When does a resignation amount to a constructive dismissal?

What is a constructive dismissal?

In terms of section 186(1) (e) of the Labour Relations Act 66 of 1995 as amended ("LRA"), one form of dismissal is when the employee terminates the employment contract (in other words resigns), with or without notice, because the employer made continued employment intolerable.

This is generally referred to as a constructive dismissal or a forced resignation. At first glance, this does not look like a dismissal at all as it is the employee who ends the employment relationship. However, it is because the employer makes the working environment so unpleasant and intolerable that the resignation is regarded as a dismissal.

What does the employee need to prove in order to demonstrate that a constructive dismissal has occurred?

According to the Labour Court there are three essential requirements for an employee to prove a constructive dismissal, namely:

(1) the employee ended the contract of employment;

(2) continued employment became intolerable for the employee; and

(3) the employer made continued employment intolerable.

According to the Constitutional Court, the test for constructive dismissal does not require that the employee has no choice but to resign, but only that the employer made continued employment intolerable.

The employee will need to show that the real reason for resigning was the employer making continued employment intolerable, in other words there was no other motive for the resignation, for example the family moving to a different province or accepting a better job offer from a different employer.

The employee must prove that there was a dismissal

In terms of section 192 of the LRA, an employee has the duty of proving that there was a dismissal. This applies to equally to constructive dismissals. It means that the employee must prove (by presenting evidence) that s/he resigned because the employer made the employment relationship intolerable.

Objective approach

When considering whether there was a constructive dismissal, an objective approach is used. The focus is not on the employee's (subjective) feelings and perceptions. The employee must introduce evidence to show that s/he reasonably concluded that the employer's actions made continued employment impossible.

The fact that the employment relationship has become 'inconvenient' is not enough. While a single incident may lead the employee to believe that the employment relationship is at an end, it is more often the case that there is a pattern of conduct on the part of the employer.

Resignation must be the last resort

An employee should give the employer sufficient time to address the situation or problem.

Resignation must be the last reasonable resort available to the employee. All internal procedures to resolve grievances should be followed, and the employee should alert the employer to the problems instead of just resigning. However, in some circumstances this may not be possible and each case will be treated on its own merits. For example, an employee who has been seriously assaulted by the employer cannot be expected to remain at work whilst pursuing the grievance procedure.

The resignation must not be voluntary

The resignation must not be voluntary, in other words the employee must be able to show that s/he would have continued the employment relationship indefinitely had it not been for the employer's unacceptable conduct. It is unlikely that an employee who works beyond the notice period or resigns and then later tries to retract the resignation will be able to prove constructive dismissal.

Examples of constructive dismissal

There are many instances where a resignation may constitute a constructive dismissal. Past cases offer some useful guidance:

- If an employee has been sexually harassed by a co-employee, has reported this to management and yet nothing has been done about the matter, the employee's resignation may constitute a constructive dismissal. The employer is expected to take action to protect the victim of the harassment.
- Where employees are suspended without pay and without agreeing to such in instances where the employer experienced financial difficulties.
- Where the employee was encouraged or forced to resign or face summary dismissal for reasons unrelated to the employee's conduct, capacity or the employer's operational requirements. However, if an employee resigns because s/he was given a fair written warning it cannot be viewed as a constructive dismissal.
- Where an employee of a Temporary Employment Services ("labour broker") was employed on terms that were exploitative and did not comply with the Basic Conditions of Employment Act 75 of 1997 as amended.

In the following cases the employee did not succeed in proving that there was a constructive dismissal:

- An employee resigned because the employer refused to provide the employee with salary-related information in terms of its existing policy. This was not conduct that (objectively) rendered the employment relationship intolerable.
- The employee failed to use the grievance procedure in circumstances in which there was no basis to conclude that the employer would not in good faith seek to resolve the grievance. The resignation was considered to be premature.
- An employee resigned, claiming to be the target of unfair poor performance procedures. The arbitrator found that if an employer advises an employee of its required performance standards and gives the employee fair opportunity to meet them together with the necessary support, the employee cannot terminate a performance review process by resigning and claiming constructive dismissal.

Constructive Dismissal and section 197 transfers

Section 186(1) (f) of the LRA provides that a dismissal occurs where an employee terminates employment, with or without notice, because the new employer, after a transfer in terms of section 197 or 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

If an employee resigns after the transfer of the business, in order to claim constructive dismissal s/he must demonstrate that the terms and conditions or circumstances of work provided by the new employer are on the whole less favourable than those provided by the old employer. The new employer may place transferred employees on new pension and medical schemes, provided the overall benefits of the new schemes are not less favourable than the old schemes. It is important to note that each case will be determined based on the facts of that case.

See CCMA Information Sheet: Constructive Dismissal