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Dealing with Constructive Dismissal when Resignation is the last resort



Employees often complain about various aspects of their employment. However, mere complaints about aspects of their employment, or their employer, or their duties as an employee do not automatically mean that the employer is making continued employment intolerable for the employee.

In a previous article we discussed *the important role of an independent chairperson in disciplinary enquiries*, in this blog, we will deal with constructive dismissal in the workplace when resignation is objectively regarded as the last resort.

What is constructive dismissal?

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

As per section 186(1)(e) of the Labour Relations Act:

“Meaning of dismissal and unfair labour practice

(1) "Dismissal" means that-

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.”

Simply put, constructive dismissal is recognised as a form of dismissal although the employee has resigned. The employee is required to prove that there was a constructive dismissal before the onus shifts and the employer is then required to prove that the dismissal was fair.

What elements should be present when substantiating constructive dismissal?

For an employee to prove that there was a constructive dismissal, he/she 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.
- the reason for the termination of the contract was that continued employment had become intolerable for the employee.
- the employer had made the continued employment intolerable.

Employees will have a difficult time proving constructive dismissal if they resign prior to pursuing a grievance procedure or any other internal processes available to them in an attempt to resolve the grievance. Employees must utilise the internal grievance procedures or otherwise complain to higher levels of management and escalate the matter if and when possible.

The test for constructive dismissal is an objective one. The Court has held that a key test is whether it is reasonable to conclude that the employer had made continued employment intolerable for the employee. The intolerable situation may be one event, or a number of events with a cumulative effect, which occurred over a period of time.

It was recently held by the Labour Court in the matter of *Gold One Limited v Madalani and Others* [2020]: “It is well-accepted that intolerability is a high threshold, far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter an obnoxious, rude and uncompromising superior who may treat employees badly. Put otherwise, intolerability entails an unendurable or agonising circumstance marked by the conduct of the employer that must have brought the employee’s tolerance to a breaking point.”

What are the remedies available for referring constructive dismissal disputes to the CCMA?

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 (reinstatement, re-employment or compensation).

The constructive dismissal disputes may be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) by completing the LRA 7.11 referral form within thirty (30) days after termination of the employment relationship.

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

Employers on the other hand, can prevent instances of constructive dismissal to ensure that they have proper and effective internal grievance procedures in place and that all staff are aware of the existence and working of such procedures. Furthermore, employers must ensure that *disputes and grievances* escalated through this process do receive the necessary attention and are expedited.

In conclusion, *SERR Synergy assists employers in a thorough and supportive way by ensuring that the correct procedures are followed during a disciplinary hearing.* We assist in formal grievance inquiries by serving as independent and objective chairperson. With our professional legal advisor’s assistance, the employee’s grievances will be addressed and resolved in a fair manner.

About the Author: Gerhard Viljoen joined SERR Synergy in June 2016 and is a Legal Advisor at our Pretoria Branch. He is an admitted attorney of the High Court of South Africa and completed his LLB degree, Law School and a Post-Graduate Certificate in Advanced Labour Law at the University of Pretoria.

Sources:

- Labour Relations Act No. 66 of 1995 as amended
- Sections 186 (1)(e) and 193
- Gold One Limited v Madalani and Others (JR 1109/15) [2020] ZALCJHB 180.

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