

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 employee terminated the contract because continued employment had become intolerable for the employee (examples of intolerability may include sexual harassment, assault, or non-payment of remuneration by the employer); and

- it was the employer who made the continued employment intolerable.

Employees who work in organisations with grievance procedures in place may struggle to prove constructive dismissal if they do not first follow such procedures. Likewise, employees should first try to resolve their complaints internally to enable their employers the opportunity to resolve these before resorting to the option of constructive dismissal. There are, however, instances where it may not be reasonable for an employee to do so, such as instances of sexual harassment in a small business where the alleged harasser may be the employer.

The test for constructive dismissal is objective. The courts 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 or failure to pay wages or salary).

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 necessarily establish intolerability, especially when there are other remedies available in law. 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 and that resignation remained the only reasonable remedy available to the employee.

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 conciliation application form can be downloaded from the CCMA Website (<https://www.ccma.org.za/advicecategories/ccma-referral-forms/>).

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

There is another risk associated with constructive dismissal disputes. Should the CCMA or a bargaining council find that the resignation did not amount to a constructive dismissal, that employee will not be entitled to claim from the Unemployment Insurance Fund, as 'resignation' is not a ground for a claim.

RELEVANT LEGISLATION

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