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(1) REPORTABLE: YES/NO. ☒ NO.  
(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ NO.  
(3) REVISED.

19/06/2020  
DATE

*K. Bengeni*  
SIGNATURE

**THE LABOUR COURT OF SOUTH AFRICA**

**(HELD AT JOHANNESBURG)**

**JUDGMENT**

**Of interest to other Judges**

**Case No: JR 1619/2018**

In the matter between:

**CENTRE FOR AUTISM RESEARCH AND EDUCATION CC**

**Applicant**

(Registration Number: 2011/066706/23)

and

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**First Respondent**

**A VAN DER WALT N.O**

**Second Respondent**

**RUDOLF JOHANNES JANSE VAN VUUREN**

**Third Respondent**

**KAREN ROSE VAN DER WALT**

**Fourth Respondent**

**Hearing: 3 June 2020. Via Zoom**

**Date of judgment: 19 June 2020. Judgment delivered by email at 12:00**

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**JUDGMENT**

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## Introduction

- [1] The applicant seeks to review and set aside an arbitration award issued by the second respondent (the commissioner) dated 20 June 2018. In his award, the commissioner held that the resignations of the third and fourth respondents (the employees) from the applicant's employ constituted a constructive dismissal, and awarded them compensation in sums equivalent to four and six months' remuneration respectively. The commissioner further ordered the applicant to make payments to the employees in respect of unlawful deductions and short payments in contravention of the Basic Conditions of Employment Act, 1997. All of these orders were initially the subject of review. At the hearing, the court was advised that the orders for payment of amounts unlawfully deducted and short payments had become moot, since the applicant had paid the employees the amounts that are the subject of the order on the day prior to the hearing. The scope of the review was thus confined to the commissioner's finding that the employees had been dismissed as envisaged by s 186 (1)(e) of the Labour Relations Act (LRA), i.e. that they had terminated their employment because the applicant had made continued employment intolerable.

## The arbitration hearing

- [2] The applicant operates an independent school, registered with the department of education, catering for learners affected by autism spectrum disorder. The employees resigned from the applicant's employ on 12 September 2017 by giving one month's written notice. At the arbitration hearing, both employees testified and were cross-examined by the applicant's representative. The applicant closed its case without leading evidence. The commissioner noted that both employees were exemplary witnesses, they were open and honest, and did not contradict each other or themselves. A reading of the record confirms this observation.

[3] The sole member and director of the applicant is a Ms Rozanna Riback. Both employees were employed by the applicant as special needs teachers; the third respondent in February 2017, the fourth respondent in February 2015.

[4] The third respondent testified first. He stated that prior to his employment by the applicant, he taught English at a high school. Soon after he was employed by the applicant, teachers were required to attend compulsory training concerning visual learning. On the fourth or fifth day of the training, the attendees were told that the cost of the training would be deducted from their salaries. The cost of uniforms was also deducted from teachers' salaries. The third respondent stated that he had at no stage consented to any deduction from his remuneration, and that the matter was taken up by the teachers as a collective with Riback. Riback responded in an aggressive manner, to the extent that two therapists in the applicant's employ resigned after the meeting.

[5] The third respondent testified further that Riback had on multiple occasions referred to him as a 'screaming queen'. He said the following:

Upon her return she would shout at us for the mundane things, she would attack people based on the fact that they are homosexual and that as a human being impaired my, my right to, to human dignity. As a homosexual man being called a screaming queen on a daily basis is derogatory, it is insulting, it is embarrassing. And it makes me not want to be at the, in the workplace.

[6] Riback had referred to parents at the school in the same derogatory terms. The fourth respondent said the following:

She called me often and she' be like; Ag what a scream, oh my gosh you such a queen, why you wearing make-up, all these little (inaudible) that are derogatory were made to my way, and it escalated when two parents came in and they are a lesbian couple, they have adopted a little girl with autism and uhm, Rozanna was not at work for the screening process to happen uhm, which would, at which the

Head Teacher then decided to start the screening process. Upon Rosanna's return, upon Rozanna's return to the school the first thing she told Adele was; you could have least told me that these two women are a bunch of screaming kings, it is the first time I have even heard the term screaming kings...

- [7] The third respondent then testified about being chosen to attend a conference in Cape Town, with Riback, the fourth respondent and an employee named Beverley, an occupational therapist. At the conference, he and the fourth respondent, who are both smokers, went outside to smoke during a tea break. The following events occurred:

However when it was the tea break we got called from outside, were told in front of Professionals in our Industry, in front of Peers, in front of people from all over the world, there were speakers from China, there were speakers from America, people... International speakers, publicly embarrassing and humiliating us. Shouting at us, telling us we are disgusting, we are pathetic, are you stupid, are you death, are you dumb, are you a moron...

APPLICANT REPRESENTATIVE: Why would she do that?

COMMISSIONER: Why ... (intervened)

MR RUDOLF JANSE VAN VUUREN: Because we are smokers. Right we then went back into the conference and at our lunchtime after having had our meal we then went for a cigarette which is acceptable as we had a half-hour break from the conference, from all the learning we are doing and sharing our skills and Professionalism in our Industry. We then got shouted again, we were told that when we have one more cigarette we will have to pay for this entire Conference, all the flights, she will send us back on the first plane to Johannesburg. She called us ungrateful...

APPLICANT REPRESENTATIVE: Alright what else happened, anything else?

MR RUDOLF JANSE VAN VUUREN: This continued and it caused a lot of hurt for us, as there was nowhere to go, we were in Cape Town in her space the whole time, I couldn't go home at night because for the first night we slept in conjoining rooms at the hotel we slept in, where she required us to not close the door when we are dressing because the rooms linked up to one another. That made me feel

uncomfortable. I walked out the shower and she said; Hey let me see that little bum your boyfriend is a lucky man. I felt attacked, I felt unwanted attention on me by my boss...

COMMISSIONER: Why could you not close the door?

MR RUDOLF JANSE VAN VUUREN: Because she wanted the door open.

- [8] The third respondent went on to describe what transpired that evening when he and the fourth respondent attended a dinner in Stellenbosch with Riback. After the third and fourth respondent had excused themselves from the table to have a cigarette, Riback began abusing them calling them 'pathetic' and 'immature'. Other diners were visibly concerned at Riback's conduct, especially when the fourth respondent had to excuse herself and go to the bathroom.
- [9] On the Sunday that the third and fourth respondent were scheduled to return to Johannesburg, they visited the third respondent's brother in Betty's Bay. In a discussion on their work situation, the third respondent's sister-in-law, who is an attorney, advised them that their treatment at the hands of Riback was unlawful, unethical and unconstitutional, and that they had remedies available to them. The fourth respondent testified that he and the third respondent had decided to have a discussion with Riback concerning her conduct and that as a 'backup', they had prepared letters of resignation that they intended to produce in the event that the meeting went poorly.
- [10] On Monday, back at the school, the third and fourth respondents spoke to Adele Hattingh, a senior teacher, who reported to them that Riback was 'furious'. When they met with Riback that morning, Riback told them that they were rude and disrespectful and admonished them particularly for failing to greet her that morning. The employees then tendered their resignations. Under re-examination and in response to a question as to why the third respondent felt that he could not in the meeting say to Riback that they intended resigning on account of her conduct but wish to give her an opportunity to remedy it, the third respondent answered as follows:

It would result in more shouting and at that point I have had enough, I have had enough of being shouted at, being reprimanded, be abused uhm, at the point when I submitted my resignation letter, when she chase us off the property I was relieved that I can just get out of that situation to get, to take a step away from the person abusing me.

[11] The third respondent testified that *'I was escorted off the premises about 5 minutes after my resignation.'* He had offered to work out his notice period on account of the learners under his care and in particular, to avoid any regression by reason of a sudden change.

[12] The fourth respondent testified that her employment with the applicant was first job after leaving university. At the outset, she noticed that the working environment was one in which the staff had a 'vivid animosity' towards Riback. She said the following:

... I notice that I arrived to a staff that was stressed out and I was concerned because of my caring nature and I asked Krishen may I take the initiative to start off a staff well-being committee to allow (inaudible) staff members to nice treat or think of ideas to make a more enjoyable workplace. He laughed in my face. I beginning to realised that that was not going to happen.....

while trying to do my job Rozanna conduct was sporadic and completely unpredictable, at times she would walk into my classroom uhm, to address me in front of the children about matters that are not appropriate to discuss in front of children. On one account I didn't wear make-up to school because I realised that the Therapist weren't wearing make-up so maybe I didn't need to wear make-up. Uhm, she came into the classroom, looked at me, got a fright, told me I looked like a goblin, called in Therapists who is, the once that had been there the longest, call in those particular Therapist to look at me, to look at how sick I look and to, Come on guys tell her she has a face that needs make up, you look sick sweetheart she said to me. I felt belittled in front of the children who respected me and in front of

the two Teaching Assistants that were (inaudible – very soft). Uhm, also I was attacked multiple times for my appearance. Uhm, you are too skinny, you are not eating uhm, are you eating enough, why is your hair a funny colour, you look ridiculous, it is not professional, why do you have tattoos uhm,, you look like a convict uhm...

APPLICANT REPRESENTATIVE: Were you the only person who she passed personal comments about in the uhm, School?

MS KARIN VAN DER WALT: No unfortunately she (inaudible) to express her opinion to anyone whether they were receptive to it or not, she would talk about my colleague Rudolph to me behind his back saying I can't invite him to my birthday party because he is wearing those jeans it is so embarrassing I can't take him with me. In her next breath when Rudy walked past she would say, won't you help me plan my birthday party. So it was always an untrusting relationship with her you never actually knew where you stood... It created an unpredictable climate, my anxiety levels began to increase. I am, I approach Krishen about it, he again laughed it off or tell me she is never going to change, that's just how she is. I felt powerless and I began to believe that I was the one that was too weak to cope. So I sought out uhm, extra support uhm, when I received the news that Krishen was leaving I was very stressed because he had always been the buffer between the staff and Rosanna. And he had always been the bravest person at work, and he seemed unfraid of her.

- [13] The fourth respondent then testified that after Krishen's departure in September 2016, she sought help from a psychologist to provide her with extra support structures that she could use, in an effort to remedy the situation. The reason for this she explained was:

...because I started to believe that maybe I was pathetic, maybe I was stupid, maybe I was (inaudible – very soft). Uhm, and it began to (inaudible) my self-confidence and my self-esteem. Uhm, and I never felt like that before which is why I sought out help... ... I was taught coping skills to help deal in the work environment. Uhm, however that was not enough...

- [14] The fourth respondent testified that in April 2017, she had an opportunity to attend a conference in Botswana. She gave the following evidence:

MS KARIN VAN DER WALT: I was chosen to go and present on half of the Centre because of my expert knowledge on Autism, my experience in Autism practically in the classroom as well as the fact that had (inaudible – very soft) grew up in Botswana for 18 years of my life so I would be the correct person to choose in terms of someone who is familiar with the culture, familiar with the mannerisms uhm, and personally I was excited to be able to bring these skills that I have learned back to the Country that I grew up in. I felt it was a privileged.

APPLICANT REPRESENTATIVE: So what was the problem with you going with her, if any?

MS KARIN VAN DER WALT: We arrived at the hotel uhm, I was under the impression they would be two single beds because that is what we had discussed prior however when we arrived at the Reception Rosanna calmly told the receptionist not two single beds 1 double bed please? That's when I realised I will be sleeping in a bed with my boss. I got anxious immediately but I was there alone with her so there was no one to complain to. Uhm, I was locked in a room with her and she would not let me have the keys because she enjoys the feeling of control so she needs to be the person in charge of the keys. Once we were at the hotel we checked in, we went to the room, unpacked our belongings into the cupboards and then (sigh) then we proceeded to get ready for bed. Uhm, I showered first and then after that Rosanna showered with the curtains of the shower open. Our room was adjoined to the bathroom by glass partition so her showering with the curtains open the lights on the partition open so I am in the bedroom and her naked body is right there in front of me, completely visible. I felt so trapped, so uncomfortable that I hid behind the curtain and face the windows outside until she was complete with her shower...

- [15] The fourth respondent testified further that the hotel, at the relevant time, was only 66% full. The employees' representative then asked her why Riback had booked the room she did. The fourth respondent replied as follows:



I believe it was because Rozanna perceived me as her close friend. As I have mentioned before she lowered the boundaries between professionalism and personal from the moment I arrived at CARE. Without my time at CARE she would conduct a conversation with me from the toilet, with the toilet door open, speaking to me, while using the toilet, that was not uncommon. It was also not uncommon for her to, whilst speaking to us in her, or speaking to me in her office uhm, begin changing into her gym clothes, stripping down to her underpants and her sports bra front of me during a meeting, carrying on with the meeting as though it was normal. So many inappropriate things happened I just began to accept she is a unique individual, she is not the usual boss I have come into contact with in the Professional Private Organisation and I began to try and adapt to keep her happy. Once you have been scolded by Rozanna the first time and she has belittled you to the point where you feel like a two year old child who has whetted her pants in a public place it is essential to surviving the work environments that you keep her in a good mood, because her bad moods are so extreme. An example; one day a (inaudible) parent arrived at the school for the sign for Autism outside and came to the gate to enquire about the centre. I opened the gate for him, and I asked him how can I help you, he said I have a niece in Cape Town she is four years old I suspect she has Autism. Who can I speak to here to find out about the centre, supporting (inaudible – very soft) crisis etc. I said you are in luck our Director is here today let me take you through. I took him through to Rozanna's office, he was in Rozanna's office, she immediately looked at me with anger and I knew I was in trouble, but I couldn't figure out or think of a reason why. He began to ask her questions and she treated him as though he was a person off the streets, he was black man but he was dressed like a father, and a parent, and a customer, a potential person at our school, he did not look in any way dangerous or I would not have let him into the school, I would like to make that clear. Uhm, he then, she then berated him and told he was saying out loud you cannot talk to me like this, you cannot talk to me like this, I sat in silence quietly waiting my turn. He was then escorted off the property by Security, from what I could see for no valid reason, or any reason based on his conduct, his behaviour, the nature of his questions, or his appearance.

- [16] After this incident, the fourth respondent testified that she was reprimanded by Riback, saying:

...that I am crazy do I want her to be killed, what if the guy had a gun, do I want every child in the School to be murdered, it will be on me. And then she told me to go and tell every staff member at the School that if anybody did my mistake of letting a stranger onto the School premises that each of us will receive a R1000 off our salary. Threats like this were common.'

- [17] The fourth respondent was then asked about any further abuse that may have occurred. She said the following of Riback:

She would ask me in public with this uncomfortable open personal relationship Krishen created between uhm, are you having sex with your boyfriend and is he ... She would ask me if I (inaudible – very soft) is he a smoker, I would say no, now she would tell me well he is going to dump you because you are a disgusting smoker. Despite (inaudible – very soft) X smoker, this comment was said when I was in Cape Town and in Botswana when she asked me to get out of the shower I assume it's because she needed to use the toilet or to jump into the shower, she didn't, she just wanted me to get out of the bathroom wearing my towel holding my undergarments and change in front of her outside. Uhm, I began changing and I tried to be as unengaging as possible facing the corner of the room, facing the curtains, to which I realised she was staring at me from behind and made the comment you have a nice little bum you got there, she said it with surprise because she didn't think I exercise or are on a good diet she was obsessed with my food and my weight uhm, she said my hair when it is green made me look like a goblin, told me I look sick without make-up on, or being pathetic if I wasn't able to solve a problem, if you didn't have the solution, ag pathetic... I did my best to respect her, and in my first job as my employer, as my authority, as the person who I saw to lead me, I did my best to respect her. However I found it impossible regardless of my behaviour or my conduct. Do you know I can fire you for that was a threat she made often. An example with me, one day (inaudible) the Teaching Assistant trip a child in my class on playground and then I watch her shout at him, pinch him and

moved him to the corner for a timeout which is not a strategy usable for Autism. Uhm, my child who had problems with his aggression began to punch the wall until his knuckles bled. I saw this incident and I was infuriated I went straight to the employer and I said to her I have just witness inappropriate conduct on behalf of the Teaching Assistant resulting in the physical harm of a child and the School I would like action to be taken. I was (inaudible – very soft) what you just said about your colleague is slander, be careful I could give you your first written warning for that. She didn't even hear me, so trying to bring concerns to her I was, they fell on deaf ears and I started feeling more – and more unsupported in my workplace and mentored and learned in terms of decisions I had to make about child's lives on a daily basis, I dealt with a mother who came home and found the child covered in blood, I needed to give an answer and I was forced to lie over the phone and I was said do not say anything about Ivy, do not say anything, don't get involved. Uhm, she would also call us weird, oh you guys are coke crazy or scream, uhm, she would say you acting like a 25-year-old uhm, by the third year towards the end of my appointment with her she felt comfortable enough to refer to us in a friendly way as ag you fucks uhm, or you bitches, you such bitches because you get to drink alcohol and I can't because I am pregnant. Uhm, that was common that was said in front of colleagues, in front of public places regardless of where we were. It was her over friendly batter, made me feel completely embarrassed whenever I was around her, because I knew she would draw attention wherever we were.

- [18] The fourth respondent then gave evidence about the conference in Cape Town that she attended with Riback, the third respondent and another member of staff named Bev. She testified that she soon realised that Riback did not enjoy her and the third respondent taking smoke breaks – they were scolded despite only smoking during the conference breaks. She testified further about the incident at the restaurant in Stellenbosch that evening, and said the following:

The incident started uhm, I believe it was me who trigger her irrational explosion uhm, I was sipping on my Gin and Tonic and I was genuinely thirsty from walking around that day so my first sip was a big sip. I didn't think this was a problem until she had taken it as a personal attack. Why are you drinking so fast is it because it

is so hard for you to deal with me uhm, why are you ... I am sick of the animosity on this trip uhm, you are ruining my trip I came here to have a nice time and you are ruining my trip with your cigarettes going in and out smoking you and Rudy pairing up together uhm, she said to me that I was acting like a 25-year-old and it was pathetic. However the volume was so loud that the tables around us stopped eating to observe the scene that was happening in the Restaurant. Uhm, and (laugh) she told me that smoking cigarettes was disrespecting her pregnancy, drinking alcohol in front of her was disrespecting her because I know she likes to drink so it is not fair how dare we drink in front of her, if that was her issue why didn't she bring that up when we were ordering he drinks she never bring it us, and, and objection to that. Uhm, after she had finished screaming we usually sit in silence for a few minutes to let her calm down and then wait on her que to see what she, what mood she will be in next and see how we can facilitate that in a peaceful way.... So I continued to sit at the table and I did my best to keep a (inaudible) face, as soon as the meal was over I politely excused myself and went to the bathroom and uncontrollably burst into to tears. And there were four, three or four people waiting for me at the bathroom who had seen what had happened. Mothers saying who is that woman, what just happened, are you okay, are you okay, and I said no I am not okay I can't do this anymore, I physically can't do this anymore (laugh) it is too unpredictable, too anxiety provoking, too degrading and I am not even inspire by my leader... I left lost and alone and abandoned and I remember the conversation when I tried to approach her before and she just said to me I get 100 CV's every day the door is open by all means if you feel that way walkout. And I will admit that the salary I received at CARE I was happy with, so to be threaten with go with anyone else you might get treated better was the underlined connotation but you won't get as much money. Literally challenge my own sense and materials and was I going to stay for the money or was I going to leave. And that is why I wrote in this message I would rather be poor and safe. It is not healthy for me... (Inaudible) after I quite I had to uhm, give notice at the place I was living because she didn't pay me my full salary...

- [19] On the group's return to their hotel, the fourth respondent testified that there remained '*a huge amount of animosity amongst us as three staff members and Rozanna*'. The accommodation arrangements were such that the third and fourth

respondents shared a room with two single beds, with Bev and Rozanna sharing an adjoining room with a double bed. After the fourth respondent had showered, she requested the third respondent to close the door. Riback told them to leave the door open with the result that the fourth respondent had to put on her underwear in view of three of her colleagues and her boss.

- [20] The fourth respondent testified that on the next day, she and the third respondent decided to spend the day with the third respondent's brother and his wife. While they were with them, they related their work experiences, how they felt powerless and confused. The third and fourth respondents were advised that Riback's behaviour was not appropriate, and that she could not conduct herself as she had. She and the third respondent had a conversation about what they were going to do when they returned to Johannesburg. They decided that if Riback continued to harass them and belittle them, then they would have to make the decision that they could not take it anymore and *'that must be some other job out there where we don't get treated like this'*.
- [22] On the Monday morning, the fourth respondent testified that she received a message from Riback who found it disturbing that the fourth respondent did not greet her that morning, that this behaviour was not acceptable and that they needed to meet to discuss a way forward. She and the third respondent agreed to print resignation letters since Riback wish to see them in her office that morning. When they were called to the meeting, Riback sat down and was immediately made uncomfortable by the fact that they were not afraid as they usually were. Riback told them that the way they treated her during the trip was disrespectful. During the course of the conversation, it became apparent that her suspicion had been raised she asked whether the conversation was being recorded. Both the third and fourth respondents were recording the conversation. The fourth respondent had her phone in her pocket. The third respondent held out his phone, which Riback snatched saying *'I knew it, you liars, you disrespectful, what are you trying to do, what are you trying to do.'* Riback demanded that the fourth

respondent leave the office that she could speak to the third respondent alone. The fourth respondent refused to do so and was told to get out. At that stage, the fourth respondent advised Riback that she was not leaving the third respondent alone and she placed her letter of resignation on the desk, followed by the third respondent.

- [23] The letters of resignation tendered one month's notice. The fourth respondent gave the following explanation for resigning on notice:

Because I have invested three years of my life, my time every day from 7 till 5, sometimes being asked to stay later, my contract does not stipulate any overtime. And yet I was being asked, my contract says I end work at four, I was here until five o'clock, six o'clock, oh the parent didn't fetch the child, drive the child home in your own car or we are having a school trip why don't you take on the responsibility of having these six special needs, or four special needs children in the car with you, with no pro.... legal protection, no indemnity form signed by parents or myself uhm, these were the types of demands that were expected from me...

I give, I tender the notice because I refuse to let the three years of work that the team and myself has put into those children, getting a 7 year old out of nappies, getting a 15 year old to stop biting people, getting a 11 year old girl to stop screaming in public because she is afraid of the sound of the toilet flushing. I have invested so much time with those parents, with those families, tending the children to the hospital, child falls on the playground I am the one sitting in a hospital next to the mom speaking in sign language, understanding of the child says and translating it to the doctor and the parent because my sign language was better than theirs... it killed me, it absolutely killed me to have to leave those who were in my charge, my heart broke, I felt ribbed from my community, I was so sad, so (inaudible) but at the same time I knew I wasn't going to be able to make contact because Rozanna boycotted my name and Rudy's name the moment we left. And the staff will tell you I am not allowed to talk about them. So when parent enquire as to where is my child's teacher they were met with we are not allowed to talk about it ask Rozanna and she made up some excuse...

[24] In the result, the fourth respondent was not permitted to work on notice period, nor was she permitted to say goodbye to the children under her care, nor was she permitted to engage in any handover period.

[25] In response to a question as to whether the fourth respondent had addressed any of her grievances with Riback, the fourth respondent replied as follows.

like I said I did try and approach Rozanna (laugh) because she did see me as a personal friend at a stage, and I approached and she said what is wrong with everyone, why is everyone so flipping useless. And I said the team is not useless Rozanna I just fear you are not getting the best out of them because sometimes you come across as aggressive and your tone comes across as abrasive and you can offend people without you realising. She then said to me, seriously (inaudible) it is getting boring now, I am bored, it's getting boring get out... And I was dismissed.

[26] The fourth respondent stated that she did discuss Riback's behaviour on the Botswana trip with Adele Hattingh who said that she could not believe that Rozanna did that, but at the same time, she was not surprised since she had previously been on a conference with Rozanna and *'she had told me the horror stories when she got back from a trip, of Rozanna refusing to let any of the staff hold the key to their rooms, and they are not allowed to have the key, they weren't allowed to leave, when they wanted to'*.

[27] The fourth respondent testified further that Hattingh was the most senior person at the time, that she had the idea to meet as a group, and to approach Riback as a team. That initiative came to nothing, and the group was 'scolded for colluding against her '. In relation to the Botswana trip in particular, Hattingh's response was no more than that it was unfortunate that the fourth respondent had to go through that, however there was nothing that she could do.

### The commissioner's award

[28] The commissioner correctly identified the requirements to be met to establish a constructive dismissal, i.e. that the employee must have terminated the contract of employment, that the reason for termination must be that continued employment had become intolerable for the employee, and that it was the employer who made continued employment intolerable. The commissioner observed that the second of these requirements was an issue, i.e. whether Riback had made continued employment intolerable for the employees. The test to be applied was correctly identified by the commissioner – the intolerability of employment is to be determined objectively; the employees bearing the onus of proof.

[29] The commissioner found that Riback's behaviour towards the applicants and other teachers was '*shockingly unacceptable*'. He came to the following conclusions:

65. She [Riback] clearly portrayed significant mood swings and subjected the applicants to swearing, lewd behaviour and discriminatory remarks. Calling a person a "screaming queen" or a "goblin" or stupid is wholly unacceptable. She continuously impaired the dignity of the two applicants.

66. Insisting on sharing a bedroom and a bed with the second applicant and insisting on keeping an interleading door between bedrooms, and bathroom door open, and commenting on subordinates bodies while they have to dress in front of Ms Riback is wholly inappropriate and demeaning for them.

67. So were the tantrums and screaming at the conference and the restaurant. On the evidence Ms Riback's behaviour was despicable. I have absolutely no doubt that Ms Riback's behaviour towards the two applicants caused their employment to have become intolerable.

[30] The commissioner went on to observe that generally speaking, an employee is required to exhaust all possible internal remedies prior to resigning and claiming a constructive dismissal. Further, in the present instance, there was a grievance procedure in the employees' contracts of employment. However, the



commissioner observed that Riback was 'the final point of call', and that Riback had been dismissive of prior attempts to raise issues with her. The commissioner concluded in the following terms:

72. I am satisfied that the applicants had no other option but to resign in this matter. Objectively speaking the respondent made continual employment intolerable for them. Despite their commitment to their pupils they had no other way out.

#### The test on review

[31] The test to be applied on review is not in dispute. What a commissioner does in the case of an alleged constructive dismissal is to determine the existence of a dismissal. Once the existence of a dismissal is established, the enquiry moves to one of the fairness of the dismissal. The existence of a dismissal is a jurisdictional enquiry (*SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* (2008) 29 ILJ 2218 (LAC)). In other words, the commissioner is required initially to conduct an analysis of the facts to determine whether the CCMA has jurisdiction to determine the dispute (see *Regent Insurance Co Ltd v Commission for Mediation & Arbitration & others* (2013) 34 ILJ 410 (LC)). On review, the applicable test therefore is not a threshold of reasonableness, the review court must decide whether the commissioner's decision is objectively speaking, correct (see *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* (2012) 33 ILJ 363 (LC), *Conti Print CC v Commission for Conciliation, Mediation and Arbitration and Others* [2015] 9 BLLR 865 (LAC)).

#### The grounds for review

[32] The applicant submits that the commissioner ignored the fact that the employees had not lodged a grievance prior to their resignation, and that his conclusion that the employees and maintain WhatsApp and other communications with Riback

solely to remain 'in her good books' is irreconcilable with the objective facts and are thus improbable. Further, the applicant avers that the commissioner failed to have regard to the fact that the employees never communicated their concerns regarding her alleged conduct during September 2017, nor did they provide Riback with an opportunity to address the issues. Finally, the applicant contends that the fact that the employees worked their months' notice is irreconcilable with the conclusion that their continued employment was intolerable. In short, the applicant contends that an objective consideration of the facts presented during the arbitration proceedings (including the documentary evidence that was submitted), does not justify a finding that the employees were constructively dismissed.

The legal principles applicable to constructive dismissal

- [33] The Labour Appeal Court has observed that inherent in employment relationships are often considerable levels of irritation, frustration and tension (see *Jordaan v Commission for Conciliation, Mediation and Arbitration & others* (2010) 31 ILJ 2331 (LAC)). Generally speaking, these are insufficient in themselves to establish the intolerability of continued employment. Something more is required. As the court observed in *Regent Insurance*, at paragraph 53 of the judgment:

The court's function is to look at the employer's conduct as a whole and to determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The conduct of the parties is to be looked at as a whole and its cumulative impact assessed...

- [34] In broad terms, the key elements of the test are that the contract of employment must have been terminated by the employee, the employee must not have terminated the contract voluntarily (in the sense that he or she would have continued in employment indefinitely but for the unbearable situation created by the employer), continued employment must, objectively, be intolerable, the intolerable circumstances must have been of the employer's making, and the employer must be culpably responsible for the conduct that created the intolerable

conditions (see Myburgh and Bosch *Reviews in the Labour Courts* (Lexis Nexis 2016) at p 364-5).

- [35] The courts have highlighted the importance of the need to exhaust a grievance procedure prior to the resignation which is later contended to constitute a constructive dismissal (see, for example, *Lubbe v ABSA Bank* [1998] 12 BLLR 1224 (LAC); *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Masters v Dispute Resolution Centre & others* (2008) 29 ILJ 356 (LC)). This is sometimes expressed as a requirement that where an employee could reasonably be expected to invoke a grievance procedure, the resignation will not be regarded as a dismissal because resignation was not a measure of last resort. But this is not an inflexible rule – where on the facts of a particular case it appears that the employee could or should have raised a grievance through available channels, the employee should generally be expected to have done so. Where those channels are ineffective or where on the facts it would be futile for the employee to resort to a grievance procedure, an employee is not necessarily precluded from claiming constructive dismissal. What is required is an examination of all relevant facts, and a determination of what was reasonable in the circumstances. As Gaibie AJ succinctly held in *Regent Insurance* (at paragraph 53 of the judgment):

...the court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed...

#### Analysis

- [36] The only element of the test in dispute in the present instance is whether the employees have established, objectively, that continued employment by the applicant had become so unbearable that they could not be expected to remain in

that employment. As I have indicated, this is an assessment that must be made from the perspective of a reasonable person in the shoes of the employees.

- [37] In the pre-arbitration minute, the following was recorded under 'Facts in dispute' at paragraph 14:

The Applicants contend that Ms Riback's conduct, which the Applicants contend which ultimately led to their constructive dismissal, included but was not limited to unauthorised and/or unlawful deductions from the applicants' salaries, imposing unreasonable and in some instances unlawful demands on the applicants, use of abusive and offensive language when dealing with the applicants, sexual innuendos, sexual harassment, sexual orientation discrimination, making of disparaging and derogatory remarks, undermining and belittling the applicants, embarrassing and humiliating conduct toward both applicants, and impairment of the applicants' constitutional right to dignity. This conduct was in front of the respective applicants' and/or their work colleagues and/or in public places.

- [38] As I have indicated, the third and fourth respondents testified as to the above contentions and in the course of doing so, made serious allegations against Riback. None of these were seriously contested in cross examination, and Riback elected not to attend the arbitration or lead any evidence. The objective assessment of the intolerability of continued employment must be made on the basis of the undisputed version of the employees.

- [39] More than 10 years ago, Prof Alan Rycroft wrote an article in the *Industrial Law Journal* (see Rycroft 'Workplace Bullying: Unfair Discrimination, Dignity Violation or Unfair Labour Practice' (2009) 30 *ILJ* 1431) in which he sought to give content to the concept of workplace bullying, suggested that workplace bullying constituted a form of harassment. He said the following:

Workplace harassment impacts in different ways. Sexual harassment impacts on an employee's dignity, bodily integrity, job security and personal safety. Racial

harassment impacts on an employee's sense of worth, dignity and empowerment. Workplace bullying has been linked to a feeling of incompetence in handling the job, to a sense of alienation from colleagues, to anxiety that there will be no promotional recognition, to job security, to feelings of inadequacy, to knock on tensions in personal relationships, and to depression.

[40] Rycroft suggests the following definition of workplace bullying:

[Harassment]...is generally seen as persistent and unwelcome conduct which is hostile or offensive to a reasonable person and induces a fear of harm and demeans, humiliates or creates a hostile and intimidating environment was calculated to induce submission by actual or threatened adverse consequences. Taking these generic aspects of harassment, it has been suggested that bullying refers to any unfavourable or offensive conduct on the part of a person or persons, which has the effect of creating a hostile workplace environment... In these terms, bullying includes a wide range of insulting, demeaning or intimidating behaviour that lowers their self-esteem or self-confidence of an employee.

[41] Rycroft identifies a number of specific behaviours, which include persecution in various forms, threats and inspiration of fear, degradation, e.g. sexual harassment, deliberate insults, hypercritical negative responsible attitude (ridicule, unfriendliness, etc.), offensive administrative penal sanctions which are suddenly directed against an individual employee without any objective cause, explanations or efforts at jointly solving any underlying problems. Rycroft goes on to observe that being humiliated or demeaned lies at the heart of the concept of dignity, and that the public humiliation of an employee is almost certain to destroy or seriously damage the relationship of trust and confidence between employer and employee.

[42] Turning to the present case, I have quoted from the evidence at some length, simply because the evidence best speaks for itself. A summary would not inadequately convey the deep sense of degradation and humiliation suffered by the third and fourth respondents. The third respondent gave uncontroverted

evidence that as a gay man, he felt demeaned, insulted and embarrassed by being referred to as a 'screaming queen' on a daily basis. The fourth respondent gave uncontroverted evidence that Riback demeaned her on account of her appearance and her dress. Both the third and fourth respondents gave uncontroverted evidence regarding sexual innuendo and harassment at the hands of Riback, and in particular the discomfort they felt when Riback required them to shower and dress in circumstances where their privacy was compromised, and when she made comments about their bodies. Both the third and fourth respondents gave uncontroverted evidence of Riback's behaviour toward them in public places, where they were admonished in abusive terms in front of colleagues and members of the public.

- [43] To the extent that the applicant attempted to paint the third and fourth respondent's versions as false or exaggerated, there is no merit in this submission. The third respondent explained what appeared to be the anomalous friendly overtures made by him and the fourth respondent to Riback in the following terms:

...it was all around her and how she felt. And as a result of that we always had to be nice to her and chat nicely to her, to stay in her good books because working for a narcissist like that a (inaudible) you have to make them happy, make them, give them the impression that you are unhappy because the second they notice that they will attack you and break you down.

- [44] The fourth respondent in particular was clearly able to articulate the effect of the workplace environment on her mental well-being. She identified the source of her feelings of inadequacy, and was fortunate enough to receive support both professionally and from family. The fourth respondent testified as to how she came to recognise the relationship between her and Riback for what it was and how she was able to summon the courage to confront Riback. In response to a suggestion by the applicant's representative that events at the conference were no more than a 'friendship tiff', she said the following:

About her... let me be very clear that showed that she was my real friend nothing about her, I could not trust her, she took my money, she is (inaudible) people against each other constantly, she was not my real friend, she was my boss who pushed the boundary from personal life and professionalism. I had peace because I knew, didn't know any better I'd never been in another working environment. Now in the work environment I am in now these are all red flags I don't even have my principal cell phone number. We communicate over email that is perfect.

- [45] In short, what the evidence discloses is a workplace operated by a narcissistic personality whose offensive and unwelcome conduct had the effect of creating a toxic working environment in which discrimination, degradation and demeaning behaviour became the norm. I have no hesitation in finding that the nature and extent of the workplace bullying suffered by the third and fourth respondents was such that for the purposes of s 186 (1) (e) of the LRA, their continued employment was rendered intolerable.
- [46] In so far as the applicant contends that the employee's failure to lodge a grievance is fatal to their claim for constructive dismissal. As I have indicated, and to the extent that the applicant seeks to elevate this to the status of a legal principle, this is not the case. All of the relevant facts and circumstances must necessarily be taken into account. It was not in dispute during the arbitration hearing that the employees did not lodge a grievance. The commissioner found that generally speaking, an employee is required to exhaust all possible internal remedies before resigning and claiming a constructive dismissal. He found that Riback was in fact the final point of contact for the purposes of prosecuting any grievance, and that their direct supervisor was hesitant to take up issues on their behalf. The fourth respondent testified that when she had taken up issues with Riback, Riback became 'bored and disengaged'.
- [47] The fourth respondent also led evidence that she had attempted to address complaints with Riback directly, and with both the co-director, Krishen Samuels and her senior, Adele Hattingh, on a number of occasions. The third respondent

also testified that he had raised grievances with the head of teachers, Adele Hattingh. When the fourth respondent proposed to Samuels that a staff well-being committee be formed, he laughed at her. Samuels said that Riback would never agree to it, 'it's not going to happen'. The fourth respondent lodged a grievance with Samuels, recording that Riback did not speak to staff appropriately, that staff were struggling and their well-being was a matter of concern. When Samuels left the applicant, the fourth respondent testified that *'the person was my protector and who was in charge of protecting the staff make sure that everything was fair and now he had gone, my sense of security went with him'*. The fourth respondent testified that after Samuels had left, there was no longer a 'buffer' and that when Riback started to manage the staff, things went from bad to worse. The third respondent testified that on their return from the conference in Cape Town, they approached Hattingh who informed them that Riback was furious. The fourth respondent testified:

After this training we sought advice from a teacher who was in the same boot (sic) as us, she had nowhere to go and this is where it really struck me that there is no grievance procedure, because the only person that she can address their grievance with is the person who has inflicted this, the situation in the first place.

[48] The evidence is clear that despite a term of the employees' employment contracts to the effect that employees may lodge any grievance with their immediate manager/director, this was not an option open to them. In particular, the person against whom their grievance was directed was Riback herself, the applicant's sole member and director. As the third respondent put it in his evidence in chief, *'But again you can't approach a person you have a grievance with as the Director, as the HR system, as the Judge and the Juror and the Culprit there is no possible solution to that'*.

[49] In so far as other agencies where grievances might have been lodged are concerned, the fourth respondent was asked in cross-examination why she had



not reported the acts of sexual harassment that she described to the police. Her answer was instructive, and goes to the root of abusive power relationships in the workplace:

I was disempowered the entire time that I was working for her, was made to feel small, belittled I didn't go to the police I didn't tell my parents, I was ashamed I wondered why, why me does she do this in front of Bev, does she do this in front of Adel, I felt uncomfortable and it is not uncommon for a victim of sexual harassment or abuse to be silent in the moments directly after, it is not uncommon. It is fear and shame and guilt because you feel like why me, why me what I do, why did she pick me she doesn't do this to Anuska, she doesn't do it to Bev, she didn't do it to Adel why me?

[50] To the extent that the applicant contends that the employees' willingness to work out the notice period is incompatible with any notion of intolerability of future employment, the evidence clearly discloses the reasons for the employees' election to work their one month's notice period. The reason they chose to do so was out of their sense of duty towards the learners in their care, and the need for a smooth transition so as to minimise any harm that might be caused to them. Instead, both employees were escorted from the applicant's premises by security guards within five minutes after their resignation.

[51] In summary, on the facts, viewed objectively, the applicant rendered the employees' continued employment intolerable. The commissioner's decision that the employees had been unfairly dismissed and are entitled to compensation is thus correct, and the application to review and set aside his decision stands to be dismissed.

### Costs

[52] The court has a broad discretion in terms of s 162 of the LRA to make an order for costs according to the requirements of the law and fairness. Mr Cook, who

appeared for the third and fourth respondents, submitted that an order for costs on the scale as between attorney and client was appropriate. He submitted that the third and fourth respondents were young adults, the fourth respondent in her first employment, and that they had been traumatised by Riback's behaviour. Further, the quantum of compensation awarded to them by the commissioner was not overly generous, and an order for costs on the ordinary scale would amount to a pyrrhic victory given the legal costs that they have had to incur in opposing the present application. I agree with these submissions. In my view, the requirements of the law and fairness dictate that a punitive costs order should be granted. The court ought to express its concern and displeasure at the manner in which the employees were treated in the present instance, and the fact that the applicant sought misguidedly to review and set aside the commissioner's award. Further, I must necessarily take into account the fact that the applicant abandoned its review of that part of the award that ordered the repayment of monies unlawfully withheld and deducted only on the day of the hearing. Frankly, had the employees filed a cross-review to increase the quantum of compensation, I would have given serious consideration to the application.

I make the following order:

1. The application is dismissed, with costs, such costs to be paid on the scale as between attorney and client.

  
p.p. André van Niekerk

Judge of the Labour Court

## APPEARANCES

For the applicant: Adv. D Groenewald, instructed by Serfontein Viljoen & Swart

For the third and fourth respondents: Adv. AL Cook, instructed by Allardyce Attorneys.

LABOUR COURT