

CONSTRUCTIVE DISMISSAL

WHAT IS CONSTRUCTIVE DISMISSAL?

Constructive dismissal is where an employee terminates the contract of employment with or without notice because the employer made continued employment intolerable for the employee.

Constructive dismissal is a form of dismissal and requires the employee to prove that there was a constructive dismissal, before the employer must prove that the dismissal was fair.

If the dismissal is found to be unfair the employee is entitled to the remedies set out in the Labour Relations Act 55 of 1995 for unfair dismissals.

THE ELEMENTS OF A CONSTRUCTIVE DISMISSAL

In order to prove that there was a constructive dismissal an employee will have to prove on a balance of probabilities that –

- the contract of employment was terminated by the employee because of the employer's conduct and not, for instance, because the employee was planning to resign in any event;
- the reason for the termination of the contract must be that continued employment has become intolerable for the employee. Examples of intolerability could include sexual harassment,

assault or non-payment of remuneration by the employer; and

- it must have been the employer of that employee who made the continued employment intolerable.

Employees will struggle to prove constructive dismissal if they leave prior to going through a grievance procedure. Employees must utilise grievance procedures or complain to higher levels of management, provided that that is a reasonable option in the circumstances. For example, it may not be reasonable for an employee in a small business to lodge a grievance against an alleged sexual harasser if that person is his or her employer.

The test for constructive dismissal is an objective one. The Court have held that a key test is whether it is reasonable to conclude that the employer made continued employment intolerable for the employee. The intolerable situation may be one event (e.g. harassment) or a number of events that have taken place over a period of time (e.g. racial prejudice).

Intolerability is a high threshold to prove. It is far more than just a difficult, unpleasant or stressful working environment or employment conditions, or a rude superior. Even a breach of the employment contract or deductions from salary would not *per se* establish intolerability. When establishing intolerability, the employer's conduct as a whole together with its cumulative impact must be considered and it must be

proven that the employee could not have reasonably been expected to put up with it.

REFERRING CONSTRUCTIVE DISMISSAL DISPUTES TO THE CCMA

The employee may refer a dismissal dispute by completing the LRA 7.11 referral form within thirty (30) days of the termination of the employment relationship.

The employee could request reinstatement or compensation. Compensation up to 12 months' remuneration may be awarded.

The duty of proving dismissal rests with the employee and that of justifying it rests with the employer.

RELEVANT LEGISLATION

- Labour Relations Act No 66 of 1995 as amended
- Sections 186 (1)(e) and 193.