

## ARTICLE

### CONSTRUCTIVE DISMISSAL AND RE-INSTATEMENT

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Section 186(1)(e) of the Labour Relations Act provides the remedy of constructive dismissal which is used by an employee when the said employee terminates an employment contract as a result of the employers conduct.<sup>1</sup> In order to test whether constructive dismissal is applicable as described in *Jooste v Transnet Ltd t/a SA Airways*,<sup>2</sup> one must have regard as to when an employee resigns, that there was no other motive for the resignation, and that the employee would have continued the relationship indefinitely had it not be for the employer's unacceptable conduct.<sup>3</sup> The conduct of the employer usually involves hostility, sabotage, victimisation, bullying, falsely accusing an employee of misconduct or incompetence, changing an employee's job description, undue demotion<sup>4</sup> or changing an employees working location on short notice.<sup>5</sup>

In practice, constructive dismissal is treated the same as unfair dismissals, in that the dispute can be referred to the CCMA. The court will have regard to the following five (5) points, being that the circumstances were intolerable to such extent that continued employment no longer were possible;<sup>6</sup> the sole cause of the resignation of the employee was due to the unbearable working circumstances; the employee had no other alternative than to resign; the intolerable working situation was caused by the employer and that the employer was in control of the unbearable circumstances and did not affect any change thereto to improve it.<sup>7</sup>

In usual circumstances, when an unfair labour dispute is successfully proven, the employee will be awarded compensation, alternatively, retrospective re-instatement. In the case of a constructive dismissal, the court was previously left with a question as to whether reinstatement will not defeat the essence of constructive dismissal due to intolerable working conditions, but the question was answered in the case of *Western Cape Department v Julian John Gordon and Others*.<sup>8</sup>

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<sup>1</sup> Labour Relations Act 1995 (Act Number 66 of 1995).

<sup>2</sup> *Jooste v Transnet Ltd t/a South African Airways* (1995) 16 ILJ 629 (LAC).

<sup>3</sup> The South African Labour Guide "Constructive Dismissal" (No Date) <http://www.labourguide.co.za/constructive-dismissal> (accessed 4 January 2018).

<sup>4</sup> *Van der Riet v LeisureNet t/a Health and Racquet Club* (1998) 5 BLLR 471 (LAC).

<sup>5</sup> Allardyce and Partners Attorneys "Constructive Dismissal" (18 August 2015) <http://www.allardyce.co.za/constructive-dismissal/> (accessed 4 January 2018).

<sup>6</sup> *Jooste v Transnet Ltd t/a South African Airways* (1995) 16 ILJ 629 (LAC).

<sup>7</sup> Allardyce and Partners Attorneys "Constructive Dismissal" (18 August 2015) <http://www.allardyce.co.za/constructive-dismissal/> (accessed 4 January 2018).

<sup>8</sup> *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others* (C 360/2012) [2013] ZALCCT 5; [2013] 8 BLLR 834 (LC); (2013) 34 ILJ 2960 (LC) (18 March 2013).

In the above case, the employee had worked for the Department of Education for 23 years. During 2006 the employee suffered a heart attack and he was subsequently diagnosed with post-traumatic stress disorder and depression. In the year 2007 the employee applied for ill health retirement and temporary incapacity leave. During 2009 due to a technical error on the Department's side the employee was told to resubmit his application, which he did three months later. The Department regarded the submission as being late and the employee was then regarded and treated as being on unpaid leave. He was informed by the Department that they will recover the monies paid to him during his absence by making deductions from his income each month. The employee submitted a formal grievance, but the process broke down and he subsequently resigned and referred the dispute as constructive dismissal.

The Bargaining Counsel found in the employees favour, however the Commissioners decision went on review to the Labour Court, to consider whether the reinstatement was compatible with a constructive dismissal. The employee's evidence was that should he return to the employ of the Department, he would not be subjected to the same circumstances that prevailed before he resigned. The Court took into account that the Department had done nothing to refute the evidence of the employee, and held that the employee's desire to be reinstated was not destructive to the finding that the Department had made his continued employment intolerable. Most of this court's decision was related to the appropriate remedy and was based on the fact that it was uncontested and further was the only evidence that could be relied upon by the court.<sup>9</sup>

The court held that an employee who resigns, could be reinstated if the evidence was that the employee would no longer be subjected to the same circumstances he/she was in when he/she resigned, and it would no longer be considered as intolerable.

It is therefore clear that reinstatement would be an available remedy for an employee that has been held to be constructively dismissed where circumstances permit, and provided the five (5) leg test having been proved successfully. It was reiterated in *Coetzer v The Citizen Newspaper and Kruger v CCMA and Another*<sup>10</sup> that the constructive dismissal must always be determined objectively and it must be the very last resort to an employee.

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<sup>9</sup> The South African Labour Guide "Constructive Dismissal" (No Date) <http://www.labourguide.co.za/constructive-dismissal> (accessed 4 January 2018).

<sup>10</sup> *Coetzer v The Citizen Newspaper and Kruger v CCMA & Another* (2003) 24 IU 622 (CCMA).