Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C189/2021

In the matter between:

WESTCOR SA (PTY) LTD	**Applicant**
And	
TANYA MEY	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
COMMISSIONER N E SAMUEL N.O.	**Third Respondent**

Date of hearing: 6 July 2022

Date of judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 22 November 2022

Summary: Opposed Review – constructive dismissal

JUDGMENT

HARVEY AJ

Introduction

[1] In the middle of 2020, an employee resigned when her employer imposed a salary cut during the covid-19 pandemic lockdown. Was she constructively dismissed? And, if so, might the dismissal nevertheless have been fair, given the pandemic conditions?

[2] The CCMA commissioner held that the employer had made continued employment intolerable for the employee, to whom she awarded compensation of six month's salary.

[3] The employer attacked the award on grounds of unreasonableness. It is well established, however, that the review test, in respect of a decision that a constructive dismissal was proved, is correctness. Reasonableness remains the review test when evaluating a decision on the fairness or otherwise of a constructive dismissal. I shall return to these tests later; first, it is convenient to set out the facts, which were not in dispute.

Facts

[4] Westcor, the applicant employer, is a merchandiser of fashion accessories. Mey, the first respondent, commenced employment in 2018 as a jewellery product specialist.

[5] When South Africa went into lockdown at the end of March 2020, Westcor employees worked reduced hours and earned reduced wages, supplemented by payments claimed from TERS.[1] All employees, including Mey, consented to these arrangements.

[6] On Tuesday 30 June 2020 Westcor announced that, as from 1 July, staff were required to return to working their full working hours, but that they would only be paid 75% of their salaries.

[1] The South African government's covid-19 Temporary Employee Relief Scheme,

[7] Mey immediately emailed the MD, Mr Westmore, stating that she was unable to accept the salary cut. A meeting was held:

7.1 Westcor's stance was that it could not make an exception for Mey, who was the only employee resisting the arrangement. Westcor expected employees to stand together as a team to support the business and to 'save jobs'.

7.2 Mey offered to work 75% of her hours in return for 75% of her salary (so that she could spend the remaining time on a side-business of which her employer was aware) but Westcor stated that it would in that case only pay her 75% of her reduced salary (that is, 75% of 75%, being 56% of her contractual salary).

[8] In an email on Monday 6 July 2020 Mey confirmed that, as much as she wished to support the company, she was unable to accept the 25% cut in her salary. She detailed her financial difficulties: her husband had lost his income; the family was struggling to cover expenses and was falling deeper and deeper into debt. She understood that the company wanted to avoid retrenchments, but stated that, for her, a salary reduction would be worse.

[9] On Tuesday 7 July 2020 Mey emailed Mr Brown (HR), with whom she had met the previous day, confirming that she '*cannot agree under any circumstances to a drop in salary*', to which email Mr Brown responded on Friday 10 July 2020 stating unequivocally that:

…Team members, including you, have made sacrifices of cash and leave days and have taken a salary cut in Apr & May & Jun & Jul so that all of our jobs might be saved. When you met with Liza she confirmed with you that all of these efforts have been toward the avoidance of retrenchment … (To) make it as clear as I can:

- *We are not retrenching you;*
- *We are operating on a 75% of salary for July and have suspended provident fund deductions to help*
- *We are back to a full 5 day working week with effect from 1 July*.

[10] Mey responded the same day that:

…I cannot and do not agree to a reduction in salary. I do not agree that it is fair or reasonable for the company to unilaterally require me to accept a reduction … kindly confirm that you are not going to reduce my salary.

[11] Brown again met with Mey on Tuesday 14 July 2020, and followed up with an email confirming that '*you will be earning 75% of your salary for July for which you will have worked a full 5-day working week for the month. I put forward the possibility of the company being able to provide you with a loan which could assist in making up the 25% shortfall for July, where we would look at agreeing to the terms of the repayment thereof. You indicated in the meeting that you did not want to take up the loan but would take some time to give it more consideration*'.

[12] Mey responded on Thursday 16 July 2020: she could not take a loan, thereby incurring more debt; the employer could not lawfully reduce her salary unilaterally; in the event of a retrenchment consultation, Westcor would be required to disclose financial information to show salary cuts were needed. Mey posed a number of pertinent questions exploring the employer's decision to cut salaries, including whether directors' salaries were also being reduced, whether salaries withheld from staff could be repaid at a later date, and whether Westcor had considered or implemented alternative cost-cutting measures (such as negotiating with suppliers). Mey also questioned whether there was in fact an objective need for salary cuts, pointing out that her sales had increased by 37% in the previous year, and that she had exceeded her target by 17%. In her view the employer had been profitable, and it probably had sufficient reserves to tide it over the lockdown. Mey said it was unfair and unreasonable to put the burden of the pandemic on staff whereas the company had performed well in the previous year, and had passed on very little of this benefit to employees. She recorded that Westcor had made it clear, in meetings with her, that it could not commit to a timeline: '*This reduction could go on for months. There has also been no criteria given as to when the company will go back to paying full salaries. This leaves it open ended* …'. Mey wrote that she had been forced into a position which was prejudicial and unfair.

[13] In response to this email, Westcor on 21 July 2020 provided Mey with a copy of a letter obtained from its attorney in which the attorney advised that the decision to implement a 25% salary reduction for all staff for July 2020 was a reasonable measure which would be defensible in the Labour Court should it be challenged.

[14] Mey replied on Friday 24 July 2020, again explaining that she was unable to live on 75% of her salary, could not afford to take a loan, and, while she understood the covid situation, the company was unfair to place the burden on staff whereas it had not shared the previous profitable year's upside with them.

[15] At close of business on Monday 27 July 2020, Mey submitted her letter of resignation and advised that she would refer a constructive dismissal dispute to the CCMA.

The arbitration hearing

[16] When she was cross-examined Mey agreed with Westcor's representative that it was impossible to know for how long the salary cuts would be implemented, and whether the situation would get better or worse. That the situation was indefinite was confirmed in a 'to whom it may concern' letter issued by Westcor's Head of Finance, Elana Scott, in June 2020 pleading with employees' creditors to grant them debt relief during the covid-19 lockdown, and stating '*we are, at this time, unable to provide assurances to our team regarding what we may or may not be able to do for them in the months ahead and we have urged them to seek temporary relief from their debt obligations from their creditors*'.

[17] Challenged to state her primary reason for resigning, Mey stated that she objected to the salary cut for financial reasons, and that she resigned because Westcor 'forced' her into the salary cut.

[18] Westcor's legal representative put to Mey that after she resigned an un-named person '*came to the employer and then things came out that the company sees as gross dishonesty*'. He suggested that she resigned because she knew disciplinary action was imminent.

[19] Having established that Mey was not aware of any pending discipline, and also that the employer had never charged her, the arbitrator upheld Mey's representative's objection to this line of questioning, on grounds of relevance. The arbitrator ruled that '*incidents after her resignation have no effect on our dispute'.*

[20] Finance Manager Elana Scott, who testified for Westcor at the arbitration hearing, said that when South Africa went into lockdown preliminary projections were that Westcor faced at R30m loss. The company was aware that Mey's husband had lost his income, that Mey's family was struggling financially, and that Mey was searching for ways to supplement her income (for instance, by delivering pizza). Efforts were made to assist Mey, with whom they enjoyed a good relationship, by offering her a loan, contributing to her home fibre line, and arranging a payment holiday with Discovery medical aid.

[21] Scott conceded that by July 2020 Mey's financial position had significantly worsened – although her take-home pay had remained reasonably consistent in April, May and June, this was thanks to TERS, using up her leave pay, ceasing provident fund contributions, and a 'payment holiday' (to be paid back later) on her Discovery medical aid. Documents in the evidence bundle show that the cash component of Mey's salary in July 2020 was R21,011 – just over half of her pre-lockdown cash component of R38,228.

<u>The award</u>

[22] The second respondent arbitrator, having noted that she had to decide whether Mey was dismissed, and, if so, whether the dismissal was fair, first summarised the facts before turning to consider whether the salary cut was 'intolerable'.

[23] The arbitrator referred to a number of authorities, and explored the fairness and reasonableness of both parties' conduct. She recorded that:

23.1 The employer acted unilaterally in breaching Mey's contract, notifying Mey of the salary cut the day before it was implemented. It did not engage in a bona fide s189 consultation, and 'immutably clung' to its

position. The fact that Mey was the only employee to object did not make the employer's conduct fair. The offer of a loan to offset the reduction was not reasonable, as it would lead to more debt;

23.2 Mey did everything reasonably possible to address her objection to the salary cut with the employer, which remained intransigent. Mey was not obliged to shoulder the expense of litigation to enforce her contract;

23.3 The argument that the real reason Mey resigned was to avoid disciplinary action was without merit: she was never charged and the allegations were only brought to the employer's attention after Mey had left.

[24] In her written reasons, the arbitrator does not separate out her analysis by dealing first with the existence, then with the fairness, of the alleged dismissal. Instead, having weighed up all the considerations relevant both to intolerability and of fairness, she held that Westcor '*rendered the employment relationship intolerable and consequently dismissed [Mey] through their conduct*' and immediately turned to consider remedy for '*the unfair dismissal*'. I shall return to this point later.

Legal principles

[25] In proceedings challenging any dismissal, it is the employee who bears the onus to prove that she was dismissed,[2] and the employer who must prove that the dismissal was fair.[3]

[26] A 'constructive dismissal' occurs when the employee resigns because her employer made her continued employment intolerable.[4] Whilst it might seem that it is always unfair to make continued employment intolerable, our Courts have stressed that a constructive dismissal is not inherently unfair. Arbitrators determining constructive dismissal disputes accordingly undertake the usual two-stage enquiry: firstly, did the employee's resignation amount to a dismissal, and secondly, if so, was the dismissal

[2] Section 192(1) of the LRA.
[3] Section 192(2) of the LRA.
[4] Section 186(1)(e) of the LRA.

fair? Unlike in other unfair dismissal disputes, however, the full merits of the case are relevant to both stages of the enquiry,[5] which are 'intertwined'.[6]

Test on review in constructive dismissal disputes

[27] It is firmly established (despite some criticism)[7] that the review test on the first question – whether a resignation amounted to a constructive dismissal – is correctness, not reasonableness.[8]

[28] If the Court is satisfied that the employee was dismissed, it must apply the usual *Sidumo* reasonableness test on review of the decision as to fairness. This test focuses on the outcome: is the arbitrator's decision capable of reasonable justification on all the material that was before the arbitrator (including for reasons not considered by her)?[9]

Proving the existence of a constructive dismissal

[29] In order to prove that a resignation amounted to a constructive dismissal, the employee must show that:

29.1 she terminated her employment;

29.2 her reason for so doing was that continued employment had become intolerable; and

29.3 it was the employer who caused continued employment to become intolerable.[10]

[5] *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* (2012) 33 ILJ 363 (LC) at 21.
[6] *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & Others* (1998) 19 ILJ 1240 (LC) at 38.
[7] *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* (note 5 above) at 21-23; *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre (Motor Industry Bargaining Council) & Others* (2013) 34 ILJ 3184 (LC) at 66-67; du Toit et al Labour Law Through The Cases (LexisNexis, 2022) at LRA 8-12(10); Myburgh and Bosch Reviews in the Labour Courts (Lexis Nexis, 2016) at 365-366.
[8] *Conti Print CC v Commission for Conciliation, Mediation & Arbitration & Others* (2015) 36 ILJ 2245 (LAC) at 16.
[9] *Fidelity Cash Management Service v CCMA & others* [2008] 3 BLLR 197 (LAC) at para 103; *National Union of Mineworkers and another v Rustenburg Platinum Mine (Mogalakwena Section) and others* [2015] 1 BLLR 77 (LAC) at 27.
[10] *Solid Doors (Pty) Ltd v Commissioner Theron & Others* (2004) 25 ILJ 2337 (LAC) at 28.

Intolerability

[30] The test for intolerability is objective.[11] The Court assesses both the circumstances themselves, and the employee's response thereto (but, as we shall see, the employer's response thereto is relevant to fairness, not to objective intolerability).

[31] The circumstances must be demonstrated to be '*insufferable and too great to bear*'[12] and be such that no reasonable employee can be expected to put up with them. The employee must show something more than bad treatment, or a difficult, unpleasant or stressful working environment.[13]

[32] An employee faced with an unbearable circumstance should not opportunistically resign,[14] but should make a reasonable effort to preserve the employment relationship. This principle finds its roots in the definition itself: if there is a '*perfectly legitimate avenue open to alleviate his distress and solve his problem*'[15] then continuing in employment cannot be said to be '*intolerable*'.

[33] The Constitutional Court in *Strategic Liquor Services*[16] held, however, that an employee is not required to show that she had *no choice* but to resign, but only that continued employment was intolerable. The Labour Court in *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others*[17] considered whether this altered earlier case law, but concluded that the emphasis is on whether a reasonable alternative to resignation exists: the employee need not show that there was no alternative to resigning, but must show that there was no reasonable alternative.[18]

---

[11] *National Health Laboratory Service v Yona & others* (2015) 36 ILJ 2259 (LAC); *Bakker v Commission for Conciliation, Mediation & Arbitration & others* (2018) 39 ILJ 1568 (LC) at 15-16.
[12] *Solidarity obo van Tonder v Armaments Corporation of South Africa (SOC) Ltd* [2019] 8 BLLR 782 (LAC).
[13] *Gold One Ltd v Madalani & Others* (2020) 41 ILJ 2832 (LC) at 46; *HC Heat Exchangers (Pty) Ltd v Araujo* [2020] 3 BLLR 280 (LC) at par 50.2; *Jordaan v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 ILJ 2331 (LAC) at 2336 D-E.
[14] *Albany Bakeries Ltd v Van Wyk & Others* (2005) 26 ILJ 2142 (LAC) at 28; *Chimphondah v Housing Investment Partners (Pty) Ltd & Others* (2021) 42 ILJ 1720 (LC) at 37; *Agricultural Research Council v Ramashowana NO & Others* (2018) 39 ILJ 2509 (LC) at 19.
[15] *Albany Bakeries Ltd v Van Wyk & Others* (note 14 above).
[16] *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) at 4.
[17] *Asara Wine Estate* (note 5 above).
[18] Ibid at 33-34.

Breach of contract and constructive dismissal

[34] Common-law principles governing breach of contract underpinned the development of the concept of what came to be known as 'constructive dismissal' under the 1956 LRA. At common law, faced with a breach, the innocent party can elect to accept the breach and claim damages, or reject the breach and enforce the contract. In a constructive dismissal, the employer's breach of an express term (such as remuneration, or role) or an implied term (often, the employer's duty to preserve the relationship of trust and confidence) entitled the employee to cancel the contract (by resigning).

[35] The legal basis for constructive dismissal changed completely with the introduction of the section 186(1)(e) definition in the 1995 LRA. The enquiry is no longer governed by common law contractual principles: as the LAC confirmed in *Albany Bakeries Ltd v van Wyk & others:*[19]

> *Since the advent of the Act, the prime and only consideration is whether the employer made continued employment intolerable for the employee*.[20]

[36] This is important, given that *dicta* and comments from judgments given under the previous (common law) approach to constructive dismissal are still frequently cited and relied upon today. These *dicta* should be read keeping in mind that they were made in the context of entirely different legal principles, which no longer apply.

[37] In *W L Osche Webb & Pretorius (Pty) Ltd v Vermeulen,*[21] an early decision under the 1995 LRA, the employer changed a tomato salesman's contractually-agreed commission. The LAC accepted that the employer breached the contract, that the salesman was entitled to accept the breach by resigning,[22] and that because the resignation was caused by the employer's repudiation, the salesman was dismissed. The Court held that, although the dismissal was unlawful at common law, it might nevertheless be fair under the LRA '*if there was a commercial rationale for [the change] and if the final decision was arrived at after due consultation with the*

[19] *Albany Bakeries Ltd* (note 15 above).
[20] *Albany Bakeries Ltd* (note 15 above) at 23-24.
[21] *W L Osche Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 18 ILJ 361 (LAC).
[22] Ibid at 364 E-G.

[employee] involving him properly in the process leading to a fair decision.'[23] It ultimately held that the dismissal was fair because the employer had '*intimately involved [the salesman] in the process of seeking a viable alternative*'.[24]

[38] In *Van der Riet v Leisurenet t/a Health & Racket Club,*[25] decided shortly thereafter, the LAC held that the employee (who resigned because he was unilaterally demoted during restructuring) was unfairly constructively dismissed because the employer failed to consult adequately.[26]

[39] In *Riverview Manor (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others*[27] the employer, whose business was running at a loss, cut the employee's salary by 40%. In finding that, objectively viewed, the company's conduct was intolerable, the Court took into consideration that there was no s189 consultation – rather, the employer communicated its decision in '*firm and conclusive*' terms, not as an offer, and did not justify why cutting salaries was the only reasonable option.[28]

[40] In cases where some breach or unilateral change is objectively intolerable, the existence of a commercial rationale and/or adequate consultation and goes to fairness, not intolerability. Where an employer causes or imposes some circumstance or employment condition that, objectively assessed, renders continued employment *intolerable*, such objective intolerability is not saved by virtue of the employer having consulted beforehand. Commercial rationale and consultation accordingly do not negate the existence of the dismissal, but might render the dismissal fair.

[41] This means that the employee's conduct in response to the allegedly unbearable circumstance is assessed in the first stage, because it is

---

[23] Ibid at 366 C-D.
[24] Ibid at 367D-E.
[25] *Van der Riet v Leisurenet Ltd t/a Health & Racquet Club* [1998] 5 BLLR 471 (LAC).
[26] Other decisions in which unilaterally demoted employees succeeded in proving constructive dismissal include *Du Plessis v JDG Trading t/a Price 'n Pride* [2003] 4 BALR 413 (CCMA) and *Mhlambi v Commission for Conciliation, Mediation & Arbitration & Others* (2006) 27 ILJ 814 (LC).
[27] *Riverview Manor (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2003) 24 ILJ 2196 (LC).
[28] Ibid at 41. Other decisions in which unilateral changes affecting remuneration were held to render continued employment intolerable include *Solidarity v First Office Equipment (Pty) Ltd* [2009] 4 BALR 406 (CCMA) and *Western Cape Education Department v GPSSBC* [2013] 8 BLLR 834 (LC).

relevant to intolerability. The employer's conduct in addressing the allegedly unbearable circumstance is assessed in the second stage, because it is relevant to fairness. That the conduct of employer and employee are assessed separately and are relevant to different stages of the enquiry is consistent with a fundamental premise of employment law: that the interests of employers and employees are structurally opposed.

Causation

[42] The section 186(1)(e) definition also requires the employee to show that it was the employer who 'made' continued employment intolerable: the employer must be the cause of the intolerable circumstance[29] rather than some extraneous circumstance.

Fairness of a constructive dismissal

[43] Constructive dismissal is not inherently unfair. In *Bakker v Commission for Conciliation, Mediation & Arbitration & Others*[30] Whitcher J summarised the law as follows:

Once it has been proven that a constructive dismissal has occurred, the onus shifts to the employer to prove that it did not act unfairly. A two-stage approach is thus envisaged.[31] The central question is then whether the conduct of the employer that prompted the employee to resign was fair or unfair.[32] A court will consider the circumstances with a view to establishing whether the employer's conduct was justified.[33] The focus will be on the substantive fairness of the dismissal as procedural fairness plays little or no role in most constructive dismissal cases.[34]

[44] Thus in *Bakker*, like in *W L Osche*, the employer was held to have acted fairly, despite having made continued employment intolerable.

---

[29] *Solid Doors (Pty) Ltd v Commissioner Theron & Others* (note 10 above) at 28.
[30] *Bakker v Commission for Conciliation, Mediation & Arbitration & Others* (note 30 above).
[31] *Jordaan v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 ILJ 2331 (LAC) at 2335.
[32] *Jonker v Amalgamated Beverage Industries* (1993) 14 ILJ 199 (IC) at 211.
[33] *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILJ 629 (LAC).
[34] *Bakker* (note 30 above) at 10 (footnotes as in the original).

[45] Awards have been set aside where arbitrators have awarded compensation to constructively dismissed employees without having determined whether their dismissals were fair.[35] In *Eagleton & others v You Asked Services (Pty) Ltd* [36] Basson J noted that relief cannot be granted merely upon proof that a constructive dismissal exists: compensation is, rather, for unfairness, and it is open to the employer to prove that there was a fair reason for the dismissal. And, in *Value Logistics v Basson,*[37] Steenkamp J set aside an award on a number of grounds including that the arbitrator had exceeded her powers in awarding compensation for a constructive dismissal without having determined whether it was unfair.

[46] That the two stages are sometimes conflated is perhaps unsurprising – as the Court noted in *Sappi Kraft*:[38]

> *The two stages that I have set out above are however not independent stages. They are two stages in the same journey and the facts which are relevant in regard to the first stage may also be relevant in regard to the second stage. Moreover there may well be cases where the facts relating to the first stage are determinative of the outcome of the second stage. Whether or not this is so is however a matter of fact and no general principle can or should be laid down.*

Analysis

[47] The questions for this Court are:

47.1 First: was the finding that Mey's resignation amounted to a constructive dismissal right or wrong?

47.2 Second: if Mey was dismissed, was the outcome one that a reasonable decision-maker would reach, on all the evidence before her?

Was Mey constructively dismissed?

[48] Westcor attacked the arbitrator's decision on this question on grounds of unreasonableness, whereas the test is in fact correctness. Generally, a

---

[35] *Capwest Mouldings & Components CC v Ely & others* (1999) 20 ILJ 2859 (LC) at 12
[36] *Eagleton & others v You Asked Services (Pty) Ltd* (2009) 30 ILJ 321 (LC) at 25.
[37] *Value Logistics v Basson* (2011) ILJ (LC) 2552 at 63-64.
[38] *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & Others* (note 6 above).

reviewing court is limited to deciding issues raised on the papers: an applicant may not advance a review ground which was not pleaded. This principle yields, however, to the principle of legality: this Court is entitled (and even obliged *mero motu*) to raise the issue of jurisdiction where the parties have proceeded on a wrong perception of the law.[39]

[49] This Court must accordingly determine *de novo* whether Mey's resignation meets the test for constructive dismissal, along the lines set out in *Solid Doors*:[40] Did she terminate her employment? Was the reason for her resignation that continued employment was intolerable? Was the employer the cause of the intolerability?

[50] The first question is easily disposed of: it was not in dispute that Mey terminated the contract of employment.

[51] Turning to the second question, there is no doubt that Mey resigned because Westcor cut her salary by 25%. That the unilateral salary cut amounted to a breach of contract is not enough: the question is whether it made Mey's continued employment intolerable.

[52] For the reasons that follow, I conclude that it did: in all the circumstances, Mey cannot reasonably have been expected to tolerate Westcor's decision to cut her salary by 25%.

[53] By July 2020 Mey's family was in financial difficulty: her husband had lost his income and they were in debt (which was increasing, considering the medical aid 'payment holiday'); she had been working reduced hours, her cash component had decreased dramatically, her leave had been utilised and her provident fund contributions were on hold. These arrangements were indefinite and Westcor made no undertaking to make good her losses in future. At the same time, Westcor's business was busy enough to warrant a return to full working hours in July 2020, and it had access to funds enabling it to offer Mey a loan.

[54] Mey acted reasonably in attempting to preserve the employment relationship: immediately upon learning of the decision she engaged the

---

[39] *CUSA v Tao Ying Industries & others* [2009] 1 BLLR 1 (CC) at 67; *Gold One Ltd v Madalani & Others* (note 13 above) at 24.
[40] Paragraph [29] above.

employer, disclosed her personal difficulties, and suggested an alternative addressing Westcor's stated financial reason (she would accept the cut but wanted to use 25% of her hours to generate income elsewhere). Mey in writing set out substantive facts supporting her reasonable belief that Westcor, having performed well in the previous financial year, probably had sufficient reserves to tide it over the lockdown. She nevertheless invited Westcor to disclose its position including other measures taken in order to survive any demonstrable pandemic-related distress. When Westcor remained intransigent in the fact of constant engagements throughout the month of July 2020, Mey resigned.

[55] Westcor argued that the situation cannot have been intolerable, because it was temporary. I do not agree. The salary cut was indefinite. It could have worsened. Meanwhile, Mey's financial distress was increasing.

[56] Westcor also submitted that Mey had options other than resignation: she could have waited until August to see whether things would improve, or filed a formal grievance, or launched urgent proceedings in this Court. As to the first suggestion, Mey waited long enough, resigning at close of business on 27 July (by which date Westcor can be expected to have informed if matters were about to improve in August). As to the second, given that Mey engaged extensively with the employer throughout the month of July 2020, I am not persuaded that filing a formal grievance was called for. Lastly, as it was precisely her financial distress which was driving these events, the expense of enforcing her contract through formal court proceedings was not a reasonable alternative solution.

[57] As to the third question, in an argument resembling that advanced by business insurers in relation to the pandemic, Westcor submitted that it was covid-19 and the lockdown which was the cause of the 25% salary cut. I do not agree. Westcor chose, from amongst a range of possible responses to the pandemic and the lockdown, to cut salaries by 25%. Westcor was accordingly the author of the circumstance which Mey alleged made continued employment intolerable.

[58] Objectively assessed, Westcor's action in cutting Mey's salary by 25% made her continued employment intolerable. The arbitrator's conclusion was correct: Mey was constructively dismissed.

Was the decision reached by the arbitrator one that a reasonable decision-maker would reach?

[59] The arbitrator awarded six months compensation to Mey for the unfair dismissal. This is, in my view, a reasonable outcome on all the evidence before the arbitrator.

[60] I say so because a fair employer would have worked with Mey to find a suitable compromise, and would, in light of the weighty arguments supporting her viewpoint that the company could continue to afford full salaries, have shared relevant financial information with her - if it existed. Mey's arguments regarding Westcor's good financial performance the previous year, as well as the company's ability to offer employees loans, warranted an explanation.

[61] Just as employees may not opportunistically resign, so may it be expected of employers that they refrain from opportunistically taking advantage of their employees' insecurities in the midst of the significant uncertainties characterising the covid-19 pandemic. Whilst it is conceivable that an employer may well have experienced financial distress during the pandemic lockdown in response to which a salary cut may have been fair and justifiable, a reasonable factual foundation for such a finding must exist.

[62] Westcor's intransigence in insisting that Mey must accept the salary cut because other employees accepted it, its refusal to permit her to utilise some of her hours to supplement her income, and its failure substantively to justify why cutting salaries was a fair and reasonable measure, mean that Mey's dismissal was not effected for a fair reason.

[63] Mr Bosch, for Westcor, argued however that the arbitrator's exclusion of the evidence relating to possible misconduct charges was reviewable. This evidence, according to him, related to the 'real reason' for Mey's resignation and was relevant to assessing the fairness of the dismissal. Secondly, in a line of argument nowhere foreshadowed in the papers, he pressed the Court

to remit the matter if it were to hold that Mey was dismissed. This was because, as I understood his argument, the arbitrator made no finding on the fairness of the dismissal.

[64] On the first issue, and having carefully studied the transcript, I agree with the arbitrator that the excluded line of cross-examination was irrelevant: Westcor's representative had sought to cross-examine Mey on allegations of misconduct which Westcor's witness would allege were reported to it after Mey's resignation. The arbitrator established that there were no pending charges against Mey while she was employed and that she was unaware of any allegations of misconduct. There was, moreover, no reason to seek a hidden ulterior motive for Mey's resignation in circumstances in which the correspondence and other evidence demonstrates that her resignation was the culmination of a four-week long engagement about the salary cut. As the evidence was irrelevant, there was no misdirection in disallowing it.

[65] I am also unable to agree that the arbitrator failed to make a finding on the fairness of the dismissal.[41] Her finding on this issue is at least implicit. The arbitrator recorded at the outset that she had to decide both 'if the applicant was dismissed and if the dismissal was fair'. She recorded evidence and engaged in analysis relevant to objective intolerability as well as to the fairness of the employer's conduct. She concluded that there was a dismissal, and said that it was unfair when she awarded compensation for '*the unfair dismissal.*'[42]

[66] It is so that the arbitrator does not, in her award, include a paragraph in which she separately sets out her reasons for finding that the dismissal was unfair. Does this mean that the award suffers from the same reviewable defect as in *Eagleton* and *Value Logistics*?[43] I think not: in those cases the arbitrators awarded compensation <u>without</u> having found that the dismissal was unfair, thereby exceeding their powers. In this case however the arbitrator awarded compensation for <u>the unfair dismissal</u>.

---

[41] I deal with this review ground despite it not having being raised on the papers. See paragraph [48] herein.

[42] Award par 44.

[43] Discussed in paragraph [45] above.

[67] It is in any event well-established that the focus in a review of an arbitration award is not on individual lapses, errors or misdirections by the arbitrator, but on the ultimate outcome. The reviewing court examines the merits of the case '*in the round*' in order to determine whether the eventual decision is one that a reasonable arbitrator could reach *on all the material before the arbitrator*.[44] If the award is capable of reasonable justification, including on the basis of good reasons not considered or identified by the arbitrator,[45] it will not be set aside: fragmented, piecemeal analyses blur the review/appeal line.[46] As Murphy JA put it in *Head of Department of Education v Mofokeng and others:*[47]

Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order … as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[68] The LAC in *Mofokeng* thus set out what Myburgh and Bosch, in their seminal book Reviews in the Labour Courts,[48] describe as a 'useful formula': the Court is:-

"required to identify *what went wrong*, whether the result *would have been different* but for this; and, if so, whether the objectively wrong decision is *capable of reasonable justification"*.[49]

[69] Adopting this helpful formulation yields the following result: on Mr Bosch's argument *what went wrong* is that the arbitrator failed to set out in her award, separately from her determination as to whether Mey was dismissed, her reasoning supporting her decision that the dismissal was unfair. Nevertheless, the result *would not have been different* had she done so. The award of compensation for an unfair constructive dismissal is *capable*

[44] *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at 12 and 25.
[45] *Fidelity Cash Management Service v CCMA & others* [2008] 3 BLLR 197 (LAC) at 103; *National Union of Mineworkers and another v Rustenburg Platinum Mine (Mogalakwena Section) and others* [2015] 1 BLLR 77 (LAC) at 27.
[46] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2014 1 BLLR 20 (LAC) at 17-18.
[47] *Head of Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at 32.
[48] Myburgh and Bosch Reviews in the Labour Courts (Lexis Nexis, 2016).
[49] Ibid at 39.

of reasonable justification on all the material properly before the decision-maker.

[70] Even if I am wrong, and the correct position is instead that the arbitrator committed a gross irregularity and exceeded her powers by awarding compensation without having applied her mind to the fairness of the dismissal, in the view I take of this matter the review application does not succeed in any event. That is because, in that case, this Court may set aside the decision and substitute it: both parties were legally represented at arbitration and there is a full record, placing this Court in as good a position as was the arbitrator to take the decision which was overlooked; substitution is moreover the proper approach because remittal will cause undue delay. On all the evidence which was before the arbitrator, this Court is persuaded that Mey's dismissal was, indeed, unfair.

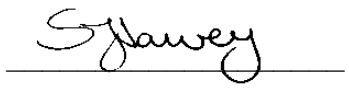
Conclusion

[71] The arbitrator was correct in concluding that Mey was constructively dismissed.

[72] The ultimate outcome was one that a reasonable arbitrator would reach on all the evidence and material properly before the CCMA in this matter.

Order

1. The review application is dismissed.
2. There is no order as to costs.



Harvey AJ

Acting Judge of the Labour Court of South Africa

Appearances:

On behalf of the applicant: L Myburgh

On behalf of the third respondent:	C Bosch instructed by Macgregor Erasmus Attorneys