REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 84/2012

In the matter between:

DISTINCTIVE CHOICE 721 CC t/a

HUSAN PANEL BEATERS **Applicant**

and

THE DISPUTE RESOLUTION CENTRE

(MOTOR INDUSTRY BARGAINING COUNCIL) **First Respondent**

COMMISSIONER P H DE VILLIERS N.O **Second Respondent**

VICTOR PEYPER **Third Respondent**

Heard: **16 January 2013**

Delivered: **14 May 2013**

Summary: **Application to review and set aside arbitration award in which arbitrator found that employer had made employee's employment intolerable in terms of s. 186(1)(e) of LRA – meaning to be given to s. 186(1)(e) of LRA – employee claiming that employer**

made employment intolerable by demoting him and removing 'channels of communication' necessary to perform work – other reasonable alternatives available to employee, including attendance of disciplinary enquiry and institution of unfair labour practice proceedings, if enquiry decided against him – employee not entitled to resign in anticipation of unfair conduct by employer – evidence not demonstrating permanent demotion without enquiry – intolerability implies no other reasonable alternatives available – not appropriate to refer matter back to the bargaining council – declarator granted.

JUDGMENT

HULLEY, AJ

Introduction

[1] The applicant seeks to review and set aside an arbitration award issued by the second respondent and for the remission of the matter to the first respondent for hearing by a commissioner other than the second respondent. In the alternative, it asks that this Court substitute the award with a finding that the third respondent was not constructively dismissed.

The factual setting

[2] The applicant runs a panel-beating business. As such, it has business relationships with various entities including towing companies, short-term brokers, insurance companies and motor vehicle manufacturers.

[3] Mr Herbert Carlson was the managing member of the applicant with

his wife, Mrs Rose Carlson, being responsible for the financial management of the applicant. The third respondent (to whom I shall hereinafter refer as Mr Peyper) was the workshop manager and Mr Christo Meyer the workshop foreman.

[4] Mr Meyer had started out with the applicant as a panel-beater and had demonstrated talents which allowed him to work his way up to foreman.

[5] Mr Peyper testified on the operations of the workshop and the impact such operations had on the ultimate demise of his relationship with the applicant. His evidence is not entirely clear, but from what I can gather it appears that the panel-beating operation consisted of approximately six ‘sections’: strip and assembly, panel-beating, bodywork, repair works, spray paint (which consisted of the preparation and spray paint areas), and finally, the quality control sections.

[6] The panel-beating operation was initially split into four teams, with each team assigned a different number; a register was kept of the work performed by each team and it was easy, said Mr Peyper, to monitor the performance of each team and to identify which team was responsible for work on a specific motor vehicle.

[7] As the workshop manager Mr Peyper was responsible for oversight of the entire operation with Mr Meyer reporting to him and he, in turn, to Mr Carlson.

[8] Mr Peyper testified that the operation ran fairly smoothly at that stage.

[9] Later, however, Mr Carlson decided to split the operations of the

workshop in two, with Mr Peyper working on one half of the workshop and Mr Meyer on the other.

[10] In terms of the new arrangement there was to be no cross-pollination of staff or tasks. Mr Peyper testified that he expressed reservations about this arrangement. Notwithstanding such reservations, Mr Carlson implemented his decision. With time the new arrangement led to difficulties. For instance, so Mr Peyper testified, if two or three panel-beaters in one section were absent on the same day, panel-beaters from the other section – which was fully staffed on that day – could not be transferred to assist them. Notwithstanding this, Mr Peyper was sometimes required to sit in on complaints from customers relating to vehicles which were not repaired in his section.

[11] In terms of the new arrangement, Mr Peyper and Mr Meyer would report directly to Mr Carlson.

[12] On 3 June 2011 Mr Peyper was summoned to the office of Mrs Carlson. She handed him a letter which was addressed to him. The letter read as follows:

> "Please be informed that a consultation between yourself and top management is scheduled for Monday 6th of June at 07h15 at our premises in order to discuss the following matters:
>
> 1. Work performance.
>
> 2. Insurance complaint.
>
> 3. Dealer complaints.
>
> 4. Client complaints.
>
> The above matters are of great concern and need immediate

intervention."

[13] Mr Carlson was away on business in Mozambique at the time and was due to return towards the end of that month.

[14] On 6 June 2011 Mr Peyper reported to Mrs Carlson's office at the allotted time and Mrs Carlson then telephoned Mr Carlson. According to Mr Peyper, Mr Carlson informed him that there had been complaints from customers including an entity he identified as Telesure. Mr Carlson stated that he had been mulling over issues for a while and could no longer avoid what was to follow. Mr Peyper and Mr Meyer were to swop positions as workshop manager and foreman; Mr Peyper would "*forfeit"* a Ford Fortuna motor vehicle which had previously been given to him; a cell phone which Mr Peyper had used to perform his functions would be taken back; and Mr Peyper was to have no further contact with the insurance companies.

[15] According to Mr Peyper, the complaints stemmed from the very changes which Mr Carlson had implemented contrary to his (Mr Peyper's) advice.

[16] Mr Peyper informed Mr Carlson that they were still working through the dealer complaints and insofar as the complaints from the clients were concerned, the relevant vehicles were not under his authority and therefore he could not be held liable for complaints relating to those vehicles.

[17] Mr Carlson was apparently unperturbed by Mr Peyper's protests. He indicated that it was unfortunate that things had reached the point it had but he had been considering the issue for a while but it was simply "one of those things*".* Mr Carlson comforted Mr Peyper that

he should not be disheartened. The telephone call concluded on this note.

[18] According to Mr Peyper, Mrs Carlson then indicated to him that she would draw up the necessary documentation and addenda and had already scheduled a disciplinary hearing for Thursday, 9 June 2011. She indicated, however, that if he did not want to be subjected to a disciplinary enquiry given the unpleasantness thereof for Mr Peyper she was prepared to telephone "the people" and tell them not to proceed. Mr Peyper stated "you have to do what you have to do" and that if Mrs Carlson felt the need to have a disciplinary enquiry then it was out of his hands. He then removed the SIM card from his mobile phone and handed it to Mrs Carlson.

[19] It is not clear from his testimony, but it appears that shortly after the same meeting Mrs Carlson indicated to Mr Peyper that she realised the difficulty which he had been placed in and he could, as an alternative go and assist Mr Carlson in Mozambique.

[20] On Friday 10 June 2011, Mrs Carlson handed a letter to Mr Peyper which read as follows:

> "Dear Vic Peyper
>
> Outcome of consultation
>
> With reference to the consultation held 6th June 2011 at the above address, it was decided that your new job title is Workshop Foreman with immediate effect.
>
> No disciplinary hearing will be needed to this regard."

[21] The letter had a place for signature by both the employer and employee, but was not signed on behalf of the employer.

[22] Mrs Carlson attached to this letter a handwritten slip which indicated what Mr Peyper's new salary and benefits would be in light of the demotion.

[23] Mr Peyper indicated that he found the demotion to be "completely degrading". From being the workshop manager reporting only to Mr Carlson, he had now been relegated to the position of foreman reporting to his previous underling, Mr Meyer.

[24] Mr Peyper testified that he informed Mrs Carlson that he did not agree with the contents of the letter of 10 June 2011 and that he required a weekend to consider the documents and would revert to her the following Monday (13 June 2011).

[25] As news of Mr Peyper's demotion began to spread, so his embarrassment intensified. A number of other personnel came to commiserate with him. At one stage, he testified, he told Mrs Carlson that he felt so "frustrated" that he could climb into his car and go home because he could not work under those circumstances. Even clients, he said, expressed shock and dismay at the events which had led to his undoing.

[26] On Monday, 13 June 2011 Mr Peyper handed a letter dated 10 June 2011 to Mrs Carlson. The letter read:

> "Dear Rose
>
> Your correspondence attached refers as well as the telephone conference between yourselves and I (*sic*) on 6 June 2011 where you indicated that a demotion in my position as Workshop Manager was effective immediately or the possibility of assisting Callie in Mozambique was offered as an alternative.

> This alternative in working in Mozambique is not a suitable option for me as I have other obligations in Nelspruit.
>
> As regards the signing of the outcome of consultation as well as the addendum to work contract I find myself in a difficult position; for the following reasons.
>
> On Tuesday 7 June 2011 I affirmed (*sic*) from you whether my job was in jeopardy to which you verbally confirmed that my job security was in no way in danger and that there would be no change to my income structure. According to you only a change in my job description would be added as an amendment to my current contract.
>
> As our relationship til (*sic*) now had been based on trust, I find this change to be very disconcerting. My loyalty and dedication to Husons since 2005 has been beyond reproach. I have also held the company's name in high regard and have always promoted its good name. This has always been and still is my ultimate desire and for this reason I find it extremely difficult to accept the terms of the documents as presented to me."

[27] According to Mr Peyper, Mrs Carlson's response to receiving this letter was that she knew that her decency on the matter would come back to haunt her and that she should have followed the disciplinary procedure.

[28] Later on that day, at approximately 2 p.m. or 3 p.m., Mr Peyper telephoned Mr Carlson who indicated that he was aware that Mr Peyper had refused to sign the letter of 10 June 2011. Mr Peyper explained to Mr Carlson that he did not agree with the contents of the letter. Mr Carlson apparently became angry and indicated that Mr Peyper should go on leave for two-and-a-half weeks until he (Mr

Carlson) returned from Mozambique. Mr Carlson stated that when he got back they could discuss the matter "but he said", testified Mr Peyper, "he is letting me know now that he is not changing his mind he is sticking to his decision" (i.e. the decision to demote Mr Peyper). According to Mr Peyper, Mr Carlson then explained to him that:

> "If I want to play it that way he knows that it is very easy … just start the procedure again and this time we can just do it the right way. In any case he said if I wanted to get rid of you, you know I am prepared to pay the price. I will pay the price he says 'you know me'."

[29] Mr Peyper testified that he regarded these statements by Mr Carlson as a threat:

> "I actually regarded it as a threat that seeing that you don't want to sign the documents, we can quite easily then just start the process again …. (inaudible) and, do it the right way. And I read into that as seen that obviously *omdat ek dwars* check, en *jy jou hardegat*, … (inaudible) just look … (inaudible) warning, second warning third warning disciplinary hearing and you are history."

[30] According to Mr Peyper he could not work under those conditions.

> "Well the conditions that was (*sic*) set by him I mean it was, it was a slap in the face … to a certain extent I am also a fairly assertive person I like things done the right way. I understood how Callie's mind works, I understood how he wanted things done and with all these limitations were placed on me, I mean how can you perform? I was looking back to the document that were given to me determining what sort of production bonuses I am looking at so forth, how do you obtain those production bonuses if the tools that you need to do the job are taken away from you. If the communication channels you need to effectively do your job are

> taken away from you it doesn't make sense. It seemed to me that this was a bit of a smokescreen to get me in a position there I would make mistakes and it was an easy way out because I [am] not performing, poor work performance let's start procedures and away you go."

[31] Mr Peyper recounted an incident to the arbitrator in which Mr Carlson had terminated the services of other staff members without following any procedure. (I understand from this that Mr Peyper wished to demonstrate to the arbitrator that Mr Carlson was true to his word.)

[32] On 14 June 2011 Mr Peyper's attorneys addressed an e-mail to the applicant in which they set out the details of the events which had unfolded until that time, pointed out that the applicant's conduct constituted a breach of "both the labour law and a violation of our client's rights" but since Mr Peyper, so they indicated in the letter, preferred to resolve the issues amicably "we are instructed to request an urgent meeting with yourselves on a without prejudice basis". They pointed out that "should you not be willing to meet or to return the Fortuna, our client will be forced to take all such steps as he may be advised to enforce and protect his rights."

[33] On the same day Mr Peyper completed a leave form and booked off for five or six days.

[34] On 15 June 2011, Mr Peyper testified, he noticed that he had developed a tingling sensation in his hand and began experiencing dizzy spells which he attributed to poor sleep. He decided to see a doctor as he was concerned that his diabetic condition was deteriorating because of the high stress levels in the workplace. His physician, Dr van Heerden, sent him to see a psychologist, Mr Gerrie

Strydom, and booked him off for seven days and also referred him to a specialist physician, Mr Alex Cruyven. Mr Cruyven diagnosed Mr Peyper with clinical depression.

[35] Mr Peyper did not return to work. He testified that his attorneys received no response to their letter despite an acknowledgement of receipt thereof from the applicant and, feeling beleaguered and remediless, he tendered his resignation on 4 July 2011.

[36] The letter of resignation (which was dated 2 July 2011) was delivered to the applicant by Mr Peyper's wife on 4 July 2011. It read as follows:

> "Dear Callie
>
> My letter, dated 10 June 2011 as well as my lawyer's letter dated 14 June 2011 refers. I am disappointed to note that you have still not contacted me or my lawyer to try and resolve the issues with me. I see that after my latest letter suggesting we sit down and talk, you continue to give effect to the decision to demote me: I note on my latest salary deposit that the amount has reduced considerably and this appears to be in accordance with your stated intention to demote me. It is obvious to me that no matter what I say you have no intention to discuss the matter with me or to change your mind.
>
> Your actions have caused me considerable embarrassment amongst the staff at the workplace and even amongst clients. Taking my cell phone and privileges was unnecessary and a slap in the face. I do not understand your instruction to me that I may not speak to clients any more (some of whom have become my friends) even though I am supposed to be the workshop foreman and still need to communicate with them in the execution of my duties.
>
> I have served the company with complete loyalty since I started

> seven years ago. However your actions over the last few months and particularly the demotion leave me with no other alternative (*sic*) but to resign with immediate effect, which I hereby do.
>
> All of my rights are strictly reserved.
>
> Yours faithfully
>
> Vic Peyper"

[37] In cross-examination, it was put to Mr Peyper that he had at least one other option before resigning which was to refer an unfair labour practice to the bargaining council having jurisdiction. It is apparent from the transcript that Mr Peyper and the applicant's legal representative were at cross-purposes on this issue. Mr Peyper was of the view that he had referred an unfair labour practice dispute to the bargaining council (he understood this to be the precursor to his dismissal dispute which was in issue at the hearing); whereas the applicant's representative was clearly referring to a separate unfair labour practice dispute relating to his demotion.

[38] Mr Peyper called two further witnesses including his wife, who testified as an expert witness. I do not consider it necessary to traverse their evidence.

[39] The company called three witnesses, Mrs Carlson, Mr Carlson and Ms Melanie Tomlinson.

[40] Ms Tomlinson was a so-called Life Style and Business Coach. Her evidence related to efforts on her part to coach Mr Peyper at the request of the applicant. Mr Carlson, so she said, had informed her that he was experiencing difficulties with Mr Peyper and wanted him to undergo business management coaching in order to develop

certain skills.

[41] Mrs Carlson testified that there had been a number of complaints which led ultimately to her issuing the letter of 3 June 2011. Under cross-examination she explained that she had spoken to an assessor from Telesure who advised her that they had received numerous complaints regarding vehicles repaired by the applicant and that Telesure was going to terminate its relationship with the applicant.

[42] Mrs Carlson testified that on about 6 June 2011 Mr Peyper was asked to return his mobile telephone and the Fortuna. Mrs Carlson stated that they wanted to prevent Mr Peyper from interacting with clients and suppliers of the applicant.

[43] According to Mrs Carlson a decision was taken between Mr Carlson and her to either demote Mr Peyper in accordance with the letter of 10 June 2011, subject him to a disciplinary hearing or offer him a position in Mozambique (with a different company owned by Mr Carlson). An offer along these lines was, she testified, put to Mr Peyper but he failed to revert; ultimately, she issued the letter of 10 June 2011 to him. The letter was not signed, she testified, because Mr Peyper had not made a decision to accept the offer.

[44] In cross-examination Mrs Carlson appeared to be somewhat ambivalent on whether any decision had been taken to demote Mr Peyper. At one stage she testified that a decision had been taken to demote him; at another stage she stated that a decision had only been taken to remove him from the "division that was causing harm to the company".

[45] Mrs Carlson stated that Mr Peyper's employment with the applicant

was not in jeopardy and she informed him as much.

[46] According to Mr Carlson, he had been in Mozambique when he received word that a written complaint had been received from an entity he described as Hotline Insurance Company. This was not the first complaint. Mr Carlson realised he needed to take some preventative measures, and so, it appears, he decided to remove Mr Peyper as a public relations exercise because he did not want to be perceived "as a person that is not serious".

[47] In his evidence in chief, Mr Carlson testified that Hotline had indicated that they would not like to continue in a working relationship with Mr Peyper, but were not prepared to lodge a formal, written complaint. Under cross-examination Mr Carlson testified that he acquired knowledge of Telesure's concerns during a conversation he apparently had with "my guy doing my quotes" who had, in turn, apparently received information from an assessor to the effect that Telesure was intending to "make changes". Mr Carlson testified that he attempted to establish the truth behind this story but the person he spoke to (who was not identified) said that it was the applicant's problem and was not prepared to get involved in the matter.

[48] On the face of it, this appears to be a material contradiction, but it is not absolutely clear from the record whether the entity referred to by Mr Carlson in chief – which he referred to as Hot Line Insurance Company – is the same entity referred to by him in cross-examination – which he referred to interchangeably as Telesure Hot Line and Telesure. It may well be that he was merely referring to the hotline of different insurance companies' hotline.

[49] At any rate, Mr Carlson testified that he informed Mr Peyper that he

(Mr Peyper) would swap roles with Mr Meyer and that Mr Meyer would take over on a temporary basis as workshop manager with Mr Peyper continuing as the foreman although his remuneration would remain at the same level. During cross-examination he testified that the package would remain the same although Mr Peyper's salary would be different.

[50] On 13 June 2011 Mr Carlson (who was still in Mozambique) had a further discussion with Mr Peyper. They discussed the applicant's letter of 10 June 2011. Mr Carlson felt that the point of the letter was to avoid having to take disciplinary action against Mr Peyper and he informed Mr Peyper he informed Mr Peyper that if he did not accept the terms disciplinary action would have to commence. Mr Peyper, he testified, did not accept the new position.

[51] Although Mr Carlson did not expressly say so, on his evidence, the fact that Mr Peyper did not accept the proposal made by the company meant, by implication, that disciplinary action would follow.

[52] Mr Carlson informed Mr Peyper to take time off and the two of them would discuss the matter further upon his return.

[53] Mr Carlson returned to South Africa on about 25 June 2011. He testified that he responded to the letter from Mr Peyper's attorneys and indicated via email that he would discuss the matter only with Mr Peyper. This email was, however, not included in the bundle of documents handed in at the arbitration proceedings.

The arbitration award

[54] The second respondent indicated in his award that:

> "Although there is no clear cut definition of a constructive dismissal

> it is clear from the case law that in order to be successful in his claim of constructive dismissal, the applicant must prove three things on a balance of probability. The applicant must prove that his working conditions were intolerable. The test is objective and not subjective. The applicant must show that the conduct of the employer judged reasonably and sensibly was such that no employee could reasonably be expected to continue in the employment relationship. The applicant must prove that it was the respondent who had made his working conditions intolerable. Lastly the applicant must prove that his resignation was the only reasonable option open to him."

[55] Later, with reference to the facts of the case the second respondent continued as follows:

> "The first issue is was the applicant demoted? The answer is clearly yes. The applicant was advised that he was no longer workshop manager and that C Meyer was taking over from him. The applicant is told that he is now the workshop foreman and that he must have no contact with dealers or insurance companies. The applicant is told [to] and does hand in his phone and his vehicle. The letters given to the applicant are not in the format of an offer. Both letters merely inform the applicant that he is now workshop foreman and that he must assist the workshop manager. He is told what his salary will be. His salary is lower as a production bonus (achieving a goal & no comebacks) is discretionary by nature. [Mr Carlson] on his own version phones C Meyer on 6 June 2011 and tells him to take over as workshop manager on a temporary basis. The applicant was thus demoted and it took place on 6 June 2011.
>
> Was the demotion offered as an alternative to a disciplinary hearing? The answer is no. [Mrs Carlson] tried to imply that the applicant was offered the alternatives of a disciplinary hearing or a

demotion. Her testimony was however contradicted by that of her husband who testified that he had told the applicant already on 6 June 2011 that he was no longer workshop manager and had told C Meyer that he was taking over as workshop manager.

Were the applicant's working conditions intolerable? The respondent did not follow any formal procedure prior to demoting the applicant. The applicant had received no counselling or warnings in the period leading up to his demotion. The applicant's vehicle and cell-phone were taken away from him. The respondent argued that the applicant was being moved out of position temporarily. This is however not reflected in [two] letters given to the applicant. The letters do not state that it will be on a temporary basis. The applicant after he is demoted is not given a clear job description as to what is expected of him. He is left in a difficult position as he does not know what he is responsible for and what he is not responsible for. He is merely told that he must assist C Meyer who used to report to him. The applicant had already been placed in a difficult situation in March 2011 when the workshop had been split between him and C Meyer. The applicant had remained responsible as workshop manager but was no longer in a position to manage effectively as C Meyer was in charge of the employees working under him. It is also very questionable if as to whether the respondent had a valid reason to demote the applicant in such a drastic manner. [Mr Carslon] testified that the main reason for the demotion was Hotline Insurance. He however acknowledged that he had not actually received a complaint from them. He had merely heard through his quote guy that they were unhappy. It would seem that [Mr Carlson] made a quick decision without thinking as to whether his decision would be fair to the applicant. [Mr Carlson] admitted that there may well have been a bit of chaos in the workplace as a result of his decision. An employer has the right to demote an employee. The employer must however [have] a valid

> reason and follow a fair procedure. The respondent did not do this in the matter at hand.
>
> Was it the actions of the respondent that had made the applicant's working conditions intolerable? It was the respondent who decided to demote the applicant without following any form of procedure and had taken away the applicant's cell phone and vehicle."

[56] Having set out the aforesaid background, the second respondent then concluded:

> "Was resignation the only reasonable option open to him [?] The applicant testified that the respondent had told him that he was not going to change his mind and that he would get rid of him if he wanted. The respondent did not really challenge the applicant's evidence in this regard and I have no reason not to believe him. The applicant did through his lawyer request a meeting to try and resolve the matter amicably. The respondent did not respond to the letter with any proposals but merely sent through a letter acknowledging receipt of the letter. In the circumstances it would have served no purpose for the applicant to lodge a grievance."

[57] It appears from the aforesaid that the second respondent was satisfied that the applicant had rendered a continued employment relationship intolerable and that it had done so by demoting Mr Peyper and making it clear to him that the decision was final.

Grounds of review

[58] The applicant has raised a host of review grounds. I do not intend trawling through every one of them. It appears to my mind that in essence the applicant's complaints against the award may be neatly encapsulated into four separate compartments:

58.1 First, the arbitrator had not analysed or not properly analysed the evidence which was before him and had not properly explained how he arrived at the conclusions which he did.

58.2 Second, the evidence did not support the conclusion reached by the arbitrator and therefore, so he complains, no reasonable arbitrator could have arrived at the decision which he did.

58.3 In this regard the applicant, in essence, contends that Mr Peyper, on his own version, had not made out a case for constructive dismissal. Moreover, he contends that the arbitrator ought to have considered the evidence which undermined Mr Peyper's testimony.

58.4 Third, the arbitrator had based his conclusion on the fact that the applicant demoted Mr Peyper when the true enquiry ought to have been whether the applicant had rendered continued employment intolerable.

58.5 Fourth, the arbitrator proceeded from the finding that the applicant had made continued employment intolerable to an award of compensation; he failed to consider whether the dismissal was unfair.

The applicable standard for review

[59] The resolution of disputes about unfair dismissals is governed by the provisions of s. 191 of the Labour Relations Act[1] (the LRA).

[60] In terms of s. 191(5) (a)(ii) of the LRA the CCMA or bargaining

[1] Act 66 of 1995

council "must" arbitrate a dispute "if" the employee "has alleged" that "the reason for the dismissal" is *inter alios* "that the employer made continued employment intolerable". The reference to making continued employment intolerable is a reference to the provisions of s. 186(1) (e) of the LRA.

[61] Section 186(1)(e) reads as follows:

> '**186 Meaning of dismissal and unfair labour practice.—**
>
> (1) '**Dismissal"** means that—
>
> (a) …
>
> (e) an *employee* terminated a contract of employment with or without notice because the employer made continued employment intolerable for the *employee*.'

[62] The Labour Appeal Court has held that the existence of "a dismissal" is a jurisdictional fact necessary for the CCMA or bargaining council to determine the dispute by way of arbitration; if that jurisdictional fact is absent the CCMA or bargaining council is not entitled to arbitrate the matter.[2]

[63] In *SA Rugby Players'* an arbitrator had found that the employees (certain rugby players) had established that they were dismissed as contemplated in s.186(1) (b) of the LRA.[3] The finding of the arbitrator

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[2] *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SA Rugby Players Association* (2008) 29 *ILJ* 2218 (LAC); *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal and Others* (2009) 30 *ILJ* 2093 (LC), at 2098C – 2099D

[3] In terms of s. 186(1)(b) of the LRA a dismissal means that 'an employee reasonably expected the employer to renew a fixed term contract of employment on the same or

in respect of one of the players was upheld on review to the Labour Court on the basis that the reasoning and conclusion were 'justified'. In respect of the others the Labour Court reviewed and set aside the arbitrator's decision on the basis that his decision was not supported on an objective and rational basis. On appeal to the Labour Appeal Court Tlaletsi AJA held:

> '[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.
>
> [40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs NO & others* (1994) 15 *ILJ* 801 (LAC) at 804C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts but upon their objective existence. The court further held that any conclusion to which the Industrial Court arrived on

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similar terms but the employer offered to renew it on less favourable terms, or did not renew it'.

> the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter *provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties*. In *Benicon's* case the court said at 804C-D:
>
> 'In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be fainthearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit.'

In my view the same approach is applicable to the CCMA.

> [41] The question before the court *a quo* was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary.' (My emphasis)

[64] I will revert to the practical application of the test and the proviso stipulated in the emphasised passage shortly.

[65] For present purposes, I consider it appropriate to draw attention to

the fact that s 191(5) (a) does not require the CCMA or bargaining council to arbitrate the dispute if there is "a dismissal", as stated by the Labour Appeal Court; it requires the tribunal to arbitrate the dispute "if" the employee has "alleged that the reason for dismissal" is one or several factors, including that the employer made continued employment intolerable. Thus, on a strict reading of the section, the relevant jurisdictional fact appears to be the existence of an allegation by the employee that the reason for his or her dismissal is one of the listed factors, not the existence of the dismissal.

[66] As noted in the *SA Rugby Players'* case a true jurisdictional fact must objectively exist before the relevant functionary may exercise jurisdiction over the matter. I have some difficulty with the notion that a finding made on a hotly contested factual dispute may be considered to be 'objective' when the determination of such finding is dependent upon an assessment of the probabilities, having regard to the credibility and reliability of several witnesses.

[67] Nevertheless, I am bound by the judgment in *SA Rugby Players* and intend to apply it.

[68] The same principles have been applied in a different setting in *Minister of Public Works v Haffejee NO*:[4]

> 'Where a tribunal is a creature of statute with no inherent powers (such as a compensation court), it cannot by its own ruling or decision confer a jurisdiction upon itself which it does not in law possess. While *de facto*, and if only to decide whether or not to exercise its adjudicatory function, it might be obliged to consider the question itself if its jurisdiction was challenged in proceedings

[4] 1996 (3) SA 745 (A) at 751F – H

> before it,I ts decision on that score would in no sense be one which has any status *de jure* and it would be amenable to challenge in a court of law even in the absence of any statutorily provided remedy by way of appeal or review. If it decided that it had jurisdiction and it was wrong, its hearing of the case would amount to an act which was *ultra vires* and of no force or effect. A party who contests the jurisdiction of such a tribunal in the sense that the tribunal's very right to exist is disputed, should not be obliged to seek a ruling on jurisdiction from it when it has no jurisdiction *de jure* to determine the question, and when its *de facto* decision thereanent would bind no one *de jure* and would immediately be vulnerable to being nullified by the decision of a court of law.'

[69] The following observations can be gleaned from these judgments:

69.1 A tribunal which is a creature of statute cannot confer upon itself powers which have not been conferred upon it by the empowering statute.

69.2 Where such tribunal's entitlement to exercise a power is dependent upon the pre-existence of a certain fact or state of affairs (a so-called 'jurisdictional fact') which fact or state of affairs the tribunal is not empowered to determine, the existence of such fact or state of affairs must objectively exist in order for the tribunal to exercise such power which has been conferred upon it.

69.3 Practically, a tribunal may consider whether the fact or state of affairs is in existence before it may exercise its own powers.

69.4 But where the tribunal does so, it does so purely as a matter of convenience; any finding which the tribunal makes

regarding such fact or state of affairs is binding upon no one: neither the parties nor a court subsequently called upon to determine the matter, and it accordingly has no legal effect.

69.5 A party disputing the tribunal's jurisdiction to entertain the issue is not obliged to seek a ruling from such tribunal.

69.6 Where, however, a decision is made by such tribunal, it may immediately be challenged in a court of law.

[70] But it seems to me that where the principle arises in a setting such as present, it is more easily stated than applied. These judgments do not expressly state what is to become of the evidence led and the proceedings held before the tribunal in order to prove the existence of the jurisdictional fact. Are the parties bound by those proceedings or are they at liberty to lead evidence afresh including evidence not led before the tribunal? If the parties are to proceed on the record of evidence gathered before the tribunal, what is the Court to make of the findings of fact and credibility made by the tribunal? Is it bound by those findings in the same way that an appeal court (rather than a review court) is bound?[5] After all, the tribunal was much better placed to observe the witnesses and to make credibility and factual findings.[6] If the Court is not bound by the findings of fact and credibility made by the tribunal, how is it to determine disputes on such facts which arise on the record? Is it to adopt a hybrid approach where the issue regarding the dismissal (the jurisdictional issue) is to be referred to oral evidence with, depending upon its finding on whether there was a dismissal, the balance to be determined upon

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[5] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 – 706
[6] *supra*, at 705

the record?

[71] The implication of the above-quoted *dicta* in the *SA Rugby Players* and *Haffajee* judgments is that the parties are bound by nothing done by or before the tribunal which concerned the jurisdictional fact and that if the finding made by the tribunal on that jurisdictional fact is challenged, evidence may be led afresh before the Labour Court or High Court, as the case may be, and a finding made afresh by that Court.

[72] These issues were not dealt with in express terms in any judgment I have come across. There are, however, *dicta* in some cases which appear to support the views expressed above and *dicta* in other cases which appear to conflict with them.

[73] In *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[7] the Labour Appeal Court held that where the applicant disputed that there was an employer-employee relationship (and therefore that the CCMA had jurisdiction) the Labour Court was called upon 'to decide *de novo*' whether an employer-employee relationship existed.[8]

[74] On the other hand, in *Phera v Education Labour Relations Council and Others,*[9] Tlaletsi AJA also faced with the question of whether an employer-employee relationship existed held that the question which the Labour Court had to consider when reviewing an arbitrator's award on the question of jurisdiction, was 'whether the material that was placed before the commissioner' established that the CCMA or

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[7] (2009) 30 *ILJ* 2903 (LAC).
[8] At 2909C
[9] (2012) 33 *ILJ* 2839 (LAC).

bargaining council, as the case may be, had jurisdiction to entertain the dispute.[10]

[75] In general, the approach adopted by the Courts appears to have been to determine the jurisdictional fact on the record which served before the arbitrator without being bound by any of the findings made by the arbitrator in respect of that jurisdictional fact. This is the approach I will adopt for the purpose of this case, having proper regard to the applicable principles relating to the resolution of factual disputes,[11] but I do not think that the issues which I have raised above have been authoritatively resolved.

What is meant by "constructive dismissal"?

[76] In general the phrase 'constructive' is to be contrasted with 'actual' and connotes that a transaction or operation has not really taken place but something which can be regarded as its equivalent has.[12]

[77] Our law introduces similar fictions in a variety of settings: the doctrine of constructive notice, constructive knowledge,[13] constructive desertion,[14] constructive delivery and constructive breaking and entering[15] are all examples of such situations. What is common in each instance is the fact that the applicable law requires the existence of one fact (such as notice, knowledge, desertion, delivery, etc.), but accepts something different as constituting the equivalent of the first fact.

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[10] At 2844F
[11] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA).
[12] *Jowitt's Dictionary of English Law* (3rd ed.) at 522. See *Murray v. Minister of Defence* 2009 (3) SA 130 (SCA) at 136A – D
[13] *Bonitas Medical Aid Fund v Volkskas Bank Ltd and Another* 1992 (2) SA 42 (W)
[14] *Froneman v Froneman* 1972 (4) SA 197 (T).
[15] S*. v Cupido* 1975 (1) SA 537 (C).

[78] Whilst the term ‘constructive dismissal’ is routinely used to describe a dismissal under s 186(1) (e) of the LRA, that term does not appear in the statute itself.

[79] The proper meaning to be given to s. 186(1) (e) of the LRA, must, in my view, commence with a consideration of the words used in that section. I have quoted that section in full above and need not repeat it here.

[80] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [16] Wallis JA dealt with the concept of interpretation of documents (whether they be statutes, contracts, wills or otherwise). He explained that –

> ‘The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and

[16] 2012 (4) SA 593 (SCA)

> guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.
>
> … It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow…'[17]

[81] Thus, the proper approach to interpretation is to consider:

81.1 The language used in the document.

81.2 The context in which the provision appears (in the rest of the document).

81.3 The purpose to which the provision was directed.

81.4 The background to the preparation and production of the document.

[82] Whilst none of the factors is to have predominance over the other, the 'inevitable point of departure' is the language of the provision.

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[17] At 603F – 604E

[83] The provisions of the LRA (like all other statutes enacted to give effect to constitutional rights) must be interpreted in a 'purposive' manner so as to give effect to the purpose of the legislation and the values enshrined in the Constitution. However, as Sachs J observed in *South African Police Service v Public Servants Association*:[18]

> 'Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. This in turn will often necessitate close attention to the socio-economic and institutional context in which a provision under examination functions. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring solution.'

[84] Thus, in giving effect to the purpose of the provision a court is not at liberty to adopt a meaning divorced from the actual language of the statute.[19] Provided the meaning of the words used is clear, that is the meaning to be ascribed to a word or phrase used in a statute and a court is not at liberty under the guise of 'purposive interpretation' to stray from that meaning.[20]

[85] It appears from the language of s. 186(1)(e) of the LRA that for there to be a dismissal under its provisions, the following facts have to be

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[18] 2007 (3) SA 521 (CC), at 529B – C
[19] *S v Zuma and Others* 1995 (2) SA 642 (CC), at paras 17-18
[20] *Michelin Tyre Co (SA) (Pty) Ltd v Janse van Rensburg and Others* 2002 (5) SA 239 (SCA), at 242B/C

present:[21]

85.1 The employee must have terminated the contract of employment.

85.2 The termination may have been with or without notice.

85.3 The reason for the employee terminating the contract of employment must have been the conduct of the employer.

85.4 Such conduct must have made continued employment intolerable for the employee.

[86] The *Collins English Dictionary* defines "intolerable" as "[m]ore than can be tolerated or endured; insufferable." It is, in short, something which is simply too great to bear. This is borne out by the various synonyms ascribed to the word in *Roget's Thesaurus*:[22]

> 'insufferable, impossible, from hell, insupportable, unendurable, unbearable; past bearing, past enduring, not to be borne, not to be endured, not to be put up with; extreme, beyond the limits of tolerance, more than flesh and blood can stand …'

[87] Whilst the phrase 'constructive dismissal' may be a convenient short-hand phrase to describe s186 (1) (e) dismissals, it seems to me that it would be more useful to use the terminology actually employed by the Legislature.[23]

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[21] *Solid Doors (Pty) Ltd v Commissioner Theron & Others* (2004) 25 *ILJ* 2337 (LAC) at para. 28

[22] *Roget's Thesaurus of English Words and Phrases*

[23] "[I]t is difficult to see why it is convenient to say that X is Y as long as one remembers that it is not Y but X, particularly when one knows that the consequences of X may be materially different to the consequences of Y", (Prof. D T Zeffertt, 'Words, Words, Words …', *Essays in Honour of Ellison Kahn* (Juta, 1989), p. 363.)

[88] So much, then, for the language.

[89] I turn now to consider the context. Section 186(1)(e) of the LRA forms part of a section dealing with dismissals and part of a chapter dealing with the right not to be unfairly dismissed or subjected to unfair labour practices. Moreover, s. 3 of the LRA enjoins a person applying the LRA to interpret its provisions so as to give effect to its primary objects and in compliance with the Constitution and the public international obligations of the Republic. The primary objects of the LRA are set out in s. 1 and include the regulation and giving effect to the rights entrenched in s. 23 of the Constitution.[24]

[90] Thus, in its context, s. 186(1) (e) must reflect the fundamental right of every person to fair labour practices enshrined in s. 23 of the Constitution. Fairness, in the context of unfair dismissals, must be considered from the perspective of both employer and employee.

[91] I turn now to consider the purpose of s. 186(1) (e) of the LRA and the background to its application. I should observe that the purpose of the section is to be gleaned from the historical context in which constructive dismissal came to form part of our law under the previous Labour Relations Act[25] and it is this context which informed the Legislature's adoption of s. 186(1)(e). Therefore, in the context of s. 186(1) (e) the enquiry into the purpose and background converge and should be considered simultaneously.

[92] The phrase 'constructive dismissal' is one which was imported into South African law from the United Kingdom.

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[24] *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* 2012 (1) SA 321 (CC), at 330D – 331A
[25] Labour Relations Act, 28 of 1956, as amended

[93] To consider its evolution from UK law into our own the analysis must begin with the position in the United Kingdom.

The position in the United Kingdom

[94] A useful starting point is the case of *Western Excavating (ECC) Ltd v. Sharp*[26] in which the Court of Appeal had to consider whether an employee was constructively dismissed under the then Trade Union and Labour Relations Act 1974.

[95] It appears from the opinion of Lord Denning MR in that case that in terms of the relevant provision (paragraph 5(2) (c) of Schedule 1 to the Act) an employer would be taken to have dismissed an employee "if, but only if" the employee terminated the contract of employment with or without notice "in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct".

[96] Lord Denning MR noted that there were two schools of thought on the proper interpretation to be given to paragraph 5(2)(c), the one school applying what the learned Judge referred to as 'the contract test' and the other school applying what he referred to as 'the unreasonableness test'.

[97] The learned Master of the Rolls summarised 'the contract test' thus:

> 'On the one hand, it is said that the words of Sch 1, para 5(2)(c), to the 1974 Act express a legal concept which is already well settled in the books on contract under the rubric 'Discharge by breach'. If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the

[26] [1978] 1 All ER 713 (CA)

> essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.'[27]

[98] The 'unreasonableness test', the learned Master of the Rolls summarised as follows:

> 'On the other hand, it is said that the words of Sch 1, para 5(2)(c) do not express any settled legal concept. They introduce a new concept into contracts of employment. It is that the employer must act reasonably in his treatment of his employees. If he conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer, the employee is justified in leaving. He can go, with or without giving notice, and claim compensation for unfair dismissal.
>
> It would seem that this new concept of 'unreasonable conduct' is very similar to the concept of 'unfairness' as described in Sch 1, para 6(8), which says:
>
> > "… the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy

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[27] *Western Excavating v Sharp*, *supra*, at 717C – E.

> the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee."

Those who adopt the "unreasonableness test" for dismissal say quite frankly that it is the same as the 'unreasonableness' test for fairness. That was the view taken by Megaw LJ in *Turner v London Transport Executive* ([1977] ICR 952 at 964). He said:

> 'So far as (c) is concerned … the wording of this sub-paragraph is not a wording which involves, or implies, the same concept as the common law concept of fundamental breach of a contract resulting in its unilateral repudiation and acceptance of that unilateral repudiation by the innocent party. The employer's "conduct" here is employer's conduct to be adjudged by the industrial tribunal by the criteria which they regard as right and fair in respect of a case in which the issue is whether or not there has been "unfair" dismissal. '[28]

[99] Ultimately, Lord Denning MR and the remainder of the court accepted that the contract test was to be preferred. The reasoning of the learned law Lord is an exercise in statutory interpretation and need not be considered here. However, in arriving at his conclusion he made an observation which is pertinent:

> 'Paragraph 5(2)(*c*) deals with the cases where the employee himself terminates the contract by saying: "*I can't stand it any longer*. I want my cards.'[29] (Emphasis added)

[100] The emphasised words reflect the notion of intolerability which was

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[28] *Western Excavating v Sharp*, *supra*, at 717f – 718a
[29] *Western Excavating v Sharp*, *supra*, at 718f

to find its way into the language of s. 186(1) (e) of our LRA.

[101] This then settled the issue in English law, but in arriving at its conclusion, the Court recognised that it was a matter of statutory interpretation and regard had to be had to the specific statute in question.

[102] Subsequently, in the case of *Woods v. W M Car Services (Peterborough) Ltd*[30] the Employment Appeal Tribunal held:

> 'In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: *Courthaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see *BAC Ltd v. Austin* [1978] IRLR 332 and *Post Office v. Roberts* [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Post Office v Roberts* (supra) paragraph 50.
>
> We regard this implied term as one of great importance in good industrial relations. Quite apart from the inherent desirability of requiring both employer and employee to behave in the way required by such a term, there is a more technical reason for its importance. The statutory right of an employee who ceases to be

[30] [1981] IRLR 347 (EAT) at 350.

> employed to complain that he has been unfairly dismissed is wholly dependent on his showing that he has been "dismissed". In the ordinary case, where an employer in fact dismisses the employee … this normally presents no difficulty. The difficulty arises in cases of constructive dismissal falling within s. 55(2)(c) where the employee has resigned due to the behaviour of the employer. As is well known, there used to be conflicting decisions as to whether, in order to constitute constructive dismissal, the conduct of the employer had to amount to a repudiation of the contract at common law or whether it was sufficient if the employer's conduct was, in lay terms, so unreasonable that an employee could not be expected to put up with it. In *Western Excavating (ECC) v Sharp* (supra) this conflict was resolved in favour of the view that the conduct of the employer had to amount to a repudiation of the contract at common law. Accordingly, in cases of constructive dismissal, an employee has no remedy even if his employer has behaved unfairly, unless it can be shown that the employer's conduct amounts to a fundamental breach of the contract.'

[103] That decision was taken on appeal, but the appeal failed.[31]

The position in South Africa under the Labour Relations Act, 1956

[104] Under the 1956 LRA the Industrial Court considered unfair dismissals in the scope of its unfair labour practice jurisdiction.

[105] An unfair labour practice was defined under that Act as:

> 'any act or omission, other than a strike or lock-out, which has or may have the effect that –

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[31] *Woods v W M Car Services (Peterborough) Ltd* [1982] IRLR 415 (CA)

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby'.

[106] An "employee", in turn, was defined as –

> 'any person who is employed by or working for any employer and receiving or entitled to receive any remuneration, and, subject to subsection (3), any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer'

[107] The establishment of conciliation boards and the invocation of the Industrial Court's jurisdiction could, except in certain limited circumstances, only be initiated by employers (or employer organisations) and employees (or trade unions).

[108] Thus, on a narrow interpretation of the 1956 LRA, an employee who had been dismissed ceased, upon his or her dismissal, to be an employee as defined in the Act and would not be entitled to relief under the Act. There were, however, other provisions in the Act which made it clear that it was to be extended to dismissed employees as well and, therefore, that a strict interpretation was not warranted.[32] The courts thus had little difficulty in finding that a person who had been dismissed by his or her employer (and was accordingly, no longer an "employee" as contemplated at common law) was nevertheless an employee for purposes of the unfair labour

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[32] Brassey, Cameron, Cheadle and Olivier, *The New Labour Law* (Juta, 1987), pp. 21 – 5

practice jurisdiction of the Industrial Court.[33]

[109] In *National Automobile and Allied Workers Union (now known as National Union of Metalworkers of SA) v Borg-Warner SA (Pty) Ltd* Van den Heever JA held:

> 'The relationship envisaged by the Act between "employer" and "employee" is therefore clearly not one that terminates as it would at common law. Cases accepting that the provisions of the Act do not relate solely to the enforcement of legal (common-law) rights, are legion. Cf *Marievale Consolidated Mines Ltd v President of the Industrial Court and others* 1986 (2) SA 485 (T) at 498I-499H; (1986) 7 *ILJ* 152 (T); and *Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court and others* 1986 (3) SA 786 (A); (1986) 7 *ILJ* 489 (A). The fact that the definition is framed in the present tense (by the use of the phrase "is employed") cannot alter the fact that other sections of the Act already referred to make it clear that ex-employees are also included within its terms.
>
> … It is therefore sufficient that the legislature clearly had in mind that once a particular employment relationship is established, the parties to it remain "employee" and "employer" as defined, beyond the point of time at which the relationship would have terminated under the common law. Where it includes also former employees seeking re-employment or reinstatement, it has placed no limitation suggesting when - or why - a former employee no longer falls within the definition. What is clear, is that when both parties so agree, or when equity permits, the relationship does come to an end.'[34]

[110] But those cases in which an employee resigned posed added

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[33] *National Automobile and Allied Workers Union (now known as National Union of Metalworkers of SA) v Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (A), at 518B – D; Brassey *et al*, *New Labour Law*, *op cit*, pp. 27 – 8

[34] At paras 518B – G

difficulties. This was so because at common law, a resignation was a unilateral act which brought about a termination of the employment contract, and required no agreement from the employer.[35] Thus, an employee who resigned would, ordinarily, not be entitled to activate the court's jurisdiction.

[111] In *Jooste v Transnet Ltd t/a SA Airways,*[36] the old Labour Appeal Court (per Myburg J, as he then was), with reference to the *Borg-Warner* case, *supra*, noted:

> 'The case of an applicant who was actually dismissed by the employer raises no difficulty in regard to jurisdiction. What is much more problematic is the case of an applicant who resigned his employment. It seems to me that if he did so with the intention to terminate the employment relationship he cannot be an "employee" within the meaning ascribed to the word by the LRA, as interpreted in the *Borg-Warner* case, and the Industrial Court will not have jurisdiction to determine any dispute between the applicant and his former employer.
>
> *A fortiori*, if the applicant resigns in terms of an agreement with his employer that they will go their separate ways, he ceases to be an employee in terms of the LRA and cannot seek redress from the Industrial Court. An agreement to end the employment relationship is common. It is often accompanied by a resignation by the employee. A resignation which is part of an agreement to terminate the employment relationship puts an end to the status of the former employee as an "employee" in terms of the LRA.'[37]

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[35] *Rustenburg Town Council v. Minister of Labour and Others* 1942 TPD 220; *Potgietersrust Hospital Board v Simons* 1943 TPD 269.
[36] (1995) 16 *ILJ* 629 (LAC). See too Brassey *et al*, *op cit*, pp. 30 – 1
[37] At 637H – 638A

[112] Against this backdrop, the Labour Appeal Court examined the concept of constructive dismissal in our law. Myburg J noted that it was not a concept that appeared in the 1956 LRA or any other South African statute and did not form part of our common law. What was however known to our common law, said the learned Judge, was the concept of repudiation.[38]

[113] The learned Judge then examined the history of constructive dismissal in the United Kingdom:

> 'In the United Kingdom, in terms of s 55(2)(c) of the Employment Protection (Consolidation) Act of 1978, an employee is treated as dismissed by his employer if the employee terminates the contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct. Anderman *The Law of Unfair Dismissal* (2 ed) at 63-4 states that para (c) was introduced –
>
> 'to avoid the possibility that employers might attempt to circumvent the statutory protection by pressurising an employee to resign. It is being interpreted, however, to limit the kind of pressure by the employer that entitles an employee to resign solely to conduct which is contractually repudiatory....Whilst the resignation itself may be with or without notice, the circumstances must be such as to justify a resignation without notice. By its terms, therefore, it presupposes contractually repudiatory conduct by the employer since at common law only a wrongful repudiation entitles an employee to resign without notice'.'[39]

[114] Myburg J held that the 1956 LRA had 'no equivalent provision to s

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[38] At 636E – H
[39] At 636H – 637A

55(2)(c) of the Employment Protection Consolidation Act', but had conferred 'a wide discretion on the Industrial Court in terms of s 46(9)(c) to determine a dispute concerning an alleged unfair labour practice'.[40]

[115] The learned Judge held that in a case based upon constructive dismissal the following factual enquiries had to be conducted:

115.1 First, the employee had to establish that he did not intend to terminate the employment relationship.[41]

115.2 Secondly, whether 'the employer did constructively dismiss him'.[42]

[116] The first enquiry, strictly speaking, had nothing to do with constructive dismissal, but was concerned with the jurisdiction of the old Industrial Court to determine the matter because, as noted above, if the employee intended to resign, he ceased to be an employee and the Industrial Court had no jurisdiction to determine the dispute.[43]

[117] Referring to the decision of the Employment Appeal Tribunal in *Woods v W M Car Services*, *supra*, Myburg J held that, subject to the fact that it was necessary find an implied term of the type set out therein, the approach which commended itself to him was that referred to above, *viz*. that an employee was entitled to expect that his employer would not, without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously

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[40] At 637D-E
[41] At 638A – C.
[42] At 638D – E.
[43] *Pretoria Society for the Care of the Retarded v. Loots* (1997) 18 *ILJ* 981 (LAC), at 984B – C

damage the relationship of confidence and trust; whether judged reasonably and sensibly the conduct of the employer was such that an employee could not be expected to put up with it.[44]

[118] This then gave content to the concept of 'constructive dismissal' in our law under the 1956 LRA.

[119] In *Pretoria Society for the Care of the Retarded v. Loots*, *supra*, the Labour Appeal Court (now sitting, since the advent of the 1995 LRA, as a full bench) had cause to reconsider the concept of constructive dismissal. Nicholson JA (Myburg JP and Froneman DJP concurring), endorsing, subject to certain limitations, the principles laid down in *Jooste's* case, held:

> 'When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation *has become so unbearable* that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.
>
> Where she proves the creation of the unbearable work environment she is entitled to say that by doing so the employer is repudiating the contract and she has a choice either to stand by the contract or accept the repudiation and the contract comes to an end; *Venter v*

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[44] *Jooste v. Transnet Ltd*, *supra*, 638H – 639A

> *Livni* 1950 (1) SA 524 (T) at 528. In that circumstance, if it constitutes an unfair labour practice, the employee is entitled to sue for compensation in terms of s 46(9)(c) of the Act.
>
> In the latter instance she is demanding, therefore, that compensation be paid because it is the employer's unlawful act that has precipitated the refusal to work and the acceptance of the employer's repudiation. The two envisaged steps are not always easily separable as the enquiry into whether the employee intended to terminate the employment by accepting the repudiation will often involve an enquiry into whether such resignation was voluntary or not. The two stages are not necessarily water tight compartments.'[45] (Emphasis added)

[120] The "two stages" referred to by Nicholson JA were those contemplated in the *Jooste* case referred to above.

[121] Thus, it was in the context of the old Industrial Court's unfair labour practice jurisdiction that the English law of constructive dismissal passed into South African labour law.

Constructive dismissal under the Labour Relations Act, 1995

[122] When the 1995 LRA came into effect the Labour Court naturally turned to the law on constructive dismissal under the 1956 LRA for guidance in respect of s. 186(1)(e) of the 1995 LRA.[46]

[123] In one of the first cases brought to the Labour Court on the subject Landman J (as he then was) held that the scheme of the 1995 LRA on the subject of constructive dismissal 'was to continue and to

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[45] At 984D – G
[46] *Sappi Craft (Pty) Ltd t/a Tugela Mills v Majaka NO and Others* (1998) 19 *ILJ* 1240 (LC); *Secunda Supermarket CC t/a Secunda Spar and Another v Dreyer NO and Others* (1998) 19 *ILJ* 1584 (LC)

utilize the concept of constructive dismissal' as set out in the pre-1995 LRA cases. The learned Judge nevertheless recognised that the principles set out in those cases were 'not adopted *holus bolus* for the new Act is a codification of the old law and with codification has come certain refinements'.[47]

[124] Under the 1956 LRA, it will be recalled, constructive dismissal was intertwined with the doctrine of repudiation. In *Albany Bakeries Ltd v Van Wyk* and Others[48] the Labour Appeal Court, giving vent to the language of s 186(1)(e), severed the cords of repudiation. Pillay AJA, rendering the judgment of the unanimous Court pointed out that:

> '[23] Since the advent of the [1995] Act the prime and only consideration is whether the employer made continued employment intolerable for the employee.
>
> [24] If the demotion is a repudiation which would entitle the employee to cancel the contract, but does not amount to making life intolerable, it is insufficient; if it is sufficient to make life intolerable, it is relevant.'

[125] With respect, this must be correct.

[126] The Courts have held that employment must objectively have been rendered intolerable in the sense that no reasonable employee could be expected to put up with the conduct of the employer.[49] At the same time the employee must himself or herself have found such

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[47] *Sappi Craft v Majaka*, *supra*, at 1249B – D
[48] (2005) 26 *ILJ* 2142 (LAC), at 2148I – J
[49] *Lubbe v. Absa Bank Bpk.* [1998] 12 BLLR 1224 (LAC), at para. 8; *SmithKline Beecham (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 *ILJ* 988 (LC), *Albany Bakeries*, *supra*, at 2149D – 2150H

conduct intolerable.

[127] In *Mafomane v Rustenburg Platinum Mines Ltd,*[50] Trengove AJ pointed out that:

> '[49] The requirement that the employee prove that his or her continued employment had become "intolerable", has the following implications:
>
> 49.1 The test is an objective one. It means that the employee must prove at least two things. The first is that the circumstances had become so unbearable that the employee could no longer reasonably be expected to endure them. The second is that there was no reasonable alternative to escape those unbearable circumstances, than to resign.
>
> 49.2 When the latter issue is considered, it must be borne in mind that the termination of an employment relationship is usually only appropriate as a remedy of last resort. An employee who resigns to escape an oppressive working environment despite the fact that there are other avenues of escape open to him or her, will usually find it hard to characterise the resignation as a constructive dismissal. The ultimate test, however, remains whether it was reasonable to resign in order to escape the intolerable working environment. That is always a question of fact that depends on the circumstances of every case.
>
> 49.3 I have thus far spoken of circumstances that render continued employment "intolerable" in the sense that

[50] [2003] 10 BLLR 999 (LC)

the employee can no longer “reasonably” be required to endure them, as if there is a single objective standard by which those matters can be judged. But that is often not the case. The question whether continued employment has become “intolerable” or whether the employee can no longer “reasonably” be required to endure it, are based on value judgments which sometimes vitally depend on the perspective from which they are made. A case where a black employee suffers race discrimination by a white employer is a good example. The assessment whether the race discrimination is so severe as to be intolerable, will often depend on the background and the perspective of the individual making it. What may seem inconsequential from the perspective of someone who has never suffered the humility and denigration of race discrimination, may be regarded far more seriously and indeed intolerable from the perspective of a lifelong victim of race discrimination and the humility and denigration that it entailed. From whose perspective then, should one judge whether the race discrimination was such that the employee could not reasonably have been expected to endure it? It seems to me that the judgment must be made from the perspective of a reasonable person in the shoes of the employee. Section 186(1) (e) firstly says that continued employment must have been made intolerable “for the employee”. It suggests that the assessment whether continued employment has become intolerable must be made from the employee’s perspective. The purpose of the section is secondly

to give effect to the right of every employee in terms of section 185(b) of the LRA and ultimately in terms of section 23(1) of the Constitution, not to be subjected to unfair labour practices. This right requires that the question whether continued employment has been rendered intolerable, be judged from the perspective of the employee. It would be unfair to deny the remedies of dismissal to employees who resign because their continued employment became intolerable from their perspective.

49.4 The conclusion that the question whether the employee's continued employment has become intolerable in that he or she cannot "reasonably" be required to endure it, must be made from the perspective of a reasonable person in the shoes of the employee, obviously does not mean that the employee's own views must prevail. The test remains an objective one. The idiosyncrasies of the particular employee are not the benchmark. The assessment must be made from the perspective of a reasonable person in the shoes of the employee, that is, from the perspective of a reasonable person with the same background, life experience and position.'

[128] However, in *Strategic Liquor Services v Mvumbi NO,*[51] the Constitutional Court held:

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[51] 2010 (2) SA 92 (CC)

‘[3] Section 185(a) of the Labour Relations Act confers 'the right not to be unfairly dismissed'. Section 186(e) defines 'dismissal' as including a situation where 'an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee'. This definition gives statutory embodiment to the jurisprudence of constructive dismissal that preceded it. The CCMA concluded that Mr Redgard had been constructively dismissed. In its application to this court, the employer contends that the CCMA - and the Labour Courts in refusing to review its determination - misconceived the jurisdictional prerequisites for constructive dismissal, since on Mr Redgard's own version he had a choice whether to resign or be subjected to poor performance procedures. It asks this court to step in.

[4] There are two reasons why the invitation cannot be accepted. The first is that the employer's submission overlooks Mr Redgard's uncontested evidence to the effect that his work situation had become intolerable and that the alternative to resignation was a sham since the employer would find a reason to dismiss him anyhow. This means there was no 'choice'. The second is that it misconceives the test for constructive dismissal, which does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.’ (Footnotes omitted)

[129] It seems to me that this latter statement must be understood to

exclude a 'reasonable' choice.[52] If it was intended to mean that an employee was not required to demonstrate that he or she had no 'reasonable' alternatives to resignation it would be in conflict with the language of the section. Quite apart from all the authorities on the question, the ordinary meaning of the word "intolerable" connotes the absence of a (reasonable) choice. I emphasise the meaning of the phrase intolerable and its various synonyms as set out above. If an employee has reasonable alternatives, it implies that the conduct of the employer is not unbearable or not beyond the limits of tolerance.

[130] Thus, in *Albany Bakeries*, *supra*, Pillay AJA, with reference to the judgment of Conradie JA in *Old Mutual Group Schemes v Dreyer and Another*[53] held:

> '[28] Conradie JA referred to the *Loots* case where mention was also made of a belief of the employee that the employer would never reform or abandon the pattern of creating an unbearable work environment. How will an employee ever prove that if he has not adopted other suitable remedies available to him? It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desire. Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct. Finally, it might well smack of opportunism for an employee to leave when he alleges that life is intolerable but there is a perfectly legitimate avenue open to alleviate his

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[52] In *SA Police Service v Safety and Security Sectoral Bargaining Council and Others* (2012) 33 ILJ 453 (LC), at 461A – C Steenkamp J did not find it necessary to draw this distinction.
[53] (1999) 20 *ILJ* 2030 (LAC)

distress and solve his problem.

[29] ….

[30] In addition, even if an employee was dissatisfied with the manner in which he was dealt with in terms of the grievance procedure, he could have made use of the machinery of the Act. Schedule 7 item 2(1) (b) of the Act provides that an employer is guilty of an unfair labour practice if it commits any form of unfair conduct relating to the provision of benefits to an employee. A person alleging an unfair labour practice relating to demotion may refer the matter to a council or if no council has jurisdiction to the CCMA for conciliation and arbitration. The first respondent did not make use of any of these procedures.'

[131] If an employee finds herself confronted by conduct which she considers intolerable, but the employee can avoid such (intolerable) conduct by taking some course of action which is reasonably within her power, other than resignation, then the employee should follow such other course of action. To hold that the employee is entitled in such circumstances to resign and claim constructive dismissal would, in my view, undermine the right to fair labour practices enshrined in s. 23 of the Constitution which requires that fairness be viewed from the perspective of both employer and employee.

Constructive dismissal in different contexts

[132] In the recent case of *Murray v Minister of Defence*, *supra*, the Court had to consider the scope of constructive dismissal. Although that case arose after the 1995 LRA had already come into effect, the LRA was not applicable because it involved the SA National Defence Force whose members were excluded from the provisions of the

1995 LRA. It was, however, common cause that the matter had to be considered in light of the constitutional rights to fair labour practices (s. 23 of the Constitution) and to human dignity.

[133] Cameron JA held:

> 'However, it is in my view best to understand the impact of these rights [the Constitutional rights to fair labour practices and human dignity] on this case through the constitutional development of the common-law contract of employment. This contract has always imposed mutual obligations of confidence and trust between employer and employee. Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees - even those the LRA does not cover.'[54]

[134] The Court in *Murray v Minister of Defence* endorsed the test adopted by Myburg J in ***Jooste's*** case from the English law, Cameron JA making two important observations:

134.1 First, the intolerable work situation must be one which is of the employer's making or over which the employer has control.[55]

134.2 Secondly, the employer must be culpably responsible for the intolerable situation. In other words, the employer must have lacked 'reasonable and proper cause'.[56]

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[54] At 135A – B; *cf SA Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA), at 627F
[55] At 138C
[56] At 138D

[135] That then demonstrates the historical background to the adoption of s. 186(1) (e) of the LRA.

[136] Having regard to the aforesaid, it appears that the purpose of s. 186(1) (e) was to ensure that the right of an employee not to be unfairly dismissed (a right entrenched in the LRA and s. 23 of the Constitution) was not rendered nugatory because the employer, instead of itself dismissing the employee, made employment intolerable to the point where the employee could no longer bear it and therefore resigned.

[137] These various factors must be reflected in the meaning to be attributed to s. 186(1) (e) of the LRA.

Was Mr Peyper's employment rendered intolerable by the applicant?

[138] In my opinion it makes no difference to the outcome which of the conflicting versions is to be preferred. On Mr Peyper's own evidence it seems to me that his employment had not become intolerable.

[139] Mr Peyper explained that Mr Carlson had confronted him on 13 June about his refusal to sign the letter of 10 June 2011. That letter, it will be recalled, purported to demote Mr Peyper without holding any enquiry. Mr Carlson chastised Mr Peyper for refusing to sign the letter and stated that he would simply go through the proper procedure and "we can just do it the right way". If Mr Peyper had any reason to doubt that "it" (the demotion) would be done properly, he proffered none. His testimony that Mr Carlson had terminated the services of other staff without following any procedure, apart from being legally irrelevant,[57] appears to have been proffered to prove

[57] *Delew v. Town Council of Springs* 1945 TPD 128

that Mr Carlson was true to his word and would carry out his threat. However, the threat in this case was that he would follow the proper procedure.

[140] In my view, Mr Peyper should have accepted Mr Carlson's undertaking to follow the proper procedure. He could have raised his defence to the accusations before the chairperson of that enquiry and then awaited the outcome. Mrs Carlson had informed Mr Peyper that the enquiry would be conducted by "the people". It is not clear who those people were, but it was clear that it was someone other than Mr or Mrs Carlson.

[141] Moreover, Mr Peyper testified that Mr Carlson informed him that he would discuss the matter further with Mr Peyper upon his return from Mozambique. This meeting never took place. It is not clear why Mr Carlson did not call for the meeting immediately upon his return. In any event, shortly after Mr Carlson returned Mr Peyper resigned. That meeting might have been the precursor to doing Mr Carlson doing it "the right way". Mr Carlson in his testimony implied as much.

[142] Mr Peyper testified that "it seemed to me" that he would be forced into a position where he, left without the tools necessary to achieve the production bonuses, would be unable to perform. He testified that if the "communication channels" were taken away he would be forced make mistakes and this would lead ultimately to him being charged with poor work performance and dismissed.

[143] I assume that the "communication channels" he refers to were the channels for communicating with the clients, insurance companies, and so forth. The company had, it will be recalled, removed his mobile telephone and instructed him not to have communications

with the clients.

[144] It thus seems to me that the aforesaid scenario painted by Mr Peyper relates to his perception of the working conditions in the new position of workshop foreman after the demotion became effective.

[145] With respect, I fail to see how this could amount to constructive dismissal.

[146] In the first place, it was not clear from the evidence that these channels of communication were necessary for Mr Peyper to discharge his functions as workshop foreman.

[147] Secondly, the scenario painted by Mr Peyper was highly speculative. At best, for him, he was seeking to draw an inference from the fact that the 'tools of his trade' had been removed, to demonstrate that it was impossible to achieve certain production criteria and, then, to draw an inference from the fact that he had been given tasks which could not be achieved to demonstrate that the new post was a charade, a "smokescreen" to get rid of him. On the evidence tendered, it is difficult to make these connections. Quite apart from the fact that the evidence does not demonstrate that these "tools" were necessary in the new position, an attempt to demonstrate that it was impossible to achieve certain production levels would have to be carefully explained with sufficient supporting evidence. This was not done in the present case.

[148] Thus, on Mr Peyper's scenario, he could have avoided being disciplined and ultimately dismissed by not making any mistakes. If he was hamstrung by measures introduced by the employer he could, when charged with poor work performance, raise this (the fact that he had been hamstrung) at the enquiry.

[149] It seems to me that an employee who anticipates that he or she will be subjected to unfair treatment at some stage in the (possibly distant) future must wait for such treatment to materialise before resigning. Even if such unfair treatment were to arise in the future, it would still have to be assessed at that stage whether the employee was entitled to resign and claim intolerability.

[150] I turn now to consider the true reason for Mr Peyper's resignation. If one pays close attention to Mr Peyper's testimony it is apparent that he found the unfolding events degrading.[58] He repeated this on several occasions during his testimony. First some of the employees working under him refused to take instructions from him and then client's commiserated with him about the demotion. When approached by the personnel manager (a person named Colleen) who sympathised with him, he told her "you have got a job to do, lets just carry on with it, lets do what we have to do".

[151] Indeed, Mr Peyper testified that he told Mrs Carlson that he was so frustrated by the humiliation he was experiencing he could simply leave. If one considers Mr Peyper's letter of resignation, the humiliation he was experiencing was the prime reason advanced for resigning. The question, thus, is whether Mr Peyper was justified in resigning. In my opinion, he was not.

[152] An employee relying upon s 186(1) (e) of the LRA must demonstrate that employment had been made intolerable by the employer. This means that Mr Peyper had to demonstrate that no reasonable employee could be expected to put up with the situation which

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[58] There is the possibility that Mr Peyper was influenced by his deteriorating health, but no expert evidence was led in this respect and I am unable to make a finding upon this. In any event, Mr Peyper did not expressly indicate that he was influenced by this factor.

confronted him and that such situation was of the applicant's making or within its control and that it was culpably responsible.

[153] Intolerability is a high threshold, even if one accepts that there is no need to demonstrate that the employee had reasonable alternatives.

[154] That junior staff refused to take instructions from Mr Peyper does not appear to be attributable to the applicant. In any event, if Mr Peyper was entitled to give them instructions and they refused, he should have taken measures to have them disciplined.

[155] I do not question the embarrassment experienced by Mr Peyper. Objectively, however, the situation had lasted for a short period of time[59] and the situation had not been fully resolved. Mr Carlson had not yet met with Mr Peyper and, importantly, had not yet managed himself to convey anything to staff and clients. Thus, much of Mr Peyper's embarrassment was at that stage based upon his perception of views held by others who had or may have had very little insight into what was unfolding.

[156] Furthermore, whilst I accept, on the evidence led, that Mr Carlson was incorrect in attributing the problems which the company was experiencing to Mr Peyper, I do not think that this was a mere subterfuge on the part of Mr Carlson. Whilst Mr Peyper did suggest that the new job was a "smokescreen" to ultimately get rid of him, this was based upon his refusal to accept the terms offered by Mr Carlson (and was in any event far-fetched). There was no suggestion by Mr Peyper that Mr Carlson had a general desire to get rid of him and there was no evidence of Mr Carlson's motive for

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[59] The initial meeting with Mr Peyper took place on 6 June 2011 and by 14 June 2011 he had gone on leave. He never returned to the workplace.

doing so.[60] After all, it appeared that Mr Peyper and Mr Carlson had a close relationship, even a friendship.

[157] Even if Mr Carlson was wrong in attributing the woes of the company to Mr Peyper, he was entitled to subject Mr Peyper to a performance or disciplinary enquiry as long as he had a genuine belief that it was warranted. There had been complaints from insurance companies about the applicant's repair work done to motor vehicles. Whether Mr Peyper could be held responsible for these complaints had ultimately to be determined at an enquiry. On the face of it, Mr Carlson was entitled to hold such enquiry even if the enquiry would ultimately come to the conclusion that Mr Peyper was not responsible for the problem.

[158] I should mention that there were a number of alternatives (to resignation) reasonably available to Mr Peyper. First, he could have attended the disciplinary enquiry and raised all his complaints at that hearing. Secondly, if a final decision had been taken on his demotion, he was entitled to refer an unfair labour practice dispute to the bargaining council in terms of s. 186(2)(a) of the LRA.

[159] Having determined this matter on Mr Peyper's version it is strictly speaking unnecessary for me to consider the factual disputes. There is, however, one issue which was interrogated in some detail in argument before me and which, out of fairness to the parties, I should examine. This is whether the demotion of Mr Peyper was final.

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[60] There was a feint suggestion that Mr Carlson may have been aggrieved by the relationship between Mr Peyper and Mr Carlson's father, but this appears to be far-fetched and was not persisted in.

[160] In my view the surrounding evidence and common cause facts are inconsistent with a final decision having been taken to demote Mr Peyper. I say this for the following reasons:

160.1 Mr Peyper testified that immediately after the telephonic meeting on 6 June Mrs Carlson informed him she would draw up the necessary documentation and addenda and had already scheduled a disciplinary hearing for Thursday, 9 June 2011, but that such hearing was avoidable.

160.2 This was consistent with both Mr and Mrs Carlson's evidence that if Mr Peyper was not prepared to accept the demotion, the company would have to subject him to a disciplinary enquiry (which might ultimately have resulted in the demotion).

160.3 The letter handed to Mr Peyper on 10 June was not signed on behalf of the applicant. Moreover, it contained a space for Mr Peyper to sign and confirm his agreement with the arrangement. Mrs Carlson testified that this was because no final decision had been taken on the demotion and the letter was given to Mr Peyper for him to accept.

160.4 Mr Peyper also testified that when he handed his own letter dated 10 June to Mrs Carlson (on 13 June 2011) she remarked that she knew she would regret not having followed the disciplinary route (which she had initially scheduled for 9 June 2011). This is consistent with Mrs Carlson's evidence that she had presented Mr Peyper with three options, but he had failed to respond to the options in time for her to proceed with the enquiry.

160.5 Finally, when Mr Peyper and Mrs Carlson met on 10 June 2011 (during which she provided him with the letter of the same date), Mr Pepyer, on his own version, stated that he did not agree with the contents of the letter.

160.6 I have quoted the letter in full above. It indicates that it was decided at the meeting of 6 June that Mr Peyper's new job title would be Workshop Foreman "with immediate effect" and that no disciplinary hearing was necessary.

160.7 The letter is, on the face of it, open to the interpretation that management had decided to demote Mr Peyper and that this decision was final and therefore no disciplinary action would be necessary. But if this is what was decided at the meeting of 6 June, Mr Peyper, would have relied on the letter as proof of his assertion; he would not have stated, as he did, that he disagreed with it.

[161] It is clear that a discussion did take place on 6 June regarding the demotion of Mr Peyper and his removal from the position. Consistent with this Mr Peyper was asked to return his mobile telephone, the Fortuna and certain other items associated with his position as workshop manager and was asked not to have any communications with clients. These facts are, however, equally consistent with the applicant's case that Mr Peyper was to be temporarily removed from the position until a hearing had been conducted.

[162] Mr Peyper testified that Mr Carlson told him that he would not budge from his decision to demote him. This implied that the decision was final. Counsel for Mr Peyper submitted that because Mr Peyper's

testimony in this respect was never challenged, it should be accepted. I agree with that submission on the facts of the present case. However, I do not think this statement made by Mr Carlson can be understood in the sense suggested on behalf of Mr Peyper.

[163] Clearly, Mr Carlson considered that unless Mr Peyper accepted the terms of the letter of 6 June 2011, he would have to be subjected to a disciplinary enquiry. Mr Peyper himself testified that this is what Mr Carlson had stated and it was apparent from Mr Carlson's evidence that this is what he had in mind.

[164] Moreover, on My Peyper's own version Mrs Carlson informed him that an enquiry had already been scheduled for 9 June 2011.

[165] Mr Carlson could not have taken a final decision whilst at the same time intending to hold an enquiry. It seems to me that what Mr Carlson had conveyed to Mr Peyper was that he (Mr Carlson) had resolved that Mr Peyper was to be demoted and would not be persuaded by any representations which Mr Peyper wished to make to him. However, if after such discussion Mr Carlson could not be persuaded, then Mr Peyper would either have to accept Mr Carlson's decision and the demotion or be subjected to an enquiry which would be conducted by somebody else. It could not mean that the demotion was final without any enquiry.

[166] In the heads of argument filed on behalf of Mr Peyper reference is made to a further factor to support the conclusion that the demotion was permanent. With reference to a passage in the record, it was argued that Mr Peyper confirmed that he had telephoned Mr Carlson and complained that his salary had been reduced to which Mr

Carlson responded "Yes, (I) reduced it".[61]

[167] It is not clear to me that Mr Peyper's evidence should be understood in the manner suggested in the heads of argument filed on his behalf. The relevant passage in the transcript reads as follows:

> 'MR PEYPER: [Mr Carlson] turned around and I actually phoned him at one stage and I've said to him I see that my salary has been reduced [and] he said to me yes he reduced it and he said to me he's got to start somewhere along the line to try and recover some of the workshop losses the problems that is in the workshop.'

[168] Thus, the reason advanced by Mr Carlson to Mr Peyper for making the deductions had nothing to do with the demotion; it had to do with the losses suffered by the business.[62]

[169] In the circumstances, I am satisfied that no final decision to demote Mr Peyper had been taken.

Relief

[170] I have set out the nature of the relief sought by the applicant. It seeks an order that the matter be referred back to the first respondent to be determined by a different arbitrator, alternatively that this Court substitute the decision of the second respondent with a finding that the third respondent was not constructively dismissed.

[171] Since the determination of the jurisdictional issue is this Court's to make, it would be inappropriate for me to refer the matter back to the

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[61] Third respondent's heads of argument at 14, para 14.4.2
[62] An employer is, of course, not entitled to make deductions contrary to s. 34 of the Basic Conditions of Employment Act, 75 of 1997. This issue was not raised.

bargaining council.

[172] The appropriate order is the one I intend making. It is this:

172.1 The award of the second respondent dated 6 December 2011 is hereby reviewed and set aside.

172.2 It is declared that the applicant did not make the third respondent's employment intolerable and, therefore, did not dismiss the third respondent within the meaning of s. 186(1)(e) of the LRA.

172.3 The third respondent is ordered to pay the costs of this application.

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Hulley, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant:	H. Gerber
Instructed by:	Nothnagel Attorneys
For Third Respondent:	F. Van der Merwe
Instructed by:	Duke Attorneys