

# CONSTRUCTIVE DISMISSAL



## WHAT IS CONSTRUCTIVE DISMISSAL

Constructive dismissal is where an employee resigns with or without a notice or leaves employment due to unfair pressure, unreasonable instruction or unbearable conduct on the part of the employer. Constructive dismissal is treated the same as other kinds of dismissals, and the employee is entitled to relief in terms of the LRA.

## WHEN DOES CONSTRUCTIVE DISMISSAL HAPPEN

The LRA states that constructive dismissals are usually the forced resignation of employees because employers made continued employment intolerable.

'Intolerable' means unsupportable or insufferable, which has the effect that the employer's conduct has severed the employment relationship, which makes continued employment impossible or intolerable.

If there is unfair pressure, or circumstances are unbearable at the workplace, the employee must lodge a grievance by —

- ♦ writing a letter;
- ♦ having a meeting with superiors (verbally).

The mere fact that the employee feels that he/she has been issued with an unreasonable instruction, or subjected to undue pressure, does not justify resignation and subsequent claim of constructive dismissal.

In the case of constructive dismissal, the employee must resign because of the employer's conduct. If the employee would have resigned in any event, it may become problematic to prove constructive dismissal.

The leading case, *Jooste v Transnet* (1995) 16ILJ629 (LC), states that the employee must prove that the employer's conduct led him to terminate the relationship. This requires an examination of the employee's state of mind (a subjective test). Once the employee has discharged the burden of proof, the burden shifts to the employer to show that the employee's response was unwarranted (an objective test). In other words, would such conduct of the employer be of such a nature to have reasonably produced a decision by an employee to quit?

The following are examples that might constitute constructive dismissals —

- ♦ offers of inferior employment coupled with threats to dismiss an employee if he/she does not oblige;

- ♦ an employee who decides to resign rather than accepting an unlawful deduction from his/her salary;
- ♦ an unlawful instruction by superiors that leads to forced resignation by that employee;
- ♦ sexual harassment at the workplace.

## REFERRING CONSTRUCTIVE DISMISSAL DISPUTES TO THE CCMA

The employee must complete the LRA 7.11 referral forms.

The employee could request reinstatement. The employee may be compensated up to 12 months.

**The duty of proving dismissal rests with the employee and that of justifying it rests with the employer.**

## RELEVANT LEGISLATION

Labour Relations Act, s186, s192