REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D409/2011

In the matter between

THUMBTRIBE TRADING CC **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER HILDA GROBLER N O **Second Respondent**

DIANE LORNA Macleod **Third Respondent**

Heard: 21 November 2013

Delivered: 27 March 2014

Summary: Review application – constructive dismissal - allegations that an employee was badly or unfairly treated cannot suffice - she had to prove that such treatment was sufficiently hostile, harsh or antagonistic to meet the standard that "intolerable" sets - she cannot make out a case for constructive dismissal if she left the applicant's employment in a fit of pique or out of an excessive overreaction to a management style with which she did not agree – constructive dismissal not proved.

JUDGMENT

CELE, J

Introduction

[1] The essence of this application is about a determination whether an employee who reported to the CCMA instead of reporting at her workplace and thereafter referred a constructive dismissal dispute was indeed dismissed by her employer. The matter was presented as an application in terms of section 145 (2) of the Labour Relations Act[1] to review and set aside an arbitration award dated 17 April 2011 issued in this matter by the second respondent. The award panned out to 62 pages. The application was opposed by the third respondent in whose favour the award was issued.

Background facts

[2] There are a number of aspects of the evidence which remained common cause between the parties and such of that evidence as was outlined by the second respondent will provide a guide to follow in this matter. The third respondent was initially contracted to the applicant as an independent contractor from 1 January 2007 to June 2007. Thereafter, she was placed on full time employment by the applicant with effect from 1 July 2007 as a Senior Java Developer. She designed software to enable the applicant to sell applications such as electronic games to cell phone users. She had to ensure that cellular telephones could be used to download the contents, *inter alia*, of games, ring tones, real-tones, videos, full tracks and wallpapers. Costs of the download were charged to the phone to which the data had been sent. The applicant's business was that of providing platforms from which games could be downloaded onto cellular telephone handsets. The business required

[1] Act Number 66 of 1995.

knowledge and the application of the latest and developing technology, and was based in a high pressured IT environment.

[3] It was a busy working environment, where a number of resignations occurred in a relatively short period as appeared in the resignation letters of Mr AJ Brindley, on 9 February 2007, Mr Walt Pretorius on 6 July 2007, Mr Antonio Soldat on 7 August 2007, Ms Nishkar Ramatautar on 16 August 2007, Ms Julien Staheli on 4 October 2007, Mr Grant de Lange on 11 September 2007 and Mr Rory Smith-Belton on 25 September 2008. All resigned in amicable circumstances, though.

[4] The third respondent entered into a working arrangement with Mr Graeme Haley, the owner and Manager of the applicant, in terms of which she had to spend certain hours at the workplace and the remainder of hours would be spent at her house. She had to be in the office from about 07h30 till 14h30 and had to accommodate about two more work hours at home. This was done to help accommodate her position as a single parent to her son. She had to record the number of hours worked at her home and submit them to Mr J Haley. Her normal working time was to be 40 to 45 hours per week. A written contract of employment was drawn up but was never signed by the third respondent who queried a clause in it that outlined the working hours as not in terms of the agreement reached by the parties.

[5] The third respondent worked very hard, diligently and clocked in much more time than the 40 to 45 hours to her work with the result that the business of the electronic applications sold by the applicant improved markedly. When the third respondent joined the applicant, its business was very small, consisting of a core staff being Mr Graeme Haley, his wife Ms Kathy Haley, his brother, Mr John Haley and a few other employees who did not stay that long. The applicant officially reported to Mr G Haley in 2007 until around August 2008. Mr John Haley was responsible for finances, administration and human resources, the HR, while Ms Harley was part of the management team. The applicant showed its gratitude for the time and effort put in by third respondent to her work by promising her a holiday in February 2008 and finally paying for

her and her son to go to Mauritius on holiday in the first week of July 2008. An email from Mr G Haley dated 8 April 2008 in that regard said:

> 'Di - I am backing you and am doing everything I can to help you. The idea of the Mauritius trip is to thank you and also give you some well earned rest. I am very aware of how much you are doing and how much sweat and blood you pour in.'

[6] At arbitration, the third respondent said that she frequently worked between 70 and 80 hours a week during the period January 2007 to July 2008. She said that Mr G Haley was an incredibly good salesman who was continually bringing in new deals thus making promises to clients without consulting her to establish whether the projects were manageable in the time frame he had agreed to with clients. She said she was constantly trying to get to all the different issues and commitments that had been made. In respect of that evidence, Mr G Haley testified that the third respondent ought to have given him "a reality check" which she did not. According to the third respondent, that matter had been discussed and Mr G Haley knew that she was under severe stress but he ignored even his undertaking that he would check with Ms Haley whether he should bring in another deal.

[7] Mr G Haley frequently undertook to appoint suitably qualified staff to lighten the third respondent's burden. She said the extra staff materialised almost a year after she was employed and until that time she had to try and "keep up" with Mr G Haley. The third respondent repeatedly informed Mr G Haley that she was under severe pressure, that she was buckling under the strain and that her health was suffering.[2] She had an occasion to write to Mr G Haley where she said that:

> 'Sorry but I am just not holding up under this strain. I permanently feel like vomiting and am on the point of tears - not in my nature. For the first time in my life I feel I am breaking under the pressure because I cannot do things properly. The only way in IT is the right way and I don't have time to do things right. Just get them in make shift then never get back to fix them. This is a dangerous place for Thumbtribe to be.'

[2] See the last paragraph of the e-mail of 8 April 2008.

[8] During April 2008, Mr G Haley acknowledged that she was still under stress and said that it would be good to have another 10 people on board and he expressing the hope that it would materialise in the next six months. She reported to Mr G Haley with whom she exchanged e-mails on the work that he told her to attend to, such as having to attend to Vidzone, Momac, the case with Momac and Dstv and to keep him updated apart from all other elements that she was working on.

[9] In June 2008, the applicant engaged the services of Mr Philip Kruger as another Java Developer. As a recognition of all the work the third respondent put in, she went to Mauritius with her son for a week in early July 2008 on a paid-for holiday and returned on or about 8 July 2008. She really appreciated the gesture of Mr G Haley. She, however, said that she was so tired that she could not enjoy the holiday. As a consequence, she took a number of decisions while she was in Mauritius, one of which was no longer to work the excessive number of hours that she had been working. Given that Mr Kruger was then on board, she hoped that she would be able to cut back on those hours and to get some balance in her life. However, according to her Mr Kruger did not take some of the pressure off her as he took over work which had, until then, been handled by an outside contractor and her workload remained excessive.

[10] In some unexplained circumstances, the third respondent came into possession of the *curriculum vitae,* the CV*,* bearing the names of Philip Kruger and she assumed it belonged to Mr Kruger who joined her as an employee of the applicant. According to that CV Mr Kruger lacked qualifications for the job he was placed in and the third respondent, accordingly had a dim view of the abilities of Mr Kruger to do his job. It turned out only at the arbitration hearing that the CV was not of Mr Kruger employed by the applicant.

[11] The third respondent and Mr Kruger started off with a somewhat strained relationship. On one of those early days together, Mr Kruger was pre-occupied with his cellular telephone when the third respondent was speaking to him and she took offence at that and reported the incident to Mr G Haley.

On another day, Mr Kruger rewrote a project and he made a mistake by leaving a session open such that those sessions caused problems on the server. According to him all developers make mistakes in their codes and so, the third respondent should simply have fixed that mistake within minutes. He might well have said that the third respondent did not behave like a Senior Java Developer but he could not recall it. Mr Kruger did not appear to have any particular issues with the third respondent. In August 2008, Mr Kruger was made the IT team leader over the third respondent. On 11 August 2008, Mr G Haley had an occasion in which he issued a letter in an email to the credit of the third respondent by saying, *inter alia*, that:

> 'When Di joined us in 2007 we found ourselves in a situation where a previous employee had made a complete mess of our system. Di basically had to ring fence the issues and dig her way out while maintaining a fully operational production environment. It took incredible efforts for her to juggle both production and development in a highly stressful environment. When she joined us, she embarked on cleaning up the mess from the previous staff member, including documentation which had never been done before. Di has been truly committed to Thumbtribe and has made sure that at every instance she has put our interests first. Her efforts have been greatly appreciated by all of us at Thumbtribe."

[12] At some stage, Mr Kruger asked the third respondent to write a test as he had made it clear that he would change the technology and so, the purpose of the test was to determine the course the third respondent was to undertake. He did not design the test himself but had obtained a copy thereof when he was still in the corporate world and he had used it a number of times before he joined the applicant. He tweaked it to suit his purposes. The third respondent did not write the set test. Mr Kruger did not know why the third respondent did not write the test.

[13] It became apparent to the second respondent that, from the evidence of the third respondent and that of Mr Kruger, that the issues around this test were based on a misunderstanding which could only be attributed to poor communication and a lack of information from the respondent's side. Had the

third respondent known what Mr Kruger's correct CV was, where the test had originated from and what the exact purpose thereof was, she would not have been suspicious of what Mr Kruger was about. According to the second respondent, Mr G Haley knew why Mr Kruger wanted the third respondent to write the test and why she had some concerns about it. Mr G Haley was said to have failed to either ensure that they discussed the matter or to clear up the misunderstanding when he called both into meetings to address areas of concern that he ostensibly had with the third respondent's productivity and loyalty.

The relationship between Mr G Haley and the third respondent

[14] According to the third respondent, very little had come of her plans to cut back on the excessive hours once she returned from Mauritius. She testified that she no longer worked some 70 hours a week but said that she was still working more than the 40 to 45 hours stipulated in her contract. When it became apparent that she was working closer to 40 rather than to 70 hours, a week, she noticed a subtle change in Mr G Haley's attitude towards her. She said she could initially not put her finger on it but it became apparent that Mr G Haley was no longer communicating with her as before and he referred much more to Mr Kruger while she was still doing most of the work. She said that the same e-mail dated 11 August 2008 praising Mr Kruger, stating that the IT team would increase in numbers, suggested that someone would be appointed to lead the IT team and it commented on what was perceived to be "heavy vibes" around the office. It continues to say:

"....

> We are currently re-looking the way in which our team will be structured. This is something that John is putting a great deal of time and effort into. We have had quite a flat structure which has worked well in the start-up phase of our business but we will be making changes over the coming weeks to better deal with the amount of work coming our way.
>
> Thank you for agreeing on Friday to move forward positively and putting any misunderstandings/issues behind you. I can't even begin to express how

> unfair it is to on the rest of Thumbtribe when any of our team bring their issues into the office and do not attempt to resolve this with the person that they have the problem with. We are too small for politics and HEAVY vibes around the office. Please keep the communication levels up and spend time trying to improve Thumbtribe instead of looking for faults in colleagues...'

[15] The third respondent said that, that e-mail came about after she went and told Mr G Haley that Mike, who was looking after the servers, had expressed concern because Mr Kruger had overloaded the server with unnecessary sessions. Mike, she said, had found it difficult to discuss the problem with Mr Kruger as the latter was aggressive to suggestions made. When she spoke to Mr Kruger about these sessions, he became both aggressive and defensive. While Mike put in a solution, the third respondent said it was important to address the cause of the problem. She reported the matter to Mr G Haley who, she said, was not interested in what she had to say.

[16] Mr G Haley referred to the importance of "personality fit and integrity" of the IT team in the 11 August 2008 email. However, as there were only two members in the team and e-mail heaped praise on Mr Kruger, the third respondent considered that remark with direct reference to her. Until that point there had never been a suggestion that the third respondent's personality did not fit and she said it was a given that her integrity had always been paramount and non-negotiable. There had further never been any suggestion that she did not fit in with the company culture. However, the third respondent formed the impression that the email was meant to convey a shift in Mr G Haley's attitude to her, when he wrote "[w]e are too small for politics and HEAVY vibes around the office." According to Mr G Haley, misunderstandings had been resolved.

[17] She said that she had noticed a definite change during August to October 2008 in Mr G Haley's conduct towards her as he suddenly stopped talking to her and when he did, he would do so while other men were present. The third respondent perceived these discussions in a negative light for the following reasons:

- She said she would be called into the office where a number of men, being John, Mr G Haley, Mr Kruger and Andre who would be standing in a semi-circle.

- One of them would make a comment and when she responded another would comment so that she would have to turn and face that person.

- She would ask for facts or tried to discuss issues but she would never get a response as the topic would be changed.

- Those interactions did not constitute meetings in the normal sense of the word but were designed to harass her. During one of the discussions, Mr G Haley made comments such as that company should be run by young people. When she asked Mr G Haley whether that meant they do not want her on the team, he backed down and said they needed her experience before changing the subject. Mr G Haley and Mr Kruger commented that she was too old and too stupid to learn a new technology. Nothing concrete was said but she believed negative suggestions were implied. Insinuations about her productivity were made.

- Mr G Haley remarked that she no longer worked after she left on a Friday to which she replied that she had worked her 40 hours for the week. Thereafter, she confronted him and asked how many hours he wanted her to work but instead of answering, he simply changed the subject. She had been working between 40 and 55 hours a week at this point.

- When Mr G Haley asked her whether she would be prepared to go for further training she replied in the affirmative saying that she had no time to keep up. However, while new employees were sent for training, she was never sent.

[18] Mr G Haley testified that he had discussed the matter of further training or going on courses with the third respondent but it was not doable because of the arrangement that she had with her son. The third respondent was recalled

to testify and she challenged her none availability to training by saying that she would have made arrangements as she did when she went to the Nokia conference in Dubai. She said no specifics of the course were ever discussed with her, it was merely mentioned and thereafter it would never be referred to again.

[19] As already indicated, the third respondent worked with a number of projects at any given time. Priority was given to each project depending on the demand of the clients. The projects included the Vidzone XML, Momac, the case with Momac, Dstv, EA games for MTN, Nokia, Selatra and to keep updating Mr G Haley and the IT team, which by then had increased in number. Two of the projects are of more relevance to the issues between the parties, being the Nokia and the Selatra games.

The Nokia project/Nokia Content Development – NCD

[20] The Nokia deal was considered to be a very good deal. The third respondent said that the ultimate goal was that the applicant would have Nokia sitting on the server and they would supply it with data and content that would display correctly on a Nokia handset. When a user saw and wanted to buy it, it also had to be able to deal with the billing aspect. She agreed that the idea was not for her to run with and finish the Nokia contract. However, on 10 October 2007, she became involved when Mr G Haley told her that the Indian company would run the project with her. She said she was very keen but raised concerns because it had to be integrated with applicant's systems. Later, Mr G Haley instructed her to oversee the project. However, by February 2008, the Indian company had failed to deliver for the past 4 months. Mr G Haley was dissatisfied and sent the third respondent to a Nokia conference in Dubai. The third respondent said that when she was in Dubai, she had to pretend that the third respondent had a team attending to the Nokia project.

[21] Mr G Haley's problem with her involvement in Nokia was that, according to him, she led him to believe that the work would be completed in time and that he relayed this information to Nokia that wanted to hold him to that undertaking. She said if that had been her only task and if she had three

months she would have been able to complete it. The deadline set by Nokia was the end of April. She agreed that it might have been possible to meet the deadline were it not for the other tasks she had to attend to. Mr G Haley was also aware of the communication between the third respondent and Mr Rafiq. By that time Mr Rafiq was already agitated and Mr G Haley undertook to deal with him. She said the work on the Nokia deal continued after the deadline had passed.

The Selatra games

[22] The Selatra project had been on the third respondent's list for some months prior to November 2008. Messrs G Haley and Kruger had discussions on it with her and she had to attend to it. Admittedly, she had many other tasks on her list for months. According to her, no specific start or end dates had been scheduled for any particular task and things were frequently rescheduled depending on workloads. No one, including the third respondent, could recall when Selatra had been allocated to her but she was told only on 6 November that she had to complete the task on that day. According to Mr G Haley, the third respondent's attention was to have been on Selatra for at least three weeks prior to 6 November. Her version was that she had been busy with other asks including reports for Mr J Haley, changes to billing and attending to multiple Momac sites per reseller. Those, she said, were critical tasks. She disputed any suggestion that some tasks were taken away to enable her to focus only on Selatra.

[23] She denied, in her evidence that she had promised to deliver on the Selatra by the deadline date, saying that even if all the procedures were in place it would have been in impossible to load all the games in one day. She said that the applicant had not instructed her before 6 November to focus only on Selatra. Mr G Haley's e-mail dated 25 August 2008 set out a long list of projects that he wanted his employees to attend to. Selatra was not a top priority for it appeared as item number 13 and it specifically records that "Rory and the applicant were responsible" for the integration of those games. Further to that, Mr G Haley merely asked in a skype conversation of 28 August 2008 'how things were with Selatra'. She said that it was not possible

to do anything with the Selatra until a receipt of the necessary data from the supplier. Only on 18 November 2008 did Mr J Haley write to one Paul, of Selatra, to ask for the correct pricing.

[24] The source of conflict between the parties on this issue was brought about by telephone and email communications of 6 November 2008 mostly between Mr G Haley and the applicant. In the morning, Mr G Haley had a chat with the third respondent in which he made her aware that Selatra ingestion needed to be completed on that very day. He then issued an e-mail to her at 08h12 in which he confirmed the earlier discussion with her and copied the e-mail to the IT team. He said in that e-mail that he expected Selatra working 100%, with automatic ingestion, ingestion into MTN and ingestion into Momac. He told her to load the games herself and to make sure that they came through with no errors. She had to let the team know the time when the games were up so that the team could start to bring the games through for Nokia and Samsung. He said that he could not stress enough just how critical the task was and emphasised that it had to be done on that day. At 12h17, Mr Andre Steyn, an IT team member of the applicant, sent an e-mail to the third respondent, asking for an update as to the titles yet ingested of the Selatra games so as to record them in his spread sheet. At 13h54, the third respondent responded to Mr Steyn with a copy sent to the IT team, saying that she had not started on the Selatra ingestion yet, as she was still busy on checking the MTN and Momac ingestion.

[25] At 17h03, still on 6 November 2008, Mr G Haley issued an e-mail to the third respondent saying that:

> 'Things cannot continue like this. I wrote you an email this morning as well as made a phone call to you. I pointed out that nothing was more important than getting this ingestion sorted out today.
>
> John informs me that he asked you to run some reports that should not have taken you more than 15 minutes to do and what you gave him didn't work anyway... so he had to go to Lorrae and get it sorted.

> You should have informed anybody with a work request that you had one single goal for the day which was to complete SELATRA and the ingestion into MTN and MOMAC.
>
> I gave a very clear instruction. You made no effort to respond to the email and at 6:30 pm this evening you informed me on the phone (because I phoned you) – that you haven't even started.
>
> I am at my wits end... I am getting very poor reports back of what you are doing and my patience is wearing thin.
>
> Neither John nor I were aware that you were working from home today either. Your communication skills leave a lot to be desired.
>
> I don't expect a response. But I do expect Selatra to be completed today as was the request this morning.
>
> I will see you in the office tomorrow.'

[26] In her defence, the third respondent said that although Mr G Haley had instructed her to complete the Selatra ingestion on 6 November, Mr J Haley had also asked her to complete some reports for him and pressed her for them despite the fact that she told him that she had to work on the Selatra games. She said that as she was the only one who could help him, she tried to get the reports out as quickly as possible. She averred that it often happened that she was given a deadline that was impossible to meet just to have someone else coming with a request that required her immediate attention. As to the instruction of 6 November 2008, the third respondent said that it meant that she had to make sure that data came through correctly; she had to write a system and it was physically impossible to perform the three steps that were required in one day. The process she had to perform required her to write a tool, to put the software in place, to pull the data onto the server and validate it to make sure that all hands sets matched. She said the first step could not be dealt with in one day as there were hundreds of games on Selatra and it was simply not possible to send them to MTN in a short period of time.

[27] The third respondent's weekly time sheet for 24 November 2008 reflects that she was still busy with Selatra two weeks after she had been given a day to complete the job. Other than Selatra, she worked on EA games for MTN, investigated the Vidzone XML download and metadata, changed handset matching on all game ingestions, wrote fixes for data; tested the Selatra ingestion and sent a game to Momac.

[28] Mr Kruger said that Selatra was not finalised because the problem persisted, resulting therein that the games could not be ingested on a live environment and it did not filter out games they did not want. After the departure of the third respondent, he oversaw that Nick continued with the Selatra ingestion. While Nick succeeded in ingesting the games it was not done in an elegant manner but they knew the old piece of code would fall away and they needed it to work till it did fall away. Mr Kruger said he did not know whether it was possible to finalise Selatra in one day when Mr G Haley gave that instruction on 6 November 2008 because he did not know the state at which the project had progressed. He said that it took Nick a few days to fix whatever needed fixing. It was done by mid-Dec 2008 before shut down.

Third respondent's alleged failure to advise Mr G Haley that she was overloaded

[29] According to Mr G Haley, the third respondent accepted tasks without indicating that she could not complete them in time or at all. She said that she never once met a deadline because Mr G Haley would impose the deadline when he was already behind the commitment he had made to the client. He imposed those deadlines because he knew she would bend over backwards to help him out of situation he got the third respondent into. She referred to the Samsung deal that had been outsourced and had not worked out. When called upon to assist with this deal, she worked through the night and although she could not finalise it, Mr G Haley knew that she would deliver. She completed the project in the next few days.

[30] She said that Mr G Haley knew that she would push herself to the absolute limit. In the process, things were not finalised which meant that she would have to attend to them again at a later date but mostly she could not return to

them more comfortably because there was always a new project and therefore a new crisis. While the third respondent agreed that Rory and Mike assisted in various ways, she said they were not assigned to her and Mike handled additional tasks that were not on her list. However, she conceded that if Mike had not done the work he did, it would have had to be done by her. Mr Kruger said that Rory's tasks were moved to the third respondent because the software was not conducive to what he had to do and it was given to the third respondent to fix because things had to work.

[31] The third respondent testified that she was attending to the MTN project, the Nokia project and had to sort out the administration system in-house at the same time. She said that she had to jump to attend to whatever "shouting was the loudest" and could not focus on a single project at any one time. She said she attended to the worst bottlenecks to enable the business to function. Mr G Haley knew at all times what enormous workload she was carrying as she kept him informed so that he could make business decisions. As members of staff were resigning, she had less help than before and finally Mr G Haley decided to outsource the Nokia project to an Indian company. This was a dismal failure in that none of the promises made by that company came to fruition.

[32] A need to keep in mind a distinction in periods between the pre and post Mauritius holiday need to be kept in mind as the third respondent unequivocally conceded that after her holiday she worked less hours and it remained common cause that more and more members joined the IT unit.

[33] There is an e-mail that Mr G Haley sent to the third respondent on 9 December 2008 which, according to her, implied that she was responsible for the loss of the Nokia deal for he said that:

> 'We need to have a discussion around your role and future in 2009. With the loss of Nokia NCD and continuous lack of commitment towards meeting targets and taking ownership of duties that are given to you, I think that we need to finish the conversation that was started last week.'

[34] At the arbitration hearing, Mr G Haley appeared to be somewhat conceding that the third respondent was not responsible for the loss of the Nokia deal.

The vacation and sick leaves

[35] The third respondent envisaged taking the end of the year leave from 12 December 2008. She said when she discussed the issue of her leave with Mr J Haley, it transpired that she had to take her leave that was due in December otherwise she would forfeit it. Leave arrangements were made with Mr J Haley where after she had to complete a leave forms. On leave arrangements, Mr Kruger said leave was traditionally approved by Mr J Haley. However, it had recently been decided that leave should be approved by managers. Mr J Haley was still approving leave applications as it was difficult to change habits. An e-mail was sent out on 25 November 2008 asking staff to indicate when they plan to take their leave. The third respondent's name was listed among those that had not indicated what their leave arrangements were. She wrote an e-mail to Mr J Haley, informing him that she had given her leave forms to Linda, Mr J Haley's secretary. At no time was it indicated to her that it would be a problem with her taking leave during December.

[36] She said that she had a very full work schedule until 12 December 2008 as she had been given work only until that date and in the event that further tasks had been scheduled for the next week, she would have spoken up and reminded Mr Kruger that she was on leave. On 9 December 2008, she was also given Nick's workload and that meant she had to process batches on top of her work.

[37] On 9 December, Mr G Haley instructed her to ensure that Colin, who was coming down from Johannesburg, could be trained on the ingestion of games. She said that there was no documentation available for that task which meant that she had to produce such documents. However, in her view, it would have taken about three weeks to get those documents in place. She sent an e-mail on 9 December 2008 at 14h26 telling Mr G Haley that she was going on leave as her last working day was on 12 December 2008. The next she heard from Mr G Haley was through an e-mail of the same date, 9 December 2008 which

she said pushed her “over the edge” as this was the first indication that there was a problem with her taking leave and as planned. It reads:

> ‘Hi Di
>
> My understanding is that your LEAVE still needs to be approved and at this stage you are nowhere near completing any of your tasks.
>
> We can discuss this in detail when I am back in the office later this week.
>
> We need to have a discussion around your role and future in 2009. With the loss of Nokia NCD and continuous lack of commitment towards meeting targets and taking ownership of duties that are given to you, I think that we need to finish the conversation that was started last week.
>
> The email below highlights your attitude... you think that you are going on leave and that the request I have made with regards to Colin is not your problem.
>
> This will no longer be tolerated and measures are now being put into place.
>
> I have allowed you the benefit of the doubt for too long and there have been far too many deadlines missed (and missed by months... not days) and the cost to the company of just the Nokia deal alone has been enormous.
>
> We have not got a contract in place with you. This will need to be dealt with as unless I am mistaken you are still contracting on a fixed monthly fee.’

[38] The third respondent came to work on the following day and while at work opened her e-mails and saw the response to the leave notification from Mr G Haley. She closed her laptop computer, left the workplace and proceeded straight to her Medical Practitioner, Dr David Deacon. Mr Kruger testified that he only knew she was taking leave when she advised that she would not be there to attend to Colin. He said that had he known that she wanted to go on leave, he would have consulted with whoever she was working with to find out if it was okay business-wise and then he would have approved it as he had no objection to her taking leave. He said he could have juggled things around to accommodate her.

[39] To a suggestion that the third respondent had failed to follow the correct procedure as she was to have discussed her leave requirements with Mr Kruger, she said that apart from always discussing leave with Mr J Haley, Mr Kruger would have known by no later than 25 November that she was taking leave and that her last day at work would have been the 12th of December as he would have seen it on the schedule that she had completed. Further to that, she said his position as IT manager only meant that he could assign tasks to her. The procedure was to discuss leave with Mr J Haley and once he had given his permission, the next step was to complete the leave forms and submit them. She said she had never been informed that this procedure had changed.

A consultation with Dr Deacon

[40] Dr Deacon operated as a General Practitioner for about 30 years. He said that most of patients that he saw involved psychiatric and psychological treatments. He said that the third respondent came to see him on 10 December 2008, in great state of agitation, very stressed, tearful and very upset. He discussed with her and she reported to him that she had been working tremendous long hours for a long time, so much so that she was taking work home on the weekend, her son was apparently going to work in the evenings with her, so there was care for him but it put a tremendous stress on her. He could not remember the exact cause that triggered it but it was basically the fact that she had been working tremendously long hours for a long period of time.

[41] Upon information given to him by the third respondent and having noticed how she presented herself, Dr Deacon diagnosed her as suffering from *acute stress/anxiety syndrome*. He did not think that she was in any state to work because of her state of anxiety. He recommended that she takes tranquillisers with the possibility, it her state did not settle down, of taking anti-depressants. He felt that her state had been going on for a while and she had the early stages of a reactive depression, meaning she could become quite seriously ill. He recommended that she stayed out of work for two weeks, as he thought it would take at least one week to stabilise and settle her down and one week to

recover. He knew her for about 15 years as her family Doctor. He knew that she was not the quickest person to run to a Doctor and that she was very averse to taking medication of any kind. He knew that she had been through fairly stressful situations before but they did not cause her to be in such a state. He said that her state was acute, meaning it had just started, as opposed to chronic which would mean it had been going on for a period of time. A syndrome was a collection of symptoms and in this case there were a lot of the symptoms of anxiety, being stressed, to get a knot in the stomach, headaches, muscle spasm, sweating, fear of reality and a tight chest.

Chief findings of the second respondent

[42] The second respondent found that while Dr Deacon, the third respondent and Mr Kruger were good witnesses, Messrs G Haley and J Haley were not, and that only little reliance might be placed on the versions that the two Haley's placed before her.

[43] She also found that the third respondent:

- did not set deadlines,
- did not go on a 'go slow',
- did not ignore instructions or do as she pleased,
- did not submit false time sheets,
- was not given an instructions to make Selatra her priority three months before 6 November 2008,
- did not give Mr Kruger reason to state that her work was poor.

[44] Further, she found that the third respondent:

- did her work as diligently as before;
- elected to try and work 40 – 45 hours per week but more often than not worked many more hours without any overtime pay;

- did not pose a threat to the applicant in any way and remained loyal and dedicated throughout;
- worked against tremendous odds;
- had every reason to believe that she was being excluded;
- was not unreasonable in her perception that Mr G Haley was alienating her by harassing her at meetings, refusing to answer questions, refusing to face issues where she had confronted him following his insinuations that she wasn't working after hours or that her productivity had sharply dropped;
- did not refuse to go on a training course;
- did not refuse to write Mr Kruger's test for the sake of refusing or questioning, but had legitimate concerns and questions that were not addressed;
- was overburdened with a workload that was totally unfair;
- did not fail to meet deadlines because she was tardy but faced a work environment where her task list and priorities kept changing on a regular basis;
- was not given the assistance promised;
- was expected to work as hard as she did before she went to Mauritius; and
- followed the correct procedure when she had applied for leave.

[45] Further findings are that:

- Mr G Haley was the one who managed her and not Mr Kruger.
- At the very latest Mr G Haley knew by 9 December 2008 that she would be on leave from 12 December 2008 but did nothing to discuss

the matter with her. He simply sent her the email that severely traumatised her.

- Most of the issues that were laid at the third respondent's door had nothing to do with her but was simply due to poor communication and poor management on the applicant's side.

- She was extremely stressed because of the workload and specifically because of the particularly unreasonable demands that were being made on her from 6 November 2008 onwards.

- In the circumstances, the email that Mr G Haley sent her on 9 December 2008 pushed her, in her words "over the edge" resulting in a medical diagnosis of "acute stress"/"anxiety syndrome".

- The applicant's callous response to her medical condition and utter disregard that it showed towards her when she was booked off sick, was too a large degree representative of Mr G Haley' attitude and conduct towards her during the last 6 months of her employment.

- Mr G Haley conceded that he knew the applicant was unhappy. In fact, he went so far as to say that she was "disgruntled" and as a consequence thought she might "turn on" the applicant but did absolutely nothing to establish why she was so unhappy. While knowing that the third respondent was in an emotional state where he identified her as a potential problem and suspecting that she might "turn on" the applicant, Mr G Haley continued to add to her stress by increasing her workload, setting unrealistic, unreasonable and unfair deadlines for her, without considering what effect an even greater burden and increased, excessive demands would have on her.

- Mr G Haley wrote her a scathing, humiliating, and deliberately hurtful email that contained an untruth an unfair comment as well as a direct threat, saying:

  - she was responsible for the loss of the Nokia contract;

- because he had refused or failed to sign the employment contract, she was not an employee but a contractor; and
- her attitude would no longer be tolerated and measures were then being put into place.

- This email was the last straw under circumstances where the third respondent was physically and mentally exhausted because of the pressure and stress to which she had been subjected for months, while feeling increasingly alienated. Further to that, the insinuations which she perceived to have been aimed at her dedication and commitment and suggested that her employment was on the line, was confirmed when Mr G Haley wrote that unless he was mistaken she was still contracting on a fixed monthly fee, that is, she was not an employee.

- The applicant made the third respondent's work situation and environment increasingly intolerable over a period of months and that Mr G Haley's email dated 9 December 2009 indeed pushed her "over the edge" – she simply couldn't take anymore.

- The manner in which the third respondent terminated this employment relationship amounted to a resignation and that this resignation constituted a constructive dismissal after the applicant had relentlessly broken her down, in spirit and mind, over a period of some months, escalating its indefensible conduct from 6 November 2008 until 9 December when Mr G Haley sent her the email that reduced her to tears, caused her to finally snap, and resulted in her walk-out.

- The third respondent sought compensation only. It took her three months to sufficiently recover mentally and physically to a level where she could face stress again. She required a full year to rebuild her working life and her career.

- It, therefore, followed that the applicant took no steps whatsoever to make any redress at any stage.

- It is equitable in all circumstances to grant the third respondent compensation in an amount equal to 12 months remuneration, that is R36 750 x 12 = R441 000 (four hundred and forty one thousand rand).

Grounds for review

[46] The applicant raised various grounds for review in which the findings of the second respondent were assailed. Essentially, the applicant submitted that the second respondent committed a gross irregularity in many respect when she assessed evidential material as a result of which she reached conclusions which a reasonable decision maker could not reach in respect of the evidence led. I do not propose to outline each and every one of the numerous factual ground identified by the applicant. Some of the grounds are that:

1. Once the second respondent decided, in the interlocutory hearing, that the third respondent had terminated the employment her approach was as if the constructive dismissal was already proved. This is the incorrect approach. The second respondent should have had regard to the fact that the third respondent bore the onus of proving that the applicant made her employment intolerable. Instead, she effectively placed an onus on the applicant to prove that its conduct was at all times fair.

2. Taking the pre-Mauritius period into account skews the evidence as it ended some 5 months before the third respondent left the applicant's employ. That period is irrelevant to the dispute as it is quite apparent on the third respondent's version that after she returned from Mauritius she reduced her hours worked, on both versions continued working half day at the office and on the applicant's version no longer worked from home.

3. The second respondent ought to have considered whether the third respondent's perceptions were objectively justified or whether her misinterpretation of events caused her dissatisfaction with her work environment. Instead, the second respondent had only regard to the third respondent's subjective state of mind and did not consider

whether a reasonable person in the same circumstances would have considered her further employment with the applicant as intolerable. In the process the second respondent made no real enquiry into the credibility of the third respondent, accepted her version verbatim and chose to make the worst credibility findings against two of the applicant's witnesses all based on incorrectly made inferences rather than fact.

4. The second respondent did not consider the contradictions in the report made by the third respondent to Dr Deacon compared with the third respondent's evidence. As is evident from Dr Deacon's evidence, the third respondent relied on the period before her Mauritius trip to convince him that she was working tremendously long hours for a long time, taking work home on the week-ends, taking her son to work with her in the evenings and as a result suffering tremendous stress.

5. Also evident from Dr Deacon's evidence is that the third respondent made no mention that:

   (a) She worked half day at the office, spent the afternoon in leisure activities with her son and was thereafter supposed to work from home under her own supervision;

   (b) After her return from Mauritius, she continued working half day but reduced her hours worked;

   (c) There was tension at the office because she believed Phillip Kruger was not suitably qualified;

   (d) There was tension between her and Graeme Haley whether;

      (i) on her version that he and others ganged up on her in meetings where insinuations were made or;

      (ii) on applicant's version that meetings were held in an attempt to improve her productivity;

(e) And most tellingly no mention was made of the e-mail allegedly "pushing her over the top" and which she regarded as a refusal of her leave.

6. The second respondent did not consider these contradictions and had she done so she would have had to conclude that the third respondent chose to tell Dr Deacon only such selected details so as to ensure that he granted her sick leave.

7. The second respondent was extremely evasive when questioned as to whether she took the flight that she booked for her holiday. Eventually, she maintained that she did not take the flight nor did she cancel it. The second respondent ought to have had regard to the evasiveness of the third respondent in this regard and ought to have at least considered the impact such evasiveness had on her credibility.

8. The second respondent had no regard as to whether the third respondent's poor opinion of Phillip Kruger was at least partly the cause of the friction between her and Graeme Haley. Instead, she glossed over it, described it euphemistically as a misunderstanding and blames the applicant for allowing the "misunderstanding" to continue.

9. The Selatra project deserves specific attention as the third respondent, in her evidence in chief, relied on Graeme Haley's e-mail of 7 November 2012 to create the impression that it was suddenly foisted on her and she was given the impossible task of finalising it in one day. During her evidence in cross-examination, she initially maintained her position but eventually changed her version when pressed to the effect that it was on 7 November 2008 that Selatra suddenly became urgent. The second respondent did not take this shift in the third respondent's position into account and simply accepted her revised position without considering any impact such a shift had on the third respondent's credibility.

10. In contrast, the second respondent made very adverse credibility findings against Graeme Haley as well as John Haley holding that both

lied under oath and fabricated evidence. She did so not on the basis of demeanour or obvious contradictions in their evidence but by incorrectly drawn inferences and misconstruing the evidence as are set out in the supplementary affidavit. As a result of this one sided approach by the second respondent, she came to the conclusion that the e-mail directed by Graeme Haley to the third respondent was designed to upset, hurt and humiliate the applicant. In coming to this conclusion, the second respondent considers the e-mail in isolation and without regard to the events beforehand especially the third respondent's drop in production, the fact that she was going on leave without completing the Selatra project and that no-one knew about her plans to go on leave.

11. The second respondent's award falls to be reviewed and set aside as being incorrect and not one which a reasonable decision maker, taking into account the totality of the evidence could reach and that the third respondent should bear the costs of the review application.

Grounds opposing the review application.

[47] In opposing this application, the third respondent made a number of submissions to support the findings made by the second respondent. These grounds include but are not limited to averments that:

1. Whatever test is applied in constructive dismissal cases, makes very little difference. The third respondent was appallingly treated by the applicant and Graeme Haley in particular and was rightly found by the second respondent to have been unfairly dismissed as envisaged by section 186 (1) (e) of the Act.

2. The applicant has disingenuously tried to portray the reduction of the third respondent's working hours as something the third respondent was not entitled to do and as some sort of reaction to the fact that Mr Kruger had been appointed. The applicant further attempts to elevate

minor incidents between the third respondent and Mr Kruger in support of this fallacy. The proposition is untenable and ignores the uncontested evidence of both the third respondent and Mr Kruger that there was no personal dislike or animosity between them. The applicant appears to concede that it was the reduction in the third respondent's working hours which led to the animosity toward her by Mr G Haley, yet it can offer no possible explanation as to why the third respondent was required to work hours in excess of those for which she was being remunerated in terms of her contract of employment.

3. The third respondent did not make several complaints about Mr Kruger as suggested. She raised only one issue with Mr G Haley in regard to an error that Mr Kruger had made and testified that she had done so because Mr G Haley had always previously relied on her to bring such things to his attention and she felt it was advisable that he be informed.

4. The bald statement that the third respondent's output dropped and she did not meet deadlines was likewise inappropriate and presented in a manner suggesting that the third respondent was at fault. It is abundantly clear that the third respondent could not have been expected to keep working the same hours she had prior to June 2008 and it follows axiomatically that she would not have been able to complete the same volume of work as she had in the past. Despite that, the applicant appears to have expected her to complete the same volume of work and attempted to compel her to do so by overloading her and subjecting her to unreasonable deadlines with the Selatra issue being a case in point.

5. The events prior to June 2008 set the tone for what transpired thereafter. By that time, Mr G Haley had driven the third respondent to a state of mental and physical exhaustion and, after sending her on holiday to Mauritius for a week, clearly expected that the pattern would continue and that the third respondent would continue to work the same hours she had previously. It is apparent on both parties' versions that it was this fundamental difference which gave rise to the tension

toward the third respondent post June 2008. In the circumstances, it is hardly surprising that the applicant wishes to detract from the relevance of the pre-June period.

6. The applicant notes the adverse credibility findings made against the applicant's witnesses. The second respondent's criticisms of their evidence are entirely cogent and completely supported by the record. Moreover, it is trite that a higher Court should be very slow to interfere with credibility findings made by a trier of fact in a lower forum where the presiding officer would have been the person best suited to make such findings.

7. The applicant attempts to suggest that there were material discrepancies between the evidence of Dr. Deacon and that of the third respondent and that the second respondent should have considered that as affecting the credibility of the third respondent. The contentions are without merit. The primary purpose of Dr. Deacon testifying was for him to confirm his clinical diagnosis of the state the third respondent was in at the time of her dismissal. That he might not have remembered everything the third respondent told him when he testified almost a year after their consultation is hardly a cause for concern.

8. There is no evidence that the third respondent had a "poor opinion" of Mr Kruger or any indication that same might have been because of friction between her and Mr G Haley. On his own version, Mr Haley's animosity towards the third respondent was because she was working fewer hours than she had prior to June 2008. The second respondent's approach to this issue as expressed in paragraph 26 of the award is entirely correct.

9. The applicant is disingenuously attempting to manipulate the events and create an impression that the poor treatment of the third respondent by Mr Haley was simply a misperception on her part fueled by the antagonism that she felt towards Mr Kruger. Clearly, if any such antagonism based on a misunderstanding of Mr Kruger's qualifications

existed as Mr Haley claimed, then he should have dealt with the situation and cleared up any misunderstanding, and the second respondent's observations in this regard are entirely appropriate. The most plausible explanation for Mr Haley's failure to deal with such alleged antagonism is that it did not exist and was simply an *ex post facto* attempt by Mr G Haley to rationalise his lamentable treatment of the third respondent. It is thus hardly surprising that the applicant went to considerable length to substantiate the hypothesis that there was friction between the third respondent and Mr Kruger. The hypothesis was unsustainable, particularly in view of the un-contradicted evidence of both the third respondent and Mr Kruger that no such friction existed.

10. At no point in the proceedings does anyone substantiate on the applicant's behalf that the work physically done by the third respondent was measured against the hours that she claimed to have worked and was found to be wanting. This is in itself a damning indictment of the applicant. Even if the version that the third respondent was under-performing could be substantiated it was incumbent on the applicant to follow a proper performance management process and not to attempt to bully her into working longer hours as Mr Haley did.

11. It was not a unilateral decision that the third respondent would reduce her working hours after June 2008. Mr G Haley had promised her on numerous occasions that he would take steps to employ more staff and reduce her workload. On his own evidence, the employment of Mr Kruger was intended to achieve this result. The criticism of the third respondent is grossly unfair when one considers that she was sometimes working double the amount of hours required by her contract of employment without being paid overtime and the effect that this had had on her health.

12. Moreover, the suggestion that the third respondent admitted that her production and presumably, therefore, her productivity had dropped is misleading. The portion of the record referred to indicates simply that the third respondent stated that she produced less work because she

worked fewer hours. At no stage did she state that she worked less hours than required by her contract or that the applicant did not get full value for the hours worked. She in fact pointed out in her evidence that she was more productive in the hours that she did work because she was not consistently tired.

13. The applicant criticised the second respondent for accepting the third respondent's version and rejecting the applicant's evidence that Mr Haley had instructed her since the September 2008 that the Selatra ingestion was her main priority and that she had been taken off anything else. This issue is a crucial aspect of these proceedings and the following is apparent from the record:

- Haley was specifically challenged to produce any evidence to support his contention and was manifestly unable to do so despite having been given ample opportunity.

- The only evidence the applicant could produce was that the Selatra ingestions were one of several responsibilities foisted on the third respondent in August and September 2008 and that others had been instructed to assist the third respondent in early September.

- At this time, the third respondent was giving Mr G Haley consistent feedback on what she was doing and on 8 September 2008 she gave him an update on all her numerous responsibilities including the Selatra ingestions, informing him that the program had been written but that it would not run on the test server. The ingestions could thus not be completed until problems with the server had been resolved.

- Thereafter, on a weekly basis, the third respondent informed Mr G Haley of precisely what she had been working on and this did not include the Selatra ingestions. At the stage that Mr Haley gave her the unreasonable instruction on 6 November 2008 to complete the ingestions that day, he must have been aware that

the task was impossible to complete in such a short period of time and that the problems with the server had put a stop to work on Selatra almost two months previously.

14. In the circumstances, it is manifestly obvious that Mr Haley had, in his usual fashion, lost focus on the Selatra issue and had utilised the applicant to complete other tasks. The instruction to complete the Selatra ingestions in one day on 6 November 2008 was simply another attempt to bully the third respondent into working around the clock as she had done prior to June 2008. His evidence that the Selatra ingestions had been the applicant's sole priority in the weeks leading up to 6 November 2008 was a blatant lie to justify his grossly unreasonable instruction. The second respondent's adverse findings as to Mr Haley's credibility were entirely justified.

15. The applicant further contended that the second respondent erroneously decided that the e-mail from Mr Haley to the applicant on 9 December 2008 had been designed to upset, hurt and humiliate the third respondent and that she had come to this conclusion without regard to the events which had previously occurred. The suggestion is untenable because:

- It is patently obvious from a reading of the plain language of the offending e-mail that the Second Respondent is correct.
- Mr Haley himself conceded that in the e-mail he had effectively "lashed out" at the third respondent.
- On Mr Haley's own version the third respondent could not, in any way, be held to blame for the applicant having lost the Nokia deal. Accordingly, the contention that the e-mail was a fair response to the situation is incomprehensible.

16. The e-mail was quite clearly a culmination of an ongoing pattern of abuse of the third respondent by Mr Haley, tantamount to a repudiation

of the thirds respondent's contract of employment and the final factor is rendering her employment with the applicant intolerable.

Evaluation.

[48] At the very outset, it needs to be said that there is always a need to be drawn between appeals and reviews. Some of the submissions by the parties left one thinking that an appeal, instead of a review application was being considered. To this extent Mr Ungerer, for the applicant, concluded his remarks by saying that second respondent's award falls to be reviewed and set aside as being *incorrect* (my emphasis) and not one which a reasonable decision maker, taking into account the totality of the evidence could reach. The correctness of an arbitration award, as opposed to a ruling, does not fall for consideration in review applications. In the case of *Komape v Spoornet (Pty) Ltd and Others,*[3] the Court held that:

> 'The question for consideration at the review level is not whether the decision of the commissioner is correct but rather whether the inference drawn from the facts before the commissioner is one which a reasonable decision maker could not have drawn'.

[49] I have had to consider the merits of this matter in the limited sense that necessarily entailed scrutiny of the merits of an administrative decision where there lies the danger, not in careful scrutiny, but in "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge`s own opinions." My task is to ensure that the decision taken by second respondent falls within the bounds of reasonableness as required by the Constitution.[4]

[50] The third respondent bears the onus to prove that she was constructively dismissed and if that onus is discharged, then the applicant bears the onus to

[3] (2009) 29 ILJ 2967 (LC) at para 27.
[4] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) at paras 106 to 109.

prove that such dismissal was fair.[5] The third respondent had to prove the following:

(a) that she had terminated the contract of employment;

(b) because continued employment had become intolerable for her; and

(c) because applicant had made such continued employment intolerable.[6]

[51] Allegations that the third respondent was badly or unfairly treated cannot suffice. She had to prove that such treatment was sufficiently hostile, harsh or antagonistic to meet the standard that "intolerable" sets.[7] She cannot make out a case for constructive dismissal if she left the applicant's employment in a fit of pique or out of an excessive overreaction to a management style with which she did not agree.[8] The test whether the third respondent's resignation amounted to a constructive dismissal is an objective one and her subjective perceptions and apprehensions do not determine the issue.[9]

[52] It remained common cause between the parties that the third respondent no longer worked extraordinarily long hours from July to December2008. Exhibit H contains hourly timesheet with total hours worked by the third respondent for the period 11 August to 7 December 2008. The total adds to 775.5 hours worked. She had to work 7 hours in the office, from 07h30 to 14h30. The total office hours are 7 x 5 days a week x 16 weeks, which equal 560 hours. This leaves 215.5 hours which she worked at home. In terms of her contract of employment she had to add 2 hours per day at home x 5 days x 16 weeks which equal 160 hours. Therefore her contract time was 560 + 160 = 720. She worked the overtime of 775.5 – 720 = 55.5 hours. For this period she worked 16 weeks x 5 days a week which is 80 days. The average of overtime worked per day is 80 days divided by 55.5 hours = 1.44 hours. By her own account,

[5] Section 192 (2) of the LRA; Read with *Smithkline Beecham (Pty) Ltd v CCMA and Others* [2000] 3 BLLR 344 (LC) at paras 35 and 36.
[6] *Solid Doors (Pty) Ltd v Commissioner Theron and Others* (2004) 25 ILJ 2337 (LAC) at para 28.
[7] *Foschini Group v CCMA and Others* (2008) 29 ILJ 1515 (LC) at para 22.
[8] *Milady's, a division of Mr Price Group Ltd v Naidoo and Others* [2002] 9 BLLR 808 (LAC) at paras 25 and 33.
[9] *Smithkline Beecham* op sits at paras 38 and 42.

therefore, she no longer worked exorbitantly long hours during the period material to this matter.

[53] According to Dr Deacon's evidence, the third respondent said to him that she was working tremendously long hours for a long time, taking work home on the week-ends, taking her son to work with her in the evenings and as a result suffering tremendous stress. No attempt was made to correct Dr Deacon's version on the third respondent having suffered acute stress and anxiety syndrome due to being forced to work tremendously long hours for a long time. Dr Deacon could not remember the details of the source of the stress but he knew what the third respondent told him. He had to know the source of the stress so as to remove the third respondent from it. Otherwise the stress triggers could override the prescribed treatment. What he then did was to remove her from work for two weeks so as to avoid being exposed to working tremendously long hours for a long time. In his letter of 10 January 2009, Dr Deacon wrote that the third respondent was under severe stress at work and had been working excess overtime for 18 months. We now know that in her last five months with the applicant, the third respondent only worked 1.44 hours of overtime, which could hardly be described as excess overtime. It then begs the question why the third respondent told Dr Deacon an untruth when she actually knew the exact source of her misery and why this version was left uncorrected during the arbitration hearing. Indeed, and as contended by the applicant, the second respondent did not consider the contradictions in the report made by the third respondent to Dr Deacon compared with her evidence.

[54] At the insistence of Mr J Haley for employees to indicate their leave period preferences, the third respondent completed her application for leave and submitted it on 20 November 2008. Mr J Haley had to satisfy himself that company policy procedures, if any, were complied with by the leave applicants. Such could include a recommendation of the leave by a supervisor where that could be applicable. In instances of none compliance, the attention of an applicant had to be drawn to the outstanding requirement. In the period 20 November 2008 to 9 December 2008, no evidence was produced of any

outstanding requirement to be complied with by the third respondent to qualify for her proposed leave. Whether her leave form was kept by Mr J Haley or his secretary was irrelevant for what the third respondent had to do to get approval for her leave. It behoved the applicant to then respond to that application and to do so within a reasonable time to let the staff know where they stood with their applications.

[55] The behaviour of the applicant on 9 December 2008 at 14h13 through its Mr G Haley was very strange when, instead of responding to the leave application, it informed the third respondent by an e-mail what work she had to do in the period when she thought she would be on leave. Mr G Haley could not be allowed to play ignorance of the third respondent's application for leave. His brother who was also a member of management had the application with him for longer than two weeks. The probabilities are that the two gentlemen discussed this application. There was a reason why Mr J Haley insisted on the staff having to submit their leave applications in time. The company wanted to know how to structure its activities around the material period. Having not been told why she could not take her leave as planned, the third respondent was entitled to assume that leave had been approved. She was, therefore, entitled to respond as she did in the e-mail of the same date at 14h26 that she would be on leave and would not be able to train Mr Colin Becker who was to come from Johannesburg.

[56] Through Mr J Haley the applicant told the third respondent to indicate when she wanted to go on leave with no conditions stipulated. She indicated her preferences. Through Mr G Haley, the applicant was condemned for applying for leave and going on leave when such leave was never disapproved. In this respect, the applicant was being inconsistent in how it ran its business. Mr G Haley's e-mail revealed two issues. One was that the third respondent would not take the leave at the time that she wanted to as her leave still had to be approved. The second is that Mr G Haley had a number of concerns about the third respondent and her employment conditions which the two had to sit down and continue to discuss as they had started a week before.

[57] The reaction of the third respondent to the two issues is really the issue in this matter. For the leave issue, she went to Dr Deacon's consulting rooms and complained about working extremely long hours. She was then booked off-sick for two weeks. It was her evidence that she had already made arrangements for her vacation leave. She would have been frustrated when she was told that the leave was yet to be approved. Had she told Dr Deacon that she was not feeling well because she had applied for a vacation leave only to be told at the late hour that her leave was yet to be considered, Dr Deacon might have felt it would be wrong to be used to grant her sick leave instead. She might not have found it appropriate to tell the Doctor that she was ill because she was held to blame for the delay and collapse of projects at her work place, as it might depict her as a failure in her profession. It talks to her ego as an expert in her own right. Dr Deacon might have found it difficult to have to remove her from those stressful triggers. In my view, telling the Doctor that she was suffering due to being exposed to prolonged, extremely long working hours, was a well calculated lie to sort out the leave issue she was confronted with. She wanted to catch Mr G Haley in the little game he was playing with her and Dr Deacon was a means to an end. The second respondent failed to see this issue for what it was, in the process of evaluating evidential material, with the consequence that she reached, on this issue, a conclusion which a reasonable decision maker could never have reached.

[58] The second issue is about the concerns that Mr G Haley had with the third respondent. The third respondent faced with this concern decided to terminate her employment with the applicant by referring a dispute pertaining to constructive dismissal. What Mr G Haley said to her in the e-mail had to worry her. It might entail her being subjected to an internal disciplinary measure with the possibility of a dismissal or a demotion. It could mean that the applicant might revoke the flexi-working hours that she was enjoying. Yet an employer has the right and the prerogative to exercise disciplinary measures to its employees.

[59] It would be ludicrous though, not to expect the third respondent not to be concerned about her future with the applicant as the e-mail of 9 December 2008 by Mr G Haley raised irrelevant issues against the third respondent who only wanted to take a leave that was due to her. The remarks by Mr G Haley were certainly an unfair treatment of the third respondent, in terms of their timing. The e-mail is, however, clear. It calls on both parties to sit down and finish a discussion which they had started some two weeks before. So the third respondent knew the issues for the discussion. This was an employee who asked for more staff to be employed and indeed more such staff was employed. She interacted with them in various projects which she worked with as evinced by a series of e-mails they exchanged. She was no longer working long hours of unpaid overtime. In my view, the third respondent has not been able to prove that such treatment was sufficiently harsh, hostile or even antagonistic to meet the standard that "intolerable" sets.[10] She could not make out a case for constructive dismissal when she left the applicant's employment out of an excessive overreaction to a management style of Mr G Haley with which she did not agree.[11]

[60] In the circumstances, I find that the applicant has shown that the second respondent misdirected herself, to the extent that her findings are at odds with those I have made here, and she has committed a gross irregularity when she evaluated the evidential material before her with the consequence that she reached a decision which a reasonable decision maker could not reach in this matter.

[61] Accordingly,

1. The arbitration award issued by the second respondent in this matter is reviewed and set aside.

2. The third respondent was not constructive dismissed by the applicant.

3. No costs order is made

[10] *Foschini Group* above n 7 at para 22.
[11] *Milady's* case above n 8 at paras 25 and 33.

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Cele, J

Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant:	Advocate G R Ungerer
Instructed by:	Weber Attorneys, Durban.
For the Third Respondent:	Advocate P H N Schumann
Instructed by:	Brett Purdon Attorneys, Durban