 2015 she submitted a fourth grievance, copied to Jooste-Mokgethi. Finally the latter responded, saying no more than she would tell Mbulawa to "pay attention to the matter".

[12] On 30 April 2015 Mrs Brink resigned. She stated in her resignation letter that she considered herself to have been constructively dismissed. She referred a dispute to the Bargaining Council accordingly.

Arbitration award

[13] The arbitrator correctly identified the dispute in terms of s 186(1)(e) of the LRA. He had to consider whether the employer had made continued employment intolerable for the employee.

[14] The arbitrator noted that the college failed to challenge most of the allegations by Mrs Brink. He concluded that Hamza did make the comments about sitting on Mr Brink's lap and did demand Mrs Brink's

dismissal. And Rossouw (and the college) did nothing to address Mrs Brink's grievances. When the college did react, it was to threaten her with disciplinary action for "involving herself with her husband's disciplinary procedure". And having submitted two complaints about Rossouw and Mbulawa, Jooste-Mokgethi instructed one of them to address the very complaint.

[15] The arbitrator correctly asked the question, "Can it be said that the [employee] was subjected to intolerable treatment?" He concluded that she was. Hamza had wanted her dismissed and dragged her into the process involving her husband. That the employee felt victimised, was understandable. Her grievances were ignored; instead, she was threatened with disciplinary action. By act and omission, she was subjected to intolerable treatment.

[16] Having found that the employee had been constructively dismissed, the arbitrator turned to the question whether the dismissal was nevertheless fair. He found that it was not. The college ignored her grievances. It did not treat her fairly. And she was victimised for raising her grievances.

[17] Having considered that the employee was constructively dismissed and that it was unfair, the arbitrator considered the appropriate remedy. At the time of her resignation, her fixed term contract had another 19 months to run. But she had secured employment at the same salary at Northlink College. In order to work there, she had to commute from Malmesbury to Bellville every day – at a cost of about R1 000 per week in fuel costs alone. The arbitrator considered compensation equivalent to six months' salary to be fair. That amounted to R125 655, 00. Her petrol costs alone for the remaining 19 months of her contract would be R81 700, 00. The difference (R 43 955, 00) would equate approximately two months' salary. He found that to be a suitable *solatium* for her un*fa*ir treatment.

Grounds of review

[18] Mr *Allom*, for the applicants, submitted that the arbitrator's conclusion was not one that a reasonable arbitrator could reach.[4]

Evaluation

[19] The applicants complain that Mrs Brink's allegations about the way she was treated were generally uncorroborated. But the arbitrator acknowledges this; yet he points out that the college did not challenge those allegations. That is a proper and reasonable evaluation of the evidence before him. And Hamza, one of the main protagonists, was not called by the college to respond to the serious allegations against her.

[20] Although he did not refer to it, the arbitrator's approach was in line with that of the SCA in *Murray v Minister of Defence.*[5]

[21] As in *Murray*, the arbitrator asked whether the college's conduct was such that its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. Given the employee's numerous grievances and the college's failure to respond, that was a conclusion that another reasonable arbitrator could reach.

[22] Mr *Dykman* also referred to *Value Logistics v Basson*[6] where this Court summarised the following principles regarding constructive dismissal, citing the Constitutional Court in *Mvumbi*:[7]

22.1 The test for constructive dismissal does not require that the employee had no choice but to resign, but only that the employer should have made continued employment intolerable.

22.2 The employer must be culpably responsible in some way for the intolerable conditions: the conduct must have lacked 'reasonable and proper cause'.

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[4] In other words, the test in *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 29 *ILJ* 1097 (CC). Although the question in a constructive dismissal case may redound to the question whether there was a dismissal at all – i.e. a jurisdictional question – both parties approached it from this angle.

[5] (2008) 29 *ILJ* 1369 (SCA).

[6] (2010) 32 *ILJ* 2552 (LC) paras 28-38.

[7] *Strategic Liquor Services v Mvumbi NO (*2009) 30 *ILJ* 1526 (CC); [2009] 9 BLLR 847 (CC).

[23] The arbitrator, without referring to the case law directly, applied the correct test. He considered the evidence before him on the probabilities. He concluded that the employer had made continued employment intolerable, especially given its recalcitrance to deal with Mrs Brink's grievances in any way. That is a conclusion that another arbitrator could reasonably have reached on the same evidence.

[24] Having found that the employee had been constructively dismissed, the arbitrator then correctly turned to the next leg of the enquiry, namely whether the dismissal was fair. He found that it was not. The college addressed its own problems whilst ignoring Mrs Brink's. It did not treat her fairly. Instead of addressing her grievances, she was prejudiced and victimised. The arbitrator's conclusion that the dismissal was unfair is a reasonable one.

[25] That leaves the question of the appropriate remedy. The employee sought compensation rather than reinstatement. The arbitrator carefully considered what an appropriate amount of compensation would be. Six months' salary equates R125 655, 00. He took into account that, having had to find alternative employment in Bellville, Mrs Brink's petrol costs for the remaining 19 months of her contract with West Coast College would approximate R81 700, 00. The difference would be equivalent to no more than about two months' salary. It is in those circumstances that he considered six months' salary to constitute fair compensation. That is not unreasonable.

Conclusion

[26] The award is not reviewable. Both parties asked for costs to follow the result. I agree. There is no longer any relationship between the parties and Ms Brink has been forced to incur legal costs after a final and binding arbitration award was handed down in her favour.

Order

The application for review is dismissed with costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	M R Allom (attorney).
FIRST RESPONDENT:	D Dykman (attorney).