Schreuder Attorneys

news

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Newsletter, Articles and Matters of Interest

1 Constructive Dismissal

Constructive dismissal is defined in the Labour Relations Act 66 of 1995[1] (LRA) [as] an employee terminating a contract of employment with or without notice because the employer made continued employment intolerable for the employee. The termination of employment is at the employee's initiative and the law considers the termination as a dismissal since the employer's conduct forces the termination of employment. (***Jordaan v CCCMA (LAC) 2011 12).***

The test for determining constructive dismissal is *intolerability*. In the recent CCMA matter of ***Lang v GJP Service (2010) 19 CCMA*** the commissioner stated that "intolerability depends on who created the situation and how long it endures. In this case the incident took place once and the employer tried to rectify it. The employee must attempt to rectify the situation by all available means before terminating the employment relationship. The Commissioner held that even though the employer's conduct was unacceptable the single incident was insufficient to render the employment relationship intolerable.

Requirements for constructive dismissal[2]:

- The employee must have terminated the contract, whether by resignation or terminating the contract.
- The reason for the resignation must be because the continued service was made "intolerable": The employee must objectively establish that the situation has become so unbearable that he or she cannot be expected to work any longer. That judgment must be made from perspective of a reasonable person in the shoes of the employee; ***Watt v Honeydew Dairies (Pty) (Ltd) (2003) 24 ILJ 466 (CCMA)***. Furthermore the employee must prove that he or she would have carried on working indefinitely but for the employer creating the unbearable circumstances.
- The employer's conduct must have created the intolerable situation: There must be a link between the employer's conduct and the

[1] Section 186 (1) of the Labour Relations Act 66 of 1995

[2] Law @ work A Van Niekerk

intolerable situation that caused the employee to resign. The question as set out in the case of ***(Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC)*** is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or seriously damage the relationship of confidence and trust between employer and employee.

- The employee must have exhausted all internal procedures and that resigning was the final and reasonable resort. In ***Pieterse v AGI (Pty) Ltd*** the applicant's claim for constructive dismissal failed because he did not follow internal grievance procedure).

The burden of proof rests on the employee, who must prove constructive dismissal on a balance of probabilities ***(Jooste v Transnet Ltd t/a SAA (1995) 16 ILJ 629 (LAC))***.Once the employee has discharged the onus of proving constructive dismissal, the onus shifts to the employer to prove that the employee's action of resigning was unreasonable (Section 192 of the LRA).

A few examples of situations potentially justifying resignation:

a. The employer failed to pay the employee as agreed in the contract of employment
b. The employer set unreasonable work targets for the employee and disciplined the employee for failing to meet these targets. The employee was not given any training.
d. The employer treated the employee in a threatening, insulting and aggressive manner and exerted prolonged pressure on the employee to resign.
e. The employer did not stop sexual harassment committed against an employee.
f. Unilaterally changing the employee's job content or terms of employment.
g. Sabotage of employee's work product either directly or indirectly with repeated interruption, confusing or inaccurate direction, or uncommunicated deadline changes.
h. Harassment or humiliation, particularly in front of less senior staff.

Constructive dismissal disputes must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) within 30 days from the date of dismissal or the relevant Bargaining Council and the employee can request for compensation or re-employment (in cases where the intolerability is removed).

It is difficult to sustain argument of constructive dismissals unless there is sufficient proof and factual substantiation of the circumstances to warrant such claims. If an employee resigns and the claim for Constructive dismissal is unsuccessful the resignation remains in force.

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2. Dismissal or Resignation?

- *Resignation takes place when an employee unilaterally either in writing or verbally terminates an employment contract.*

It is not necessary for the employer to accept any resignation that is tendered by an employee or to agree with it. However a resignation must be communicated to the employer to be effective.

- Nowadays employees can resign by way of SMS. In the matter of ***Jafta v Ezemvelo KZN Wildlife [2008] 10 BLLR 954 (LC)*** the court held that a communication by SMS is a communication in writing in terms of section 12 of the Electronic Communications and Transactions Act 25 of 2002.
  Once the employer receives the SMS, the resignation is valid and cannot be withdrawn unless the employer consents to the withdrawal of the resignation.

- In the recent case of ***Mafika v SA Broadcasting Corporation Ltd (2010) 19 LC 7.1.1 and [2010] 5 BLLR 542 (LC)*** the employee was employed on a three-year fixed contract. During his contract period he was suspended pending disciplinary action. The employee sent an SMS to the respondent's CEO stating that he had "quit with immediate effect". The employee had second thoughts and informed the CEO weeks later that he was prepared to defend himself at the disciplinary hearing and that his contract had not terminated. However the CEO was away at that time and had written a letter to the employee stating that the resignation had been accepted. The letter reached the employee one day after he had sent the e-mail. The court held that the authorities that a resignation is binding only if accepted by the employer were all obiter "and that none warranted departing from the long-established principle that a resignation is a unilateral act which does not require acceptance by the employer to become binding".

- The test for determining resignation was set out in the matter of ***Quinn / Singlehurst Hydraulics (SA) Ltd [2005] 6 BALR 673 (CCMA)***. In his arbitration award, Commissioner P Shangase stated that "The test for determining whether an employee resigned or not is that an employee has to, either by word or conduct, show a clear and unambiguous intention not to go on with his contract of employment in that he has to act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfill his part of the contract."

- In the recent case of ***Lottering & others v Stellenbosch Municipality (2010) 19 LC 6.6.1 and [2010] 12 BLLR 1306 (LC).*** The Labour court summarised the common law requirements for different types of resignation as follows:
  - Notice of termination must be unequivocal.
  - Once communicated, a notice of termination cannot be withdrawn unless agreed.
  - Termination on notice is a unilateral act – it does not require acceptance by the employer.
  - Subject to the waiver of the notice period and the possible summary termination of the contract by the employer during the period of notice, the contract does not terminate on the date the notice is given but when the notice period expires.
  - If the employee having given notice, does not work the notice, the employer is not obliged to pay the employee on the principle of no work no pay.
  - If notice is given late (or short), that notice is in breach of contract entitling the employer to either hold the employee to what is left of the contract or to cancel it summarily and sue for damages.
  - If notice is given late (or short) and the employer elects to hold the employee to the contract, the contract terminates when the full period of notice expires. In other words if a month's notice is required on or before the first day of the month, notice given on the second day of the month will mean that the contract ends at the end of next month.

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