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**INTOLERABLE CONDUCT IN A CONSTRUCTIVE DISMISSAL:  
AN EXPLORATION OF CASE LAW DEALING WITH INTOLERABLE CONDUCT**

by

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## **DECLARATION**

**I, Lara Jansen van Rensburg do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.**

**Signed at Pietermaritzburg**

**Date:**

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## **ABSTRACT**

This paper focuses on the issue of constructive dismissal in terms of s186(e) of the Labour Relations Act 66 of 1995 which defines dismissal to include circumstances where an employee resigns because the employer has made continued employment intolerable.

The purpose of this paper is to explore and describe case law on this issue and to consider what type of conduct has been regarded as intolerable by the courts in order to determine whether or not a case for constructive has been met.

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## CHAPTER 1: INTRODUCTION

This dissertation concerns Labour Law and s186(1)(e) which defines the term dismissal to include a constructive dismissal i.e. where the employee resigns because of intolerable conduct by the employer.

Section 186(1) of the Labour Relations Act<sup>1</sup> states that ‘dismissal’ means that-

- “(a) an employer has terminated a contract of employment with or without notice;
- (b) an *employee* reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
- (c) an employer refused to allow an *employee* to resume work after she-
- (i) took maternity leave in terms of any law, *collective agreement* or her contract of employment; or
- (d) an employer who dismissed a number of *employees* for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
- (e) an *employee* terminated a contract of employment with or without notice because the employer made continued employment intolerable for the *employee*;
- (f) an *employee* terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the *employee* with conditions or circumstances at work that are substantially less favourable to the *employee* than those provided by the old employer”.

It is clear from the statutory definition of dismissal that there are a number of circumstances where a dismissal can take place, including that the employer terminated the contract; failure to renew contract; failure to resume work after maternity leave, failure to re-employ; constructive dismissal due to having to endure intolerable conduct and a dismissal relating to a s197 transfer of undertakings. A constructive dismissal is where the employee terminates the employment contract as he has had to endure intolerable conduct from the employer. An ordinary dismissal is when the employer terminates the contract and not the employee. The resignation in a constructive dismissal comes about because of the conduct of the employer.

Changes of conditions and circumstances are brought about with the sole aim of compelling the employee to resign and constitute unfair conduct on behalf of the employer.<sup>2</sup>

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<sup>1</sup> 66 of 1995. Herein after referred to as the LRA.

<sup>2</sup> F van Jaarsveld; S van Eck *Principles of Labour Law* (2005) 167.

Section 192(1) of the LRA states: “in any proceedings concerning any *dismissal*, the *employee* must establish the existence of the *dismissal*”. The onus rests on the employee to prove that the relevant factors are present in order to establish the existence of a dismissal. Once the onus is discharged by the employee, it passes to the employer who has to prove that the reason for the dismissal was for a fair reason and in accordance with fair procedure.<sup>3</sup> The test for whether the onus is discharged is thus on a balance of probabilities.<sup>4</sup>

This paper aims to highlight the core requisite that the employer engaged in some intolerable conduct in terms of s186(1)(e) and the dismissal is regarded as a constructive dismissal. Several forms of conduct constitute intolerable conduct and some conduct does not warrant the labelling of intolerable conduct. The dissertation is divided into conduct and cases that do constitute intolerable conduct and conduct and cases that do not. The difficulty in most courts is establishing which conduct by the employer is tolerable and which falls within the scope of intolerability.

Intolerable conduct is not defined in the LRA or at common law and the courts have to use the facts of each case and discretion to determine whether the said conduct constitutes intolerable conduct.

In *Amalgamated Beverages Industries (Pty) Ltd v Jonker*<sup>5</sup> the court defined the concept of a constructive dismissal as follows:

“[u]nlike an actual dismissal, a constructive dismissal consists in the termination of the employment contract by reason of the employee’s rather the employer’s own immediate act. However, such an act of the employee is precipitated by earlier conduct on the part of the employer, which conduct may or may not be justified.”<sup>6</sup>

As there are various forms of intolerable conduct, the courts have stated that “the circumstances of constructive dismissal are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal of fact”. This was stated in the English case of *Woods v WM Car Services (Peterborough) Ltd*<sup>7</sup> and adopted by our courts in *Jooste v Transnet Ltd t/a SA Airways*.<sup>8</sup>

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<sup>3</sup> J Grogan *Dismissal* (2011) 68.

<sup>4</sup> S192(1) of LRA.

<sup>5</sup> (1993) 14 ILJ 1232 (LAC).

<sup>6</sup> *Amalgamated Beverages Industries (Pty) Ltd* page 1248 at 1.

<sup>7</sup> (1982) IRLR 413 (CA) at 415.

<sup>8</sup> (1995) 16 ILJ 629 (LAC) page 638 at G.



There were three requirements for determining a constructive dismissal according to the Labour Appeal Court in *Solid Doors (Pty) Ltd v Commissioner Theron & others*.<sup>9</sup> Firstly, the employee must have terminated the contract of employment. Secondly, the reason for termination of the contract must be that continued employment has become intolerable for the employee. Thirdly, it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for a constructive dismissal to have been established. If one of them is absent, constructive dismissal is not proven.<sup>10</sup>

In *Pretoria Society for the Care of the Retarded v Loots*<sup>11</sup> the Labour Appeal Court formulated the approach to be adopted when determining whether a resignation amounts to a constructive dismissal:

“Where an employee resigns or terminates the contract as a result of constructive dismissal, such employee is in fact indicating that the situation has become to unbearable that the employee cannot fulfil what is the employee’s most important function, namely, to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded, then she has not been constructively dismissed and her conduct proves that she has in fact resigned.”<sup>12</sup>

In *Jordaan v Commission for Conciliation, Mediation & Arbitration & others*<sup>13</sup> the Labour Appeal Court overturned the previous tests for a constructive dismissal and adopted a more concise two-stage approach in order to prove a constructive dismissal: Firstly, the employee bears the initial onus of showing, on an objective standard, that the employer has rendered the employment relationship so intolerable that no other option is reasonably available to the employee save for termination of their relationship. Thereafter an evaluation is made whether the dismissal was unfair. The option of constructive dismissal can only be pursued when an employee is left with no other option. An employee must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination,

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<sup>9</sup> (2004) 25 ILJ 2337 (LAC).

<sup>10</sup> *Solid Doors (Pty) Ltd* par 28.

<sup>11</sup> (1997) 18 ILJ 981 (LAC).

<sup>12</sup> *Pretoria Society for the Care of the Retarded* page 724.

<sup>13</sup> (2010) 31 ILJ 2331 (LAC).

is available to him or her.<sup>14</sup> This is the authoritative test as it is a judgement from the Labour Appeal Court and creates precedent and this test is used by lower courts today to determine whether a constructive dismissal has taken place.

However, with regard to constructive dismissals, it has been stated that: “mere unhappiness at work is not enough. Managers in particular are expected to be able to put up with ambiguity, conflict in relationships, power struggles, office politics and the demand for performance where if not delivered no payment is made”.<sup>15</sup>

The Cape High Court has stated in *Murray v Minister of Defence*<sup>16</sup> that the test they adopted for a constructive dismissal is:

“The requirements which an employee must meet, in order to establish that he or she has been constructively dismissed, would appear to involve a twofold enquiry, the first being that the employee must establish that there was no voluntary intention by the employee to resign – the employer must have caused the resignation. In the second instance, and in determining whether in fact constructive dismissal has been established, the court must look at the employer’s conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee could not have been expected to put up with it”.<sup>17</sup>

The tests adopted by the courts are all similar and the same requirements are needed however the courts have used different words to determine the test. Overall the requirements are that the employee must terminate the contract of employment because conduct has been intolerable from the employer.

In *Brummer v Daimler Chrysler Services (Pty) Ltd*<sup>18</sup>, the CCMA stated that the test for a constructive dismissal is: “(a) did the employee intend to bring an end to the employment relationship? (b) had the employment relationship become so unbearable, objectively speaking, that the employee did not fulfill his obligation to work? (c) was the intolerable situation created by the employer? (d) was the intolerable situation likely to endure for a period that justified termination of

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<sup>14</sup> *Jordaan* page 2335.

<sup>15</sup> *Eastern Cape Tourism Board v CCMA & others* [2010] 11 BLLR 1161 (LC) par 37.

<sup>16</sup> [2006] 8 BLLR 790 (C).

<sup>17</sup> *Murray* par 25.

<sup>18</sup> [2004] 9 BALR 1060 (CCMA).

the relationship by the employee? (e) was the termination of the employment contract the only reasonable option open to employee in the circumstances?”<sup>19</sup>

Here the CCMA looked at a number of factors. However the test is still the same one as was stated authoritatively in the Labour Appeal Court above. The CCMA has just used different words to explain the same test.

The subsequent chapters are divided to include various categories of conduct by the employer which might be regarded as intolerable ranging from a broad range including impairment of dignity; discrimination; unfair labour practice; employment conditions; resignation issues and not exhausting domestic remedies.

As this dissertation is an exploration of case law, precedent is important and is created with superior court decisions therefore the higher decisions of cases are important in order to distinguish what the courts previously held with regard to similar conduct. Numerous cases will be looked at to determine if the conduct constitutes intolerable conduct.

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<sup>19</sup> *Brummer* page 1088 at 3.7.

## CHAPTER 2: DEFINING INTOLERABLE CONDUCT

The difficulty for the courts has always been to define exactly what constitutes intolerable conduct for purposes of a constructive dismissal. The word ‘intolerable’ was looked at in *Value Logistics Ltd v Basson & others*<sup>20</sup> and it was held to indicate a significant level of breakdown in the employment relationship. It means that the employee could not continue to endure the employment relationship.<sup>21</sup>

The word ‘intolerable’ according to Grogan in *Employment Law* observes that constructive dismissal should be confined to situations in which the employer behaved in a deliberate oppressive manner and left the employee with no option but to resign in order to protect his interests.<sup>22</sup>

The employer must be culpably responsible in some way for the intolerable conditions. The test is whether the conduct lacked ‘proper and reasonable’ cause. Intolerable could mean that there is an onerous burden on the employee. Conduct must be ‘objectively unbearable’.<sup>23</sup>

In *Dawtre & another v BBR Security (Pty) Ltd*<sup>24</sup> the court looked at the term intolerable and stated that: “generally speaking, the word “intolerable” as it appears in the Act connotes a wider ambit than conduct that involves a breach of contract or some form of coercion or duress. In this context a fitting definition for intolerable is conduct that is “not to be endured”.<sup>25</sup> Reverting to the *Jooste* case, the English approach as set out in *Woods v WM Car Services* accords with the principle of “conduct not to be endured” by using the analogous language of “conduct . . . that the employee cannot be expected to put up with”. In other words, the employee could not reasonably be expected to endure the situation, regardless of the cause from which it originates, whether a contractual breach or otherwise”.<sup>26</sup>

The courts accept that there is a measure of discontent, dislike or frustration etc in the workplace. In *Jordaan v Commission for Conciliation, Mediation & Arbitration & others*<sup>27</sup>

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<sup>20</sup> [2011] 10 BLLR 1024 (LC).

<sup>21</sup> *Value Logistics Ltd* par 60.

<sup>22</sup> *Eastern Cape Tourism Board v CCMA & others* [2010] 11 BLLR 1161 (LC) par 39.

<sup>23</sup> A van Niekerk et al. *Law@ work* 2ed (2012) 222.

<sup>24</sup> [1998] 8 BALR 988 (CCMA).

<sup>25</sup> *Chambers 20th Century Dictionary* at 661.

<sup>26</sup> *Dawtre* page 991.

<sup>27</sup> (2010) 31 ILJ 2331 (LAC).

the court expressed this acceptance: “with an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal.”<sup>28</sup> An employee must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, other than termination, is available to him.<sup>29</sup>

The test is one of reasonableness and is an objective test and the subjective intention of the employee need not be looked at. What needs to be determined is whether objectively the conduct of the employer was said to be intolerable. There must also be some causal nexus between the employer's conduct and the circumstances that induced the employee to resign.<sup>30</sup>

The court in *Chabeli v CCMA & others*<sup>31</sup> held that the conduct of the employer must be considered as a whole including its cumulative impact on whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The intolerable conditions which the employee complained about must have been of the employer's making.<sup>32</sup>

It was stated in *Odendaal v Department of Health*<sup>33</sup> that “[i]t is conceivable that an employee can put up with an unpleasant situation for some time – be lenient, in the words of the applicant – hoping that the issues would be resolved, but, at some point, the frustration or unpleasantness becomes too much and he or she decides to resign, despite efforts to resolve the problems. For some employees, the build-up of frustration to the point of “not taking it anymore” could be a relatively short period of time; in the case of other employees, it may take longer”.<sup>34</sup>

One would have to decide whether conduct was intolerable by looking at the facts of each case and looking at the employer's conduct as a whole. The conduct must be judged objectively to determine whether the employee could reasonably be expected to tolerate it.

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<sup>28</sup> *Jordaan* page 2336.

<sup>29</sup> *Jordaan* page 2336.

<sup>30</sup> J Grogan *Workplace Law* (2012) 152.

<sup>31</sup> [2010] 4 BLLR 389 (LC).

<sup>32</sup> *Chabeli* par 19.

<sup>33</sup> [2007] 12 BALR 1110 (PHWSBC).

<sup>34</sup> *Odendaal* page 1124.

## EMPLOYER'S ACTIONS THAT CONSTITUTE INTOLERABLE CONDUCT

### CHAPTER 3: IMPAIRMENT OF DIGNITY

#### ENDURING ABUSE, ASSAULT & EMOTIONAL CRUELTY

This chapter deals with the conduct that is described as abuse, assault and emotional cruelty that relates to the conduct of the employer being so intolerable that the employee resigns and claims constructive dismissal.

Abuse is defined broadly to include physical and verbal assault where language that is derogatory or vulgar (and includes swearing at the employee) is used.

#### 3.1. PHYSICAL ABUSE

Assault could include physical assault such as slapping, or a scuffle breaking out between employees and employers.

In *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & others*<sup>35</sup> the court found that the assault on an employee was not acceptable and constitutes intolerable conduct in terms of a constructive dismissal. This Labour Appeal Court decision sets precedent in a constructive dismissal case based on enduring abuse, assault and emotional cruelty.

The facts are that Ms Petje bought the Le Monde Luggage CC as a going concern from the previous owners.<sup>36</sup> The employee continued to work for the business after the transfer and alleged physical abuse as that of a slap by Mrs Petje which resulted in her employment relationship becoming intolerable.<sup>37</sup>

Arbitration was entered into in which it was found that the respondent was constructively dismissed and the applicant was ordered to pay 12 month's compensation.<sup>38</sup> The appellant brought an application to have the arbitration award reviewed.<sup>39</sup> The matter appeared in the Labour Appeal Court.

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<sup>35</sup> (2007) 28 ILJ 2238 (LAC).

<sup>36</sup> *Le Monde Luggage CC* par 1.

<sup>37</sup> *Le Monde Luggage CC* par 2.

<sup>38</sup> *Le Monde Luggage CC* par 3.

<sup>39</sup> *Le Monde Luggage CC* par 4.

Prior to the Labour Appeal Court judgement, the arbitration held that: “If she were assaulted in the manner that she says she was it cannot be expected of her or any other employee as such to endure an assault and continue to work”.<sup>40</sup>

The employee in the current case stated that she had “an acrimonious telephone conversation with Mrs Petje”.<sup>41</sup> Mrs Petje then called a staff meeting to apologize to the staff for the rowdy arguments and stated that she was no longer the manager of the store.<sup>42</sup> Another angry exchange took place between the two women and the employee stated that the employer, Mrs Petje slapped her on the left side of her face while she was sitting on a chair.<sup>43</sup> The employee claimed that she fell off the chair, felt dizzy and immediately left after which she went to consult a medical doctor who referred her to a specialist so that he could conduct a hearing test.<sup>44</sup> The respondent’s version of events was supported by medical documentation.<sup>45</sup>

It was held that the employee had resigned on the basis of a working relationship which she found to be ‘intolerable’. For these reasons, the employee had discharged the onus of proving that she had been constructively dismissed in terms of s186(1)(e) of the LRA.<sup>46</sup> The award for compensation stands.<sup>47</sup>

This Labour Appeal Court decision clearly illustrates that physical abuse from an employer will not be tolerated and would constitute a constructive dismissal. The employee cannot be expected to put up with the abuse.

A similar case involving abuse is that of *Ndebele v Foot Warehouse (Pty) Ltd t/a Shoe Warehouse*<sup>48</sup> where it was held that physical abuse by an employer would constitute a constructive dismissal.

The employee was the store manager for the employer.<sup>49</sup> Financial hard times hit the employer and an option was given to the employee to be retrenched or to receive a lower

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<sup>40</sup> *Le Monde Luggage CC* par 5.

<sup>41</sup> *Le Monde Luggage CC* par 7.

<sup>42</sup> *Le Monde Luggage CC* par 8.

<sup>43</sup> *Le Monde Luggage CC* par 8.

<sup>44</sup> *Le Monde Luggage CC* par 8.

<sup>45</sup> *Le Monde Luggage CC* par 11.

<sup>46</sup> *Le Monde Luggage CC* par 25.

<sup>47</sup> *Le Monde Luggage CC* par 31.

<sup>48</sup> (1992) 13 ILJ 1247 (IC).

<sup>49</sup> *Ndebele* page 1248.

salary.<sup>50</sup> The employee decided to stay on at a lower salary.<sup>51</sup> Three days later, the employee had been accused of stealing shoes from the shop.<sup>52</sup> A scuffle broke out and the employee had to receive medical attention as a result.<sup>53</sup> He claimed that that he was fearful of returning to his work-place and that the treatment meted out to him constituted a constructive dismissal.<sup>54</sup>

The court stated: “In our view it is clearly established that there is implied in a contract of employment a term that the employers will not without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”.<sup>55</sup>

It was accordingly held that the treatment from the employer could hardly have made it possible for the employee to return to work.<sup>56</sup> The employee was probably afraid that he would again be manhandled by the employer.<sup>57</sup> The court held that it was a constructive dismissal and the employee was awarded compensation.<sup>58</sup>

Physical assault is regarded as intolerable conduct as one is not expected to endure the abuse and could be considered to be an impairment of one’s dignity. The court in this case also held that physical abuse is not to be tolerated by an employee.

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<sup>50</sup> *Ndebele* page 1248.

<sup>51</sup> *Ndebele* page 1248.

<sup>52</sup> *Ndebele* page 1248.

<sup>53</sup> *Ndebele* page 1248.

<sup>54</sup> *Ndebele* page 1248.

<sup>55</sup> *Ndebele* page 1251 at F.

<sup>56</sup> *Ndebele* page 1251.

<sup>57</sup> *Ndebele* page 1251.

<sup>58</sup> *Ndebele* page 1251.



### 3.2. VERBAL ABUSE

In *Loubser v PM Freight CC*<sup>59</sup> the court held that an employee can claim constructive dismissal due to abusive treatment by the employer. The employee was employed at the corporation and there was a good relationship between the employee and employer until a trip to Cape Town for business occurred.<sup>60</sup> The employee had tendered a verbal resignation because while in Cape Town, the employer “had used abusive and vulgar language to her telephonically when she had offered to return to Johannesburg that evening after hearing that [the employer’s] daughter had died that day”.<sup>61</sup> The next day, the employer “had again sworn at the [employee] and had accused her of “fucking around in Cape Town while the business was losing its best client”.<sup>62</sup> The applicant was outraged by the abusive language used by the employer on the two previous days and his insinuation of sexual impropriety while in Cape Town.<sup>63</sup> The employee withdrew her resignation, because a friend<sup>64</sup> of the employer had contacted the employee and persuaded her not to resign because the employer had been diagnosed with a terminal illness and that he had intended to give the employee control of the business and eventually the opportunity to buy his membership in the corporation.<sup>65</sup> The truce between the employer and the employee was short-lived,<sup>66</sup> as approximately a month later a written resignation was tendered.<sup>67</sup> According to the employee, the employer became critical of the employee’s work; the employer was aggressive and abusive towards her often shouting at staff; the employer made her feel incompetent and had made another accusation of sexual misconduct.<sup>68</sup> The applicant was willing to work her notice period.<sup>69</sup>

Following an incident of the employer swearing at the applicant, and following her to the basement and scratching the paint off her car with his car keys, another resignation was tendered with immediate effect meaning her notice period would not be worked through.<sup>70</sup>

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<sup>59</sup> [1998] 10 BALR 1275 (CCMA).

<sup>60</sup> *Loubser* page 1276.

<sup>61</sup> *Loubser* page 1277.

<sup>62</sup> *Loubser* page 1277.

<sup>63</sup> *Loubser* page 1277.

<sup>64</sup> *Loubser* page 1277.

<sup>65</sup> *Loubser* page 1278.

<sup>66</sup> *Loubser* page 1278.

<sup>67</sup> *Loubser* page 1276.

<sup>68</sup> *Loubser* page 1278.

<sup>69</sup> *Loubser* page 1276.

<sup>70</sup> *Loubser* page 1276.

The second resignation letter set out that the reason for resignation was that the employer had made continued employment intolerable.<sup>71</sup>

In analysing the evidence the court looked at the relevant statute and stated that there is no definition for the word 'intolerable' which is used in s186(1)(e) of the LRA where constructive dismissals are provided for.<sup>72</sup>

The employer's conduct was the direct cause of the applicant's resignation. He had made the continued employment relationship intolerable. Such conduct by an employer is neither fair nor lawful. It was thus rightfully held that the applicant was therefore constructively dismissed<sup>73</sup> and compensation was awarded.<sup>74</sup> The CCMA in this case held that abusive language will not be tolerated by an employee and that it would constitute a constructive dismissal.

Another CCMA decision dealing with verbal abuse is that of *Rossouw & another v Charl Meyer t/a Capwest Mouldings & Components CC*<sup>75</sup> where it was held that when an employer abuses, assaults or terrorises employees, the employees are justified in terminating their employment and claiming it to be a constructive dismissal.

The employees claimed that the employer had on several occasions behaved in an abusive, threatening and violent manner towards them and other workers.<sup>76</sup> The commissioner accepted that the employer had sworn<sup>77</sup> at his employees and terrorised them. The employees were accordingly justified in terminating their employment. They were each awarded compensation equivalent to five months' compensation.<sup>78</sup>

Once again the CCMA concludes that verbal abuse by an employer to an employee constitutes intolerable conduct and thus the employee cannot be expected to put up with it. Verbal abuse is different to physical abuse in the sense that no visible scars are shown however the employee needs to prove that the verbal abuse was intolerable.

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<sup>71</sup> *Loubser* page 1277.

<sup>72</sup> *Loubser* page 1282.

<sup>73</sup> *Loubser* page 1285.

<sup>74</sup> *Loubser* page 1285.

<sup>75</sup> [1999] 3 BALR 249 (CCMA).

<sup>76</sup> *Rossouw* page 249.

<sup>77</sup> *Rossouw* page 253.

<sup>78</sup> *Rossouw* page 254.

The Bargaining Council decision of *Lusardi v BSR Steel CC*<sup>79</sup> is a classic example of verbal abuse by an employer against an employee and constitutes a constructive dismissal. Treating the employee in a way that is designed to humiliate the employee constitutes an impairment of dignity.

The employee was a tool-maker for 20 years.<sup>80</sup> The employer insulted the employee by calling him a “*disgraziato*”, and he also criticised his work in front of the customers.<sup>81</sup> The employer admitted that he mumbled “*disgraziato*” to himself at a time that he was under immense pressure.<sup>82</sup> The court did not discuss what the definition of this word is in English.

The commissioner stated that he believed the situation at work had become intolerable, and consequently found that the applicant was constructively dismissed.<sup>83</sup> He stated that he believes that the employee contributed to an extent to the breakdown.<sup>84</sup> The employee was entitled to compensation.<sup>85</sup> Insulting an employee by an employer is cause for constructive dismissal as it constitutes verbal abuse from the one party to the other.

In conclusion it can be stated that the court will generally regard conduct to be intolerable if the employee has to endure abuse either verbal or physical, assault which could be physical for example slapping someone or emotional cruelty by an employer. The court regards that confidence and trust should be in an employment relationship and the employer will infringe the said if he abuses, in any way, his employee. This behaviour is unacceptable as it impairs the dignity of employees and I would agree that this conduct would be intolerable to handle. Dealing with physical or emotional abuse is hard for an employee to handle and could constitute intolerable conduct that an employee cannot be expected to put up with.

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<sup>79</sup> [2003] 8 BALR 839 (MEIBC).

<sup>80</sup> *Lusardi* page 839.

<sup>81</sup> *Lusardi* page 839.

<sup>82</sup> *Lusardi* page 841.

<sup>83</sup> *Lusardi* page 841.

<sup>84</sup> *Lusardi* page 841.

<sup>85</sup> *Lusardi* page 841.

## EMPLOYER'S ACTIONS THAT CONSTITUTE INTOLERABLE CONDUCT

### CHAPTER 4: DISCRIMINATION

Discrimination includes sexual harassment of an employee by an employer, or where one regards oneself to be unfairly discriminated against in terms of for example race which will be examined in this chapter.

#### 4.1 SEXUAL HARASSMENT

Item 4 of the Code of Good Practice on Handling Sexual Harassment Cases<sup>86</sup> specifies the following forms of conduct which may constitute harassment:

- (a) physical conduct - varying from touching, sexual assault, etc;
- (b) verbal conduct - including innuendos, sexual advances, suggestions or hints, etc; and
- (c) non-verbal conduct - including gestures, indecent exposure, etc.

The Code of Good Practice defines 'sexual harassment' as -

"1(1) unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

(2) Sexual attention becomes harassment if -

- (a) the behaviour is persistent;
- (b) the recipient has made it clear that the behaviour is considered offensive; and/or
- (c) the perpetrator should have known that the behaviour is regarded as unacceptable".

"Sexual harassment is perhaps the clearest example of humiliating treatment which can create intolerability for the employee".<sup>87</sup> The employee is to show that the sexual harassment was intolerable to bear.

In *Ntsabo v Real Security CC*<sup>88</sup> the Labour Court judgement illustrates what constitutes sexual harassment. The employee was employed as a security guard at a hospital.<sup>89</sup> She claimed that her "supervisor, regularly harassed her sexually<sup>90</sup> and he eventually assaulted her. This included touching the applicant's breasts, thighs, buttocks, genitals and ultimately simulating a sexual act on her resulting in ejaculating on her skirt. He also made certain

<sup>86</sup> Published in terms of s 203 of the LRA in *Gazette* 190449 GN R1367 of 17 July 1998

<sup>87</sup> A Rycroft 'The Intolerable Relationship' (2012) Oct *Industrial Law Journal* 2280.

<sup>88</sup> (2003) 24 ILJ 2341 (LC).

<sup>89</sup> *Ntsabo* page 2343.

<sup>90</sup> *Ntsabo* page 2343.

unwanted sexual proposals to the applicant".<sup>91</sup> The employee complained to the relevant people and after nothing was done, decided to resign.<sup>92</sup>

It was held that the employee had been constructively dismissed as such conduct is intolerable<sup>93</sup> and was awarded compensation.<sup>94</sup> Clearly it can be stated that inappropriate sexual touching or physical conduct from an employer to an employee would constitute constructive dismissal.

*Pretorius v Britz*<sup>95</sup> gives examples of what conduct constitutes sexual harassment and which tests needs to be adopted in order to prove whether this harassment has taken place.

This matter was before the CCMA and the parties consented to arbitration by CCMA.<sup>96</sup> Mr Britz was the employer and Ms Pretorius was his personal secretary.<sup>97</sup> The employee alleged that "she was continuously and consistently subjected to sexual harassment of different type and form including but not limited to touching, dirty language, unsolicited gifts".<sup>98</sup>

It was the employee's contention that during her employment interview, the employer expressed the hope that she was not the kind of person who sleeps around with males. In response she advised him that she was still a virgin.<sup>99</sup> The employer told the employee that he was having a poor sexual relationship with his wife and that he would like to sleep with her.<sup>100</sup> On business trips taken together, the employer would put his hand between her thighs, and although the employee always tried to stop him, he continued.<sup>101</sup>

On one occasion, the employer came to pick the employee up for work and the employer pressed and rubbed himself against her body.<sup>102</sup> The employer told the employee that he was wondering why she rejected him because everyone who slept with him always came for more.<sup>103</sup> The employer also asked her to come to work on Saturdays without wearing a

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<sup>91</sup> *Nisabo* page 2344.

<sup>92</sup> *Nisabo* page 2344.

<sup>93</sup> *Nisabo* page 2376.

<sup>94</sup> *Nisabo* page 2385.

<sup>95</sup> [1997] 5 BLLR 649 (CCMA).

<sup>96</sup> *Pretorius* page 649.

<sup>97</sup> *Pretorius* page 650.

<sup>98</sup> *Pretorius* page 650.

<sup>99</sup> *Pretorius* page 650.

<sup>100</sup> *Pretorius* page 650.

<sup>101</sup> *Pretorius* page 650.

<sup>102</sup> *Pretorius* page 650.

<sup>103</sup> *Pretorius* page 650.

brassiere.<sup>104</sup> On one occasion he threatened the employee into removing her brassiere or he would leave her at the Carlton Hotel to find her own way back home,<sup>105</sup> after which she ended up succumbing to the pressure.<sup>106</sup> The employer had bought the employee various gifts including a necklace; perfume; flowers; cards and a G-string panty.<sup>107</sup>

It was the employer's contention that the employee had a tendency of wearing revealing clothes as she was trying to get attention from male clients.<sup>108</sup> It was stated that she liked G-string panties particularly black ones and she wore those with transparent white dress or slacks.<sup>109</sup> She had been spoken to on numerous occasions about her dress code.<sup>110</sup>

It was stated by the court that "[i]n order to determine if sexual harassment did take place or not the following tests shall be applied:

Was there any *quid pro quo* sexual harassment i.e. unwelcome sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature which may have led to: submissions to such conduct made either explicitly or implicitly a term or condition of an individual's employment or; submissions to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

Was there any "hostile environment" sexual harassment? i.e. unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature that may lead or has a purpose of a effect of unreasonable interfering with the employees' work performance or creating an intimidating, hostile or offensive working environment.

It is important also to determine whether the conduct unreasonably interfered with an individual's work performance or created an intimidating, hostile or offensive working environment. Further, I need to establish the following:

- whether the conduct was verbal or physical or both;
- whether the conduct was hostile or patently offensive;
- the relationship between the alleged harasser and the survivor and or
- whether the harassment was directed at more than one individual.

One or more of these factors shall be used to control the determination.

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<sup>104</sup> Pretorius page 650.

<sup>105</sup> Pretorius page 650.

<sup>106</sup> Pretorius page 651.

<sup>107</sup> Pretorius page 651.

<sup>108</sup> Pretorius page 651.

<sup>109</sup> Pretorius page 652.

<sup>110</sup> Pretorius page 652.

Finally one needs to establish if the sexual conduct was unwelcome as sexual conduct becomes unlawful only when it is unwelcome and the employee regarded the conduct as undesirable or offensive”.<sup>111</sup>

The gift of the G-string was held to be an act of sexual harassment.<sup>112</sup> The commissioner accepted the employee’s contention of the action that the employer put his hands between her thighs.<sup>113</sup> In relation to the employee’s dress code, the commissioner stated that clearly the employer has committed the alleged acts because of the employee’s clothes, from which the commission shall draw a negative inference.<sup>114</sup>

It was conclusively held that sexual harassment did take place and led to the employee resigning from her position for a similar job without any extra benefits.<sup>115</sup> The employee was accordingly awarded compensation equivalent to nine months salary.<sup>116</sup>

The test to determine the existence of sexual harassment was made clear in this case and can be used in future in order to determine instances of sexual harassment. In this case the court held that the conduct of the employer was intolerable to handle for the employee.

*Payten v Premier Chemical Industries*<sup>117</sup> shows how a single incident of sexual harassment can make it intolerable for an employee to return back to work.<sup>118</sup>

The employee, a receptionist, was employed by Premier Chemical Industries and she terminated her employment due to the fact that continued employment had been made intolerable “when members of the employer allegedly sexually assaulted her and the failure of the employer to deal with her grievance in an effective and acceptable manner”.<sup>119</sup>

The male staff made playful advances and comments of a sexual nature.<sup>120</sup> The employee stated that it was, at times, uncomfortable but she was able to cope with it.<sup>121</sup> An example was a question that was posed by the manager which was whether a customer was the employee’s “toy-boy and whether she was sleeping with him”.<sup>122</sup> The main incident that sparked the

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<sup>111</sup> Pretorius page 652 and 653.

<sup>112</sup> Pretorius page 653.

<sup>113</sup> Pretorius page 654.

<sup>114</sup> Pretorius page 655.

<sup>115</sup> Pretorius page 657.

<sup>116</sup> Pretorius page 657.

<sup>117</sup> [1999] 8 BALR 922 (CCMA).

<sup>118</sup> A Rycroft ‘The Intolerable Relationship’ (2012) Oct *Industrial Law Journal* 2280.

<sup>119</sup> *Payten* page 923.

<sup>120</sup> *Payten* page 923.

<sup>121</sup> *Payten* page 923.

<sup>122</sup> *Payten* page 923.

resignation was when a customer at the Christmas party; “pushed her into the ladies toilet and tried to push her top garment up”.<sup>123</sup> “He wanted her to show him her bra”.<sup>124</sup> Later on the customer and a male staff member, ripped her T-shirt off over her head, and untied her bra. She held it in her hand and they tried to “nibble at her breasts” after which they were trying to pull down her Bermuda shorts.<sup>125</sup> “She had turned away to the wall and had her back to them with her hands, holding her bra and arms shielding her breasts and was trying to get her clothes back on. She said she was protesting and started crying because they were hurting her”.<sup>126</sup>

When she arrived back at work after leave taken to have her wisdom teeth extracted,<sup>127</sup> she stated that “she was still upset and could not continue working there”.<sup>128</sup> The manager was on leave and she thus she decided to come back after the Christmas Break to speak to him.<sup>129</sup> After the break, she asked the “manager what he intended doing about the incident”.<sup>130</sup> “She complained that she had not even been offered an apology”.<sup>131</sup> He said that it would be her word against theirs.<sup>132</sup> She “told him that she could not face the men in the office and could not work there any longer and demanded some compensation while she was finding another job”.<sup>133</sup> The manager suggested that she resign and work out her notice period.<sup>134</sup> She refused as she could not face them.<sup>135</sup>

The commissioner stated that on the version of the employee, “there was a serious assault on her person and her dignity and that it had been a traumatic experience for her”.<sup>136</sup> The employee was granted compensation<sup>137</sup> and it was held to be an unfair dismissal.<sup>138</sup>

Sexual harassment was proved in this case and the employee was held to have been abused by the employer and could not continue to work there.

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<sup>123</sup> *Payten* page 924.

<sup>124</sup> *Payten* page 924.

<sup>125</sup> *Payten* page 924.

<sup>126</sup> *Payten* page 924.

<sup>127</sup> *Payten* page 925.

<sup>128</sup> *Payten* page 925.

<sup>129</sup> *Payten* page 925.

<sup>130</sup> *Payten* page 925.

<sup>131</sup> *Payten* page 925.

<sup>132</sup> *Payten* page 925.

<sup>133</sup> *Payten* page 925.

<sup>134</sup> *Payten* page 925.

<sup>135</sup> *Payten* page 925.

<sup>136</sup> *Payten* page 931.

<sup>137</sup> *Payten* page 934.

<sup>138</sup> *Payten* page 922.



In *Daymon Worldwide SA Inc v Commission for Conciliation, Mediation & Arbitration & Others*<sup>139</sup> the employee claimed that the employer had spoken to her in a manner which she found objectionable.<sup>140</sup> The employee resigned stating that following the repeated sexual innuendos, expressions, actions and harassment by the employer, she lodged a complaint, which was premised on the above and which resulted in an apology being afforded to her by the employer.<sup>141</sup> She further stated that there was no grievance process undertaken, as she only required that the matter be dealt with as informally and expeditiously as possible.<sup>142</sup>

The commissioner found that the employee had been constructively dismissed at arbitration.<sup>143</sup> This matter was reviewed,<sup>144</sup> and the court held that the employee was not constructively dismissed, as it could not be proved that the employer was responsible for the intolerable conduct.<sup>145</sup>

The problem in sexual harassment cases is that there is not always a witness to corroborate a certain side of events. There are generally the two sides of the employee and the employer and the onus is on the employee to prove the intolerable conduct. In this case intolerable conduct could not be proven on the facts; however at arbitration it was held that the conduct was objectionable.

Sexual harassment is unwanted sexual behaviour that violates the right of employees and the nature thereof includes physical, verbal, non-verbal and *quid pro quo* harassment. It includes conduct of a sexual nature and touching employees inappropriately. This conduct would be regarded as intolerable. The cases above illustrate what behaviour could be regarded as sexual harassment and the court on a number of instances held that sexual harassment had taken place and thus the employee has satisfied the onus on her.

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<sup>139</sup> (2009) 30 ILJ 575 (LC).

<sup>140</sup> *Daymon Worldwide SA Inc* par 4.

<sup>141</sup> *Daymon Worldwide SA Inc* par 12.

<sup>142</sup> *Daymon Worldwide SA Inc* par 12.

<sup>143</sup> *Daymon Worldwide SA Inc* par 14.

<sup>144</sup> *Daymon Worldwide SA Inc* par 14.

<sup>145</sup> *Daymon Worldwide SA Inc* par 41.

## 4.2. BELIEF OF BEING DISCRIMINATED AGAINST OR OTHER FORMS OF DISCRIMINATION

Employees who believe that they have been unfairly discriminated against by the employer may claim that such discrimination constitutes intolerable conduct and is therefore a basis for constructive dismissal. In *Mahlangu v Amplats Development Centre*<sup>146</sup> the employee attributed differentiation in salary paid to him and that earned by other employees as racial discrimination against him. The employee received a bursary from Rustenburg Platinum Mines Ltd to continue studying for the degree of Bachelor of Science in Mining Engineering at the University of the Witwatersrand.<sup>147</sup> The bursary agreement contained conditions one of which was to work for any Amplats Group company after graduation.<sup>148</sup> The basis of the employee's case, was that as a graduate, he was being paid a salary which was less than that of other employees; that he was severely underpaid; relating in him being degraded; that this treatment was a consequence of racial discrimination against him and that ultimately, the cumulative effect of these factors was to render his continued employment for the employer intolerable, thus leaving him with no alternative other than to resign.<sup>149</sup> The employee received a training allowance of R3 833 per month which the employer described as a discretionary amount.<sup>150</sup> The employee stated that the other employees in the 'graduate pool' received a higher salary,<sup>151</sup> and that he did not want to resign as he had to pay back the loan from the company.<sup>152</sup>

In attributing that differentiation to racial discrimination against him, he evidences an emotional disregard of the applicable factual criteria comprehensively explained to, but rejected by him. The unchallenged evidence of the company's general affirmative action policy and of its attempts, within the ambit of that policy, to advance the applicant in areas considered to be more suitable than the underground environment with which his incompatibility had been established, negate that contention.<sup>153</sup> The applicant failed to discharge the onus which he bears to establish the automatically unfair constructive dismissal

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<sup>146</sup> (2002) 23 ILJ 910 (LC).

<sup>147</sup> *Mahlangu* par 3.1.

<sup>148</sup> *Mahlangu* par 3.1.

<sup>149</sup> *Mahlangu* par 3.7.

<sup>150</sup> *Mahlangu* par 3.5.

<sup>151</sup> *Mahlangu* par 6.

<sup>152</sup> *Mahlangu* par 7.

<sup>153</sup> *Mahlangu* par 21.

for which he contends.<sup>154</sup> Had the employee been discriminated against, the dismissal would have been an automatically unfair dismissal based on s187(1)(f) of the LRA.

In this case the employee thought that he was being discriminated against, and he was not. However discrimination against an employee would relate to an automatically unfair dismissal in terms of s187(1)(f) of the LRA. The grounds for an automatically unfair dismissal include but are not limited to, discriminating against an employee's race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

Had the employee been able to discharge the onus on him and prove that his salary was different based on his race, an automatically unfair dismissal would be entered into as it is a listed ground for automatic dismissals. It can also be stated that it would be considered intolerable for an employee to receive a lesser salary than other employees in the same "pool".

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<sup>154</sup>*Mahlangu* par 21.

## EMPLOYER'S ACTIONS THAT CONSTITUTE INTOLERABLE CONDUCT

### CHAPTER 5: UNFAIR LABOUR PRACTICE

Section 186(2) of the LRA states what an unfair labour practice is. It includes unfair conduct in terms of a promotion, demotion, unfair suspension or unfair disciplinary action and refusal to re-employ an employee based on an agreement. A labour practice refers to unfair conduct that can be interpreted as a single act or omission.<sup>155</sup>

#### 5.1 DEMOTION

An employee that is unfairly demoted from a position to a lesser position can claim it to be intolerable conduct and accordingly a constructive dismissal in terms of the LRA. In *Albany Bakeries Ltd v Van Wyk & others*<sup>156</sup> the Labour Appeal Court deemed a demotion as a constructive dismissal. The employer operated a business which consists of a number of bakeries located in different parts of South Africa.<sup>157</sup> The employee was employed in the Albany Manor Bakery at Menlyn in the position of regional manager of the Gauteng region.<sup>158</sup> The employer informed the employee that due to restructuring, the Gauteng regional office would cease to exist.<sup>159</sup> "He was further informed that his new position would be that of branch manager of the Pretoria branch".<sup>160</sup> The type of work he would do there was similar to that which he did as the Gauteng regional manager. The employee was emphatic that he regarded this change as a demotion.<sup>161</sup> The employee tendered a written resignation stating that he did not accept the demotion and found his continued employment with the employer intolerable.<sup>162</sup> He also claimed that the conduct of the employer was substantively and procedurally unfair.<sup>163</sup> The employee stated in the letter that he was refused a retrenchment package which weighs heavily in this matter.<sup>164</sup>

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<sup>155</sup> A van Niekerk et al. *Law@ work* 2ed (2012) 179.

<sup>156</sup> (2005) 26 ILJ 2142 (LAC).

<sup>157</sup> *Albany Bakeries Ltd* par 2.

<sup>158</sup> *Albany Bakeries Ltd* par 2.

<sup>159</sup> *Albany Bakeries Ltd* par 5.

<sup>160</sup> *Albany Bakeries Ltd* par 5.

<sup>161</sup> *Albany Bakeries Ltd* par 5.

<sup>162</sup> *Albany Bakeries Ltd* par 8.

<sup>163</sup> *Albany Bakeries Ltd* par 8.

<sup>164</sup> *Albany Bakeries Ltd* par 9.

The commissioner at arbitration found that the employee “was not dismissed and that he was not compelled, by circumstances, to resign from his employment”.<sup>165</sup> The Labour Court reviewed the decision.<sup>166</sup> It declared that the employee was constructively dismissed “and that such dismissal was unfair because the [employer] had repudiated the contract of employment. The court found that the repudiation made continued employment intolerable and rendered the resultant resignation justifiable in the circumstances”.<sup>167</sup> The employer was ordered to pay compensation equivalent to six months’ remuneration.<sup>168</sup>

The court only had to consider “whether the employer made continued employment intolerable for the employee”.<sup>169</sup> Therefore, on appeal the Labour Appeal Court stated that “if the demotion is a repudiation which would entitle the employee to cancel the contract, but does not amount to making life intolerable, it is insufficient; if it is sufficient to make life intolerable, it is relevant”.<sup>170</sup>

An employee, who leaves employment because of an intolerable work situation, wishes to stay and work indefinitely, therefore it is self-evident that if the conduct which is making his life intolerable is removed he would want to remain as an employee.<sup>171</sup> Had the conduct not been intolerable, the employee would want to stay in the current employment.

In his letter of resignation, the employee stated that one of the reasons for his resignation is that he was refused a retrenchment package.<sup>172</sup> It can thus be concluded “that had he been offered a suitable retrenchment package, he would have left willingly. That is not the behaviour of a man who was leaving because of the intolerable work situation or intolerable conduct of the employer”.<sup>173</sup> It was thus accordingly held that the employee was not constructively dismissed.

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<sup>165</sup> *Albany Bakeries Ltd* par 12.

<sup>166</sup> *Albany Bakeries Ltd* par 14.

<sup>167</sup> *Albany Bakeries Ltd* par 15.

<sup>168</sup> *Albany Bakeries Ltd* par 15.

<sup>169</sup> *Albany Bakeries Ltd* par 23.

<sup>170</sup> *Albany Bakeries Ltd* par 24.

<sup>171</sup> *Albany Bakeries Ltd* par 31.

<sup>172</sup> *Albany Bakeries Ltd* par 31.

<sup>173</sup> *Albany Bakeries Ltd* par 32.

A demotion may constitute intolerable conduct; however in this case, the employee would have left willingly if a suitable retrenchment package was offered thus conduct could not have been intolerable.

Similarly, a unilateral demotion is a form of repudiation of the contract of employment, and may amount to a constructive dismissal. In *Van Der Riet v Leisuren et Ltd t/a Health and Racquet Club*<sup>174</sup> the employee was employed as a floor instructor in one of the employer's health clubs, and was promoted to regional manager.<sup>175</sup> A restructuring of the company had occurred and in essence it was the employee's contention "that the restructuring had effectively resulted in his demotion and that that circumstance together with the manner in which the restructuring had been effected *vis-à-vis* him constituted a constructive dismissal of him and obliged him to resign from his employment".<sup>176</sup> The employer stated that there was a commercial rationale for the restructuring and denied that it had the effect of a demotion.<sup>177</sup> The employer's failure to consult with the employee about the 'vacant post', who was admittedly a suitable candidate for appointment, constituted non-compliance with the employers own rules.<sup>178</sup> The court held that the failure also constituted unfair treatment of the employee.<sup>179</sup> The court stated "that it is not every reduction in status that may be rejected by an employee and will be tantamount to a dismissal. It is a question of degree".<sup>180</sup> The court held that the employee was constructively dismissed<sup>181</sup> and was awarded compensation.<sup>182</sup>

The Labour Appeal court made precedent by stating that a demotion constitutes a constructive dismissal as it is intolerable conduct that should not have to be tolerated by the employee.

On the other hand, *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*<sup>183</sup> found that where no ulterior motive can be proven, the demotion would not constitute a constructive dismissal.

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<sup>174</sup> [1998] 5 BLLR 471 (LAC).

<sup>175</sup> *Van Der Riet* par 1.

<sup>176</sup> *Van Der Riet* par 11.

<sup>177</sup> *Van Der Riet* par 12.

<sup>178</sup> *Van Der Riet* par 28.

<sup>179</sup> *Van Der Riet* par 28.

<sup>180</sup> *Van Der Riet* par 36.

<sup>181</sup> *Van Der Riet* par 45.

<sup>182</sup> *Van Der Riet* par 48.

<sup>183</sup> [1997] 2 BLLR 124 (LAC).

The employee worked as a tomato salesman for the employer.<sup>184</sup> He resigned as there was a differentiated remuneration structure for different salesmen and he claimed constructive dismissal to which the Industrial Court agreed.<sup>185</sup> The court *a quo* found that the employee was constructively dismissed and that the dismissal was unfair because, procedurally, there had been a lack of proper consultation with the employee about the new package, and, substantively, the new package was unfair in that it deprived him of the benefits that he was previously entitled to.<sup>186</sup> The new package referred to is a new way to share in profits of the company.<sup>187</sup> Clearly the employee “was confronted with a proposed new remuneration package which was in conflict with one of the material terms of his original contract of employment”.<sup>188</sup>

An ulterior motive was not proved on the part of the employer for attempting to find a new remuneration package as a commercial rationale for the changes were established.<sup>189</sup> Also, the employee was intimately involved in the process of seeking a viable alternative.<sup>190</sup> The court held that the actions did constitute a constructive dismissal in these circumstances.

Here the Labour Appeal Court goes further by stating that a demotion can only constitute a constructive dismissal if there was no commercial rationale for the change in job.

Where an employee is not consulted about changes in conditions of employment, the court takes a view that this is a basis for constructive dismissal. In *Riverview Manor (Pty) Ltd v Commissioner for Conciliation, Mediation & Arbitration & others*<sup>191</sup> the employee sold property to the employer,<sup>192</sup> which the latter developed into a hospital. The employee was employed there as the medical director, who served in the capacity thereof along with general manager and general practitioner. The employee had full control of the management of the business, including its administration and finances.<sup>193</sup> The business ran at a loss and when the bookkeeper resigned, after which the employee and his wife took over the debt collections.<sup>194</sup>

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<sup>184</sup> *WL Ochse Webb & Pretorius (Pty) Ltd* page 125.

<sup>185</sup> *WL Ochse Webb & Pretorius (Pty) Ltd* page 125.

<sup>186</sup> *WL Ochse Webb & Pretorius (Pty) Ltd* page 127.

<sup>187</sup> *WL Ochse Webb & Pretorius (Pty) Ltd* page 126.

<sup>188</sup> *WL Ochse Webb & Pretorius (Pty) Ltd* page 127.

<sup>189</sup> *WL Ochse Webb & Pretorius (Pty) Ltd* page 129.

<sup>190</sup> *WL Ochse Webb & Pretorius (Pty) Ltd* page 129.

<sup>191</sup> (2003) 24 ILJ 2196 (LC).

<sup>192</sup> *Riverview Manor (Pty) Ltd* par 1.

<sup>193</sup> *Riverview Manor (Pty) Ltd* par 1.

<sup>194</sup> *Riverview Manor (Pty) Ltd* par 2.

The business continued to deteriorate<sup>195</sup> and a new general manager was appointed.<sup>196</sup> Consequently the employee ceased to be in charge of the hospital<sup>197</sup> and his salary was reduced to that of a general practitioner.<sup>198</sup> The employee informed the employer “that he was seeking legal advice and protested about his unilateral decision, which amounted to a breach of contract”.<sup>199</sup> The employee was advised by his attorney that he did not have to accept the unilateral change to his employment and that by replacing him with the new general manager, and offering employment on less favourable terms, the employer had dismissed him or his conduct constituted a constructive dismissal.<sup>200</sup>

The commissioner concluded that the employee had been dismissed constructively and his dismissal was procedurally unfair, however the dismissal was substantively fair.<sup>201</sup>

The employee took the matter on review stating that he “accepts the commissioner's finding that he was constructively dismissed but challenges his decision to award only five months’ instead of seven months’ compensation”.<sup>202</sup>

Evidence of the employer at the arbitration, made it clear that the employee was “demoted from general manager and medical director to general practitioner with a 40% drop in salary”.<sup>203</sup> “The demotion was triggered by the need for a competent person to manage the finances of the business without losing the medical expertise of the employee”.<sup>204</sup>

The employer's decision about the reduction in the employee's salary was final. “That was the principal issue that the employee found intolerable and caused him to resign”.<sup>205</sup> The commissioner accordingly found that the employee was constructively dismissed.<sup>206</sup> The Labour Court also held that it was a constructive dismissal and granted compensation.<sup>207</sup>

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<sup>195</sup> *Riverview Manor (Pty) Ltd* par 3.

<sup>196</sup> *Riverview Manor (Pty) Ltd* par 5.

<sup>197</sup> *Riverview Manor (Pty) Ltd* par 6.

<sup>198</sup> *Riverview Manor (Pty) Ltd* par 7.

<sup>199</sup> *Riverview Manor (Pty) Ltd* par 12.

<sup>200</sup> *Riverview Manor (Pty) Ltd* par 14.

<sup>201</sup> *Riverview Manor (Pty) Ltd* par 17.

<sup>202</sup> *Riverview Manor (Pty) Ltd* par 18.

<sup>203</sup> *Riverview Manor (Pty) Ltd* par 26.

<sup>204</sup> *Riverview Manor (Pty) Ltd* par 26.

<sup>205</sup> *Riverview Manor (Pty) Ltd* par 31.

<sup>206</sup> *Riverview Manor (Pty) Ltd* par 35.

<sup>207</sup> *Riverview Manor (Pty) Ltd* par 43.



Demotion had taken place here and the employer did not consult with the employee on the relevant matters and it was held by the Labour Court that a constructive dismissal had taken place.

In *Mhlambi v Commissioner for Conciliation, Mediation & Arbitration & others*<sup>208</sup> the matter before the Labour Court was an application for the review and setting aside of an award made by the arbitrator wherein he held that the employee was not dismissed by the employer and that the dispute between the parties related to the demotion of the employee.<sup>209</sup> The employee appeared at a disciplinary hearing as her employer had charged her with not following hospital administrative procedures. “She admitted that she had made mistakes but attributed this to too much work”.<sup>210</sup> The chairperson of the hearing recommended that she be transferred to a different department.<sup>211</sup> On receiving a letter from the hospital stating that her services were being terminated,<sup>212</sup> as no suitable alternative position in the hospital was found,<sup>213</sup> the employee appealed against the decision stating that she had not been given adequate training.<sup>214</sup> The employee “was offered an alternative position as hospital porter”. Previously, she had been appointed in the position of a surgical buyer. “This recommendation entailed a demotion and decrease in salary. The demotion was very unfair”.<sup>215</sup>

It was stated that the employee was given “the choice between resigning or being demoted and earning fifty percent less than before. That is plainly a Hobson’s choice and tantamount to a dismissal”.<sup>216</sup> It was held that, whether it was a constructive dismissal or a unilateral termination of the employee, it was unfair.<sup>217</sup> The court did not see the need to refer the matter back to the CCMA<sup>218</sup> and awarded the employee to be reinstated retrospectively, and 12 months’ remuneration.<sup>219</sup>

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<sup>208</sup> (2006) 27 ILJ 814 (LC).

<sup>209</sup> *Mhlambi* par 1.

<sup>210</sup> *Mhlambi* par 2.

<sup>211</sup> *Mhlambi* par 2.

<sup>212</sup> *Mhlambi* par 3.

<sup>213</sup> *Mhlambi* par 5.

<sup>214</sup> *Mhlambi* par 4.

<sup>215</sup> *Mhlambi* par 6.

<sup>216</sup> *Mhlambi* par 13.

<sup>217</sup> *Mhlambi* par 18.

<sup>218</sup> *Mhlambi* par 19.

<sup>219</sup> *Mhlambi* par 20.

Where one is demoted and is earning less, it clearly constitutes a constructive dismissal as one is not expected to put up with that particular conduct from the employer. Based on the cases above, it can be stated that a demotion of an employee relates to a constructive dismissal. It constitutes intolerable conduct that cannot be endured by an employee. Demotion will not be regarded as a constructive dismissal where a commercial rationale can be shown and generally the employer is to consult with the employee about demotions otherwise the employee can claim a constructive dismissal.

## 5.2 UNFAIR DISCIPLINARY ACTION

In circumstances where the employees institutes unfair disciplinary action against an employee, it could constitute a constructive dismissal as the employee could claim that the employer has made continued employment intolerable.

In *Pretoria Society for the Care of the Retarded v Loots*<sup>220</sup> the employer was charged with making working conditions intolerable by creating a hostile environment. The employee worked as an assisting manager of the facility and claimed constructive dismissal as she claimed the employer had created such a hostile environment that it was not possible for any normal individual to perform her normal duties and that she did not have any choice but to resign in order to prevent her health from deteriorating any further.<sup>221</sup> The employee was given notice of a disciplinary enquiry where after she was suspended with immediate effect.<sup>222</sup> It was stated by the court that it seemed as if the suspension formed part of an overall strategy to make the life of the employee unbearable.<sup>223</sup> The disciplinary code of the employer states that an employee has a right to receive prior warning of each and every charge and requires time to prepare her defence.<sup>224</sup> The employee requested further and better particulars to the charges against her, but was refused that by the employer, to which the court responded saying it is unfair not to grant the employee that information.<sup>225</sup>

The court was of the view that the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between itself and the employee.<sup>226</sup> The employer's conduct as a whole judged reasonably and sensibly, was such that the employee could not be expected to put up with it.<sup>227</sup> It was held that the employee was constructively dismissed, and that the conduct of the employer constituted an unfair labour practice, and that she was entitled to compensation.<sup>228</sup>

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<sup>220</sup> (1997) 18 ILJ 981 (LAC).

<sup>221</sup> *Pretoria Society for the Care of the Retarded* page 982.

<sup>222</sup> *Pretoria Society for the Care of the Retarded* page 985.

<sup>223</sup> *Pretoria Society for the Care of the Retarded* page 986.

<sup>224</sup> *Pretoria Society for the Care of the Retarded* page 986.

<sup>225</sup> *Pretoria Society for the Care of the Retarded* page 987.

<sup>226</sup> *Pretoria Society for the Care of the Retarded* page 989.

<sup>227</sup> *Pretoria Society for the Care of the Retarded* page 989.

<sup>228</sup> *Pretoria Society for the Care of the Retarded* page 991.

When the employer threatens the employee with unsubstantiated disciplinary action, it may create the impression that the employer wanted to get rid of the employee and thus could constitute a constructive dismissal. *SALSTAFF obo Bezuidenhout v Metrorail*<sup>229</sup> highlights the issue that occurs when employees are charged with disciplinary offences in order to dismiss the employee. The employee filed a grievance stating that the managers are racist<sup>230</sup> where after the managers charged him with two alleged offences<sup>231</sup> and a disciplinary hearing was scheduled.<sup>232</sup> After this the employee decided to hand in his resignation letter.<sup>233</sup> The court stated that it cannot “believe that it can reasonably be argued that an employee is precluded from claiming to have been constructively dismissed if he resigned to avoid disciplinary proceedings when an unfair result is a foregone conclusion”.<sup>234</sup> By resigning, the employee sought to avoid the unfair dismissal he suspected would occur, and which ultimately did occur.<sup>235</sup> The court held that there was a constructive dismissal and the employee was awarded compensation.<sup>236</sup>

Once again it can be stated that disciplinary offences that are instituted into only to make life intolerable for the employee will be regarded as a constructive dismissal. An employer may not take unsubstantiated disciplinary action accusations against an employee. Reasonable allegations of dismissal would not be intolerable even if it turns out that the employee was not guilty of misconduct.

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<sup>229</sup> [2001] 9 BALR 926 (AMSSA).

<sup>230</sup> *SALSTAFF obo Bezuidenhout* par 10.

<sup>231</sup> *SALSTAFF obo Bezuidenhout* par 12.

<sup>232</sup> *SALSTAFF obo Bezuidenhout* par 13.

<sup>233</sup> *SALSTAFF obo Bezuidenhout* par 13.

<sup>234</sup> *SALSTAFF obo Bezuidenhout* par 35.

<sup>235</sup> *SALSTAFF obo Bezuidenhout* par 38.

<sup>236</sup> *SALSTAFF obo Bezuidenhout* par 39.

## EMPLOYER'S ACTIONS THAT CONSTITUTE INTOLERABLE CONDUCT

### CHAPTER 6: EMPLOYMENT CONDITIONS

#### 6.1 UNILATERAL AMENDMENTS TO TERMS AND CONDITIONS OF A CONTRACT

An employer has a positive duty to discuss the proposed changes with the employee before implementing any changes in terms and conditions of employment of an employee.<sup>237</sup> Were the changes to the conditions of employment such that they made the applicant's continued employment intolerable?<sup>238</sup> This is the question that needs to be answered in the affirmative in order to claim a constructive dismissal.

*Bhana and Colombus Stainless (Pty) Ltd*<sup>239</sup> illustrates the point that if the terms and conditions of the contract are to be altered, consultation with the employee needs to take place to avoid a claim of constructive dismissal.

The employee was employed for 30 years with the employer and was currently employed as a shipping manager.<sup>240</sup> Upon returning from leave, the general manager informed the employee that a new shipping manager had been appointed.<sup>241</sup> This new appointment had taken place because the employee was not performing at the required standard and the business was suffering because of this lack of performance.<sup>242</sup> The employee was "shocked and disappointed" with the news and was planning on resigning.<sup>243</sup> He was offered a position of internal auditor however this was a lower position than that which the employee had held.<sup>244</sup> The employee accordingly tendered his resignation.<sup>245</sup>

It was stated that the employee did not consider alternative positions, and refused to participate in any discussions with the company in this regard because the trust relationship had broken down.<sup>246</sup> It was argued by the employee that it was pointless attempting to follow

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<sup>237</sup> F van Jaarsveld; S van Eck *Principles of Labour Law* (2005) 167.

<sup>238</sup> *Bhana* page 1800.

<sup>239</sup> (2005) 26 ILJ 1793 (BCA).

<sup>240</sup> *Bhana* page 1795.

<sup>241</sup> *Bhana* page 1795.

<sup>242</sup> *Bhana* page 1801.

<sup>243</sup> *Bhana* page 1795.

<sup>244</sup> *Bhana* page 1795.

<sup>245</sup> *Bhana* page 1795.

<sup>246</sup> *Bhana* page 1798.

the grievance procedure as the company had already taken a decision to remove him as the shipping manager without any prior consultation or information.<sup>247</sup> It was thus submitted that the employer had unilaterally varied the employee's contract of employment by removing him from his position as shipping manager without prior notification or consultation.<sup>248</sup>

“The commissioner stated that the decision to offer a lower position to the employee coupled with the neglect by the respondent to inform, let alone consult with the employee, goes to the root of the employment relationship and rendered the employee's continued employment unbearable”.<sup>249</sup> It was accordingly held that the employee was constructively dismissed and the employee was granted compensation.<sup>250</sup> This case illustrates that consultation is also important when employers are thinking about altering the employment contract.

The courts have held that an employer is entitled to change an employee's conditions of employment if there is a commercial rationale for doing so and if the decision to alter the conditions was arrived at after proper consultation with the employee.<sup>251</sup> In this situation the amendment will not be regarded as a constructive dismissal. *Ferrant v Key Delta*<sup>252</sup> is an illustration of the principle that not all changes to terms and conditions relates to a constructive dismissal. One still needs to prove that the conduct was intolerable. The employee was employed as a ‘sales trainee’ by the employer.<sup>253</sup> The employee tendered his resignation as a result of the change to his job description and the unilateral alteration to his terms and conditions of employment.<sup>254</sup> One change was the fact that the employer reduced the employee's monthly salary.<sup>255</sup>

“Where an applicant therefore relies on changes in the terms and conditions of his employment by his employer, as in the instant case, the court should in my view, determine whether such changes imply a coercion on the part of the employer to drive the employee to leave. It follows, therefore, that not all changes in the terms and conditions of employment by the employer amount to constructive dismissal,

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<sup>247</sup> *Bhana* page 1798.

<sup>248</sup> *Bhana* page 1798.

<sup>249</sup> *Bhana* page 1802.

<sup>250</sup> *Bhana* page 1803.

<sup>251</sup> *Bhana* page 1801.

<sup>252</sup> (1993) 14 ILJ 464 (IC).

<sup>253</sup> *Ferrant* page 466.

<sup>254</sup> *Ferrant* page 467.

<sup>255</sup> *Ferrant* page 468.

notwithstanding the fact that such changes may entitle the employee to cancel the employment contract”.<sup>256</sup>

It was held that the changes to the employee’s terms and conditions of his employment contract were not made with the intention to drive him away.<sup>257</sup> It was thus accordingly held that the employee was not constructively dismissed.<sup>258</sup> One would need to prove that the change was intolerable.

In *Howell v International Bank of Johannesburg Ltd*<sup>259</sup> the resignation of an employee in the face of a transfer of employment from Cape Town to Johannesburg amounted to a constructive dismissal. The employee alleged that the employer furnished him with an ultimatum that unless, within an unreasonable period of time, he accepted a transfer to employer’s Johannesburg office, the employer would have no option but to terminate the employee’s employment.<sup>260</sup> The employee stated that he thought he was obliged to comply, or terminate his employment.<sup>261</sup> It can thus be quite obviously concluded that the employee’s resignation was not of his own volition.<sup>262</sup>

It was held that the employee was constructively dismissed and when determining whether it was fair, the court stated it was not and raised two reasons.<sup>263</sup> Firstly, the period of time allowed to the employee by the employer to transfer to Johannesburg was totally unreasonable, particularly in the light of the employee’s personal circumstances.<sup>264</sup> Secondly, the employer had a positive duty at least to consult with the employee about his transfer before taking a final decision.<sup>265</sup> It was accordingly held that the employee was constructively dismissed and it was substantively unfair.<sup>266</sup> Compensation was awarded to the employee.<sup>267</sup> The facts of each case needs to be looked at to determine constructive dismissal.

In this case there was a constructive dismissal as his resignation would not have been a voluntary one and there was no consultation with the employee on his transfer. The court

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<sup>256</sup> *Ferrant* page 470 at B.

<sup>257</sup> *Ferrant* page 470.

<sup>258</sup> *Ferrant* page 470.

<sup>259</sup> (1990) 11 ILJ 791 (IC).

<sup>260</sup> *Howell* page 793.

<sup>261</sup> *Howell* page 795.

<sup>262</sup> *Howell* page 795.

<sup>263</sup> *Howell* page 795.

<sup>264</sup> *Howell* page 795.

<sup>265</sup> *Howell* page 796.

<sup>266</sup> *Howell* page 796.

<sup>267</sup> *Howell* page 800.

above “found that any action on the part of an employer which drives an employee to leave his employment, irrespective of whether or not there is a form of resignation, must inevitably amount to a constructive dismissal”.<sup>268</sup> By the employer ‘driving the employee away’ with a transfer, the employee could claim constructive dismissal.

In *Baba v East Cape Agricultural Project*<sup>269</sup> the employee proved that the changes to the contract created an intolerable work environment. The employee was employed as a fieldworker for the employer.<sup>270</sup> The employee claimed constructive dismissal however wanted to be reinstated, which the employer did not desire.<sup>271</sup> The employee stated in her resignation letter that she was resigning because of “the personal pressures within ECARP, humiliation, insulting criticisms of [her] work became intolerable”.<sup>272</sup>

Evidence was given by the employee to prove intolerable conduct but the employer denied allegations.<sup>273</sup> In essence the employee alleges that the employer had put undue pressure on her, with the employer responding by saying that she was only trying to manage and train the employee.<sup>274</sup> The commissioner accepted that the employee was a difficult person to manage, as she could not cope with criticism of the way in which she conducted her duties.<sup>275</sup> He also accepted that the employee “found the situation to be unbearable and that she had reached a level of frustration where she could no longer continue with her work”.<sup>276</sup>

The employee’s renewal of her fixed term contract was signed and was to extend for one year.<sup>277</sup> When she wanted to resign (before the contract expired) she was given three options by the employer: to leave, to work until the contract expires subject to conditions, or to work elsewhere in the ‘company’.<sup>278</sup> It was held that this constituted a unilateral variation of the employment contract and indicates an intention to repudiate the terms of the employee’s contract.<sup>279</sup> The commissioner stated that this would render the relationship intolerable.<sup>280</sup>

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<sup>268</sup> *Howell* page 792.

<sup>269</sup> [1999] 9 BALR 1013 (CCMA).

<sup>270</sup> *Baba* page 1014.

<sup>271</sup> *Baba* page 1014.

<sup>272</sup> *Baba* page 1015.

<sup>273</sup> *Baba* page 1018.

<sup>274</sup> *Baba* page 1018.

<sup>275</sup> *Baba* page 1019.

<sup>276</sup> *Baba* page 1019.

<sup>277</sup> *Baba* page 1020.

<sup>278</sup> *Baba* page 1020.

<sup>279</sup> *Baba* page 1020.

<sup>280</sup> *Baba* page 1020.



The employee proved on a balance of probabilities that her work environment had become intolerable.<sup>281</sup> It can therefore be concluded that she has proved constructive dismissal.<sup>282</sup> The employee wanted to be reinstated; however the commissioner was unable to accept this as a viable option,<sup>283</sup> however compensation was granted.<sup>284</sup> The employee in the above case discharged her onus to prove that the change to terms and conditions constituted intolerable conduct which ultimately constituted a constructive dismissal.

In *Manamela v Sasol Oil (Pty) Ltd*<sup>285</sup> there was not enough evidence to prove the unilateral amendment to the terms and conditions of the contract, thus constructive dismissal was not proved. The employee worked for the employer for approximately eight years.<sup>286</sup> It was the employee's contention that the employer unilaterally changed his contract of employment, in the sense that he was made a telephone operator after being employed as a principle technical advisor.<sup>287</sup> The employee also claimed that his terms and conditions of employment were changed, as he was informed that he could no longer leave the office and prior to this his job was not office bound.<sup>288</sup>

It was held that the employee's contention that his conditions of employment had been changed has not been supported with any credible evidence.<sup>289</sup> It was accordingly held that the employee was not constructively dismissed.<sup>290</sup> Where terms and conditions are changed, not with the intention to make employment relationship intolerable, it would not amount to a constructive dismissal. It is clear that if terms and conditions are to be changed, consultation with the employee needs to take place. Proof needs to be produced to prove that the situation had become intolerable and that it could not be borne any longer by the employee. The onus is on the employee to prove that the change was intolerable and this onus needs to be proved on a balance of probabilities.

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<sup>281</sup> *Baba* page 1020.

<sup>282</sup> *Baba* page 1020.

<sup>283</sup> *Baba* page 1020.

<sup>284</sup> *Baba* page 1021.

<sup>285</sup> [2006] JOL 18786 (BCCI).

<sup>286</sup> *Manamela* page 1.

<sup>287</sup> *Manamela* page 2.

<sup>288</sup> *Manamela* page 2.

<sup>289</sup> *Manamela* page 5.

<sup>290</sup> *Manamela* page 6.

## 6.2 FAILURE TO PAY EMPLOYEE'S SALARY AND UNLAWFUL DEDUCTIONS

The principal in *Odendaal v Department of Health*<sup>291</sup> is that the employer's conduct, in particular its non-payment of remuneration, is a sufficient ground for a constructive dismissal.<sup>292</sup>

The facts are that after possible fraud was detected amongst employees, new contracts of employment were given to the district surgeons.<sup>293</sup> The employee and a few others refused to sign the new contract because, according to them, the employer had unilaterally amended their conditions of employment.<sup>294</sup> This resulted in the employer stopping payment of their remuneration.<sup>295</sup> The employee continued to work without remuneration but eventually claimed constructive dismissal.<sup>296</sup> It is note worthy that the employee was again employed with the employer on the same terms and conditions to that which he refused to sign previously.<sup>297</sup>

It was argued by the employee that non-payment for a short period of time would not be tantamount to a constructive dismissal; however, the employer was guilty of more than just a short-term failure to pay remuneration<sup>298</sup> as the employee had not been paid for 17 months.<sup>299</sup>

The commissioner stated that he was convinced that the employer stopped paying the employee's salary in an attempt to coerce him into signing the new contract.<sup>300</sup> "No employee can be expected to work without remuneration for a considerable period."<sup>301</sup>

It was stated that clearly, the employee's working life had become intolerable – he had not been paid for 18 months.<sup>302</sup> Therefore it was accordingly found that the employee was constructively dismissed and that his dismissal was unfair.<sup>303</sup>

Non payment of remuneration therefore constitutes intolerable conduct that the employee cannot be expected to put up with and in turn constitutes a constructive dismissal. It has been

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<sup>291</sup> [2007] 12 BALR 1110 (PHWSBC).

<sup>292</sup> *Odendaal* page 1127.

<sup>293</sup> *Odendaal* page 1111.

<sup>294</sup> *Odendaal* page 1111.

<sup>295</sup> *Odendaal* page 1111.

<sup>296</sup> *Odendaal* page 1112.

<sup>297</sup> *Odendaal* page 1112.

<sup>298</sup> *Odendaal* page 1119.

<sup>299</sup> *Odendaal* page 1118.

<sup>300</sup> *Odendaal* page 1126.

<sup>301</sup> *Odendaal* page 1127.

<sup>302</sup> *Odendaal* page 1128.

<sup>303</sup> *Odendaal* page 1128.

established by statute that no unauthorised deductions can be made from an employee's salary. Payment of salaries is also necessary for the continued employment of the employees as can be seen from Labour Court decisions to Bargaining Councils.

The non-payment of remuneration generally results in a constructive dismissal. In *MEC for the Department of Health, Eastern Cape v Odendaal & others*<sup>304</sup> the case was a review by the employer,<sup>305</sup> as the arbitrator found that the employee was constructively dismissed and was awarded compensation. The employee contended that he was constructively dismissed after the employer had not paid his salary for a period of approximately 17 months.<sup>306</sup> The non-payment of his salary was as a result of his failure and refusal to sign a new contract of employment.<sup>307</sup> The employee contended that the new contract that was presented to him amounted to a unilateral amendment of his conditions of employment and insisted that he remained bound by his old contract.<sup>308</sup> The department wanted to integrate district surgeons into government structures.<sup>309</sup> A meeting was held where a copy of a draft policy was given to employees<sup>310</sup> and the employees (district surgeons) were informed about the new conditions of employment.<sup>311</sup> The employee, Odendaal, did not agree to the terms and conditions which were presented to him by the department.<sup>312</sup> The employee's salary was withheld until he signed the new contract of employment.<sup>313</sup> It was thus the non-signing of the new contract that gave rise to the decision not to pay the employee which, in turn, resulted in the present dispute about the constructive dismissal.<sup>314</sup> Services continued to be rendered by the employee for which he submitted invoices to the department.<sup>315</sup> "He did so apparently under the impression that his old contract still existed".<sup>316</sup>

The dispute was referred to the bargaining council as an alleged unfair dismissal.<sup>317</sup> It was expressly recorded that the employee was unhappy with the department in that the

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<sup>304</sup> [2009] 5 BLLR 470 (LC).

<sup>305</sup> *MEC for the Department of Health, Eastern Cape* par 2.

<sup>306</sup> *MEC for the Department of Health, Eastern Cape* par 4.

<sup>307</sup> *MEC for the Department of Health, Eastern Cape* par 4.

<sup>308</sup> *MEC for the Department of Health, Eastern Cape* par 4.

<sup>309</sup> *MEC for the Department of Health, Eastern Cape* par 11.

<sup>310</sup> *MEC for the Department of Health, Eastern Cape* par 13.

<sup>311</sup> *MEC for the Department of Health, Eastern Cape* par 14.

<sup>312</sup> *MEC for the Department of Health, Eastern Cape* par 14.

<sup>313</sup> *MEC for the Department of Health, Eastern Cape* par 19.

<sup>314</sup> *MEC for the Department of Health, Eastern Cape* par 19.

<sup>315</sup> *MEC for the Department of Health, Eastern Cape* par 23.

<sup>316</sup> *MEC for the Department of Health, Eastern Cape* par 23.

<sup>317</sup> *MEC for the Department of Health, Eastern Cape* par 28.

department had failed to pay his salary.<sup>318</sup> The relief that was sought was that of reinstatement as the employee wished to continue the employment relationship with the department.<sup>319</sup> The relief of reinstatement thus shows that the employee was not of the view that his employment was intolerable.<sup>320</sup>

The arbitrator stated that the employee was constructively dismissed as there was non-payment of remuneration.<sup>321</sup> “The arbitrator based her award on the premise that the non-payment of salary for a considerable time will always justify a claim for constructive dismissal”.<sup>322</sup> She had stated that: “The bottom line is that the [employee] was not paid for a considerable time and, in terms of the law that justifies a claim of constructive dismissal”.<sup>323</sup> Also that: “The respondent’s conduct, in particular its non-payment of remuneration, is sufficient ground for a constructive dismissal”.<sup>324</sup>

It was stated by Basson J “that the non-payment of remuneration will not as a matter of course constitute a ground for a constructive dismissal although I do accept that in most instances it may be a significantly persuasive factor in coming to a conclusion that a constructive dismissal did in fact take place as the non-payment of a salary would, in most circumstances, render the continuation of a employment relationship intolerable”.<sup>325</sup>

Therefore it can be stated that where an employee has a right to be paid, the refusal to pay an employee will in most instances render the employment relationship intolerable.<sup>326</sup> The law stated above did not apply to this case, as the employee was in breach of his contract of service as he refused to render his services in terms of the new contract.<sup>327</sup>

*Dawtrej & another v BBR Security (Pty) Ltd*<sup>328</sup> suggests that payment of salaries are necessary for the continued employment of employees to employers.

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<sup>318</sup> *MEC for the Department of Health, Eastern Cape* par 28.

<sup>319</sup> *MEC for the Department of Health, Eastern Cape* par 28.

<sup>320</sup> *MEC for the Department of Health, Eastern Cape* par 28.

<sup>321</sup> *MEC for the Department of Health, Eastern Cape* par 40.

<sup>322</sup> *MEC for the Department of Health, Eastern Cape* par 40.

<sup>323</sup> *MEC for the Department of Health, Eastern Cape* par 40.

<sup>324</sup> *MEC for the Department of Health, Eastern Cape* par 40.

<sup>325</sup> *MEC for the Department of Health, Eastern Cape* par 65.

<sup>326</sup> *MEC for the Department of Health, Eastern Cape* par 65.

<sup>327</sup> *MEC for the Department of Health, Eastern Cape* par 66.

<sup>328</sup> [1998] 8 BALR 988 (CCMA).

The employees contended that they were employed by the employer but were forced to resign consequent upon the employer's failure to pay their salaries<sup>329</sup> for two months.<sup>330</sup> The employer did not respond to the letters of resignation.<sup>331</sup> The employees worked for a previous employer who sold the business as a going concern and which was recognised as BBR Security (Pty) Ltd.<sup>332</sup> The employee "was employed as a consultant to generate sales of the employer's security services".<sup>333</sup> There was no contention by the employer that Mr Dawtrey was not an employee or that his salary had been paid, and the resignation letter was not challenged and it made it clear that resignation is needed as no salaries were being paid.<sup>334</sup> The second employee, Ms Brown, failed to discharge the onus that rests upon her to establish that she was an employee.<sup>335</sup> She is thus precluded from obtaining any relief.<sup>336</sup>

The court came to the conclusion that a failure to pay an employee a salary would amount to a constructive dismissal and make continued employment intolerable for the employee.<sup>337</sup> Compensation was granted to Mr Dawtrey as reinstatement was not requested.<sup>338</sup>

"The non-payment whilst accepting the applicant's services constitutes a fundamental breach of contract, repudiation in fact, on the part of the respondent, which, in terms of *Bonthuys v Central District Municipality*<sup>339</sup> is a ground for constructive dismissal".<sup>340</sup> The employee was employed as a director – corporate services<sup>341</sup> and acted as acting municipal manager.<sup>342</sup> The employee raised various complaints with the municipal manager in respect of the non-payment of her performance bonuses and the non-payment of the annual salary increments.<sup>343</sup> These payments formed part of the essential terms of the employment contract and the employer's failure to pay amounted to repudiation and a material breach of the employment contract.<sup>344</sup> The employee attempted to demand specific performance from her employer

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<sup>329</sup> *Dawtrey* page 988.

<sup>330</sup> *Dawtrey* page 989.

<sup>331</sup> *Dawtrey* page 989.

<sup>332</sup> *Dawtrey* page 989.

<sup>333</sup> *Dawtrey* page 989.

<sup>334</sup> *Dawtrey* page 989.

<sup>335</sup> *Dawtrey* page 990.

<sup>336</sup> *Dawtrey* page 990.

<sup>337</sup> *Dawtrey* page 992.

<sup>338</sup> *Dawtrey* page 992.

<sup>339</sup> [2007] 5 BALR 446 (CCMA).

<sup>340</sup> *Odendaal v Department of Health* [2007] 12 BALR 1110 (PHWSBC) page 1126.

<sup>341</sup> *Bonthuys* page 448.

<sup>342</sup> *Bonthuys* page 449.

<sup>343</sup> *Bonthuys* page 449.

<sup>344</sup> *Bonthuys* page 453.

prior to her resignation, but to no avail.<sup>345</sup> “As such she was forced by the respondent’s repudiation as well as its conduct, to accept the repudiation by resigning. It is trite law that such repudiation amounts to constructive dismissal upon the employee accepting the repudiation by tendering his/ her resignation”.<sup>346</sup> The commissioner accordingly found that the employee’s resignation had amounted to a constructive dismissal.<sup>347</sup>

This approach by the court may also be adopted in cases where there have been unlawful deductions from an employee’s salary. In *Small & others v Noella Creations (Pty) Ltd*<sup>348</sup> the employees sought a reinstatement order stating that they were compelled to ‘resign’ from employment because they were not willing to work under a certain contract of employment which contained *inter alia* the following stipulation: “Stock not accounted for (missing stock) will be paid for at the full retail price by the staff at the end of each month. However one-third of this loss will be absorbed by the management”.<sup>349</sup> The employees averred their respective ‘resignations’ were tantamount to a constructive dismissal by the employer.<sup>350</sup> The court found that the employees were to be reinstated.<sup>351</sup>

The background to this dispute is that the employer introduced a new set of rules and regulations for the staff as well as the employment contract referred to above.<sup>352</sup> The employees allege that they signed the employment contract under ‘duress’ because they felt that they would be dismissed had they refused to sign it at the time.<sup>353</sup> Deductions were made, where after the employees decided to stage a work stoppage in protest against the issue of deductions from their remuneration.<sup>354</sup> The employees were offered the following options:

- (a) to work under the conditions set out in the employment contract;
- (b) if the employee was not willing to work under the said contract, to resign; and
- (c) if the employee did not agree to either (a) or (b), she should 'allow herself to be fired'.<sup>355</sup>

It was common cause that all the applicants elected to resign under option (b).<sup>356</sup>

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<sup>345</sup> *Bonthuys* page 453.

<sup>346</sup> *Bonthuys* page 453.

<sup>347</sup> *Bonthuys* page 454.

<sup>348</sup> (1986) 7 ILJ 614 (IC).

<sup>349</sup> *Small* par 1.

<sup>350</sup> *Small* par 1.

<sup>351</sup> *Small* par 11.

<sup>352</sup> *Small* par 5.

<sup>353</sup> *Small* par 5.

<sup>354</sup> *Small* par 6.

<sup>355</sup> *Small* par 6.

<sup>356</sup> *Small* par 6.

In this case, the law regarding deductions is dealt with in The Basic Conditions of Employment Act<sup>357</sup> (BCEA) which stated in s19(e) that no deductions may be made without the written authorization of the employee.<sup>358</sup> The BCEA also prohibits the levying of a fine against an employee, as do most wage-regulating measures, for any act or omission committed by an employee in the course and scope of employment.<sup>359</sup>

Wage Determination 406 clause 4(6) provides the circumstances in which deductions may be made.<sup>360</sup> The clause states: “An employer shall not levy any fine against his employee nor shall he make any deductions from his employee's remuneration, provided that he may make the following: . . .”

“The clause then gives a list of six items, (a)-(f), in respect of which the employer may, or is required to make deductions; but none of these items relate to stock”.<sup>361</sup> It is clear that clause 4(6) above does not permit employers to make any deductions whatever, even when they purported to be deductions from commission.<sup>362</sup> It has been stated that the fact that the applicants consented to such deductions does not alter the position.<sup>363</sup>

It was held that the employees should be reinstated in their employment on terms and conditions no less favourable to them than those which governed their employment prior to such termination.<sup>364</sup> The Department of Manpower, Durban, was requested to investigate the unauthorized deductions made by the employer.<sup>365</sup>

Deductions are now governed by the Basic Conditions of Employment Act 75 of 1997 and states in s34(1) that an employer may not make any deductions from an employee's remuneration unless the employee agrees to the deduction, or the deduction is in terms of a law. Had the above case been decided now, the court would come to the same conclusion as there was no agreement between the employer and employees regarding deductions. Once again the point is made that employers need to pay employees their salaries in order for them to be expected to work for the employer otherwise the employment relationship will

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<sup>357</sup> 3 of 1983.

<sup>358</sup> *Small par 7.*

<sup>359</sup> *Small par 7.*

<sup>360</sup> *Small par 8.*

<sup>361</sup> *Small par 8.*

<sup>362</sup> *Small par 8.*

<sup>363</sup> *Small par 8.*

<sup>364</sup> *Small par 11.*

<sup>365</sup> *Small par 11.*

become intolerable. No unauthorised deductions can be made from employees' salaries or that could also relate to intolerable conduct.



### 6.3 ALTERATION OF CONTRACTUAL NATURE OF EMPLOYEE'S JOB WITHOUT CONSENT

Degradation of one's status is regarded as conduct which is deemed intolerable and could ultimately constitute a constructive dismissal. Menial work, in comparison to what one is used to, constitutes a constructive dismissal. By an employer altering the contractual provisions of one's contract, it constitutes a unilateral alteration of the contract and can constitute a constructive dismissal.

In *Smith v Cycle & Motor Trade Supply Co*<sup>366</sup> the court looked at the law regarding alteration of contracts. The employee was a bookkeeper however he was also asked to simultaneously act as joint manager and his salary was increased.<sup>367</sup> Later he was appointed as sole manager and then he was informed that his services as manager were no longer required, and that he should take up position of bookkeeper<sup>368</sup> again; however at the same salary as he was receiving to be the manager.<sup>369</sup> The employee accepted their notice as a notice of dismissal, and stated that he was not prepared to entertain the proposition after which he sued the employer for damages in the Magistrate's Court.<sup>370</sup> The Magistrate Court granted absolution from the instance.<sup>371</sup> The High Court accepted that any degradation of status is tantamount to a dismissal.<sup>372</sup> The law on this issue was looked at and determined to be as follows:

'An employer who employs a servant for a particular work, and gives him a particular status, is not entitled without the sanction of the employee<sup>373</sup> to alter the character of that contract. The contract remains intact until both parties agree to alter it; it cannot be altered at the instance of one of the parties. The employer cannot say to his employee "I am now going to alter the contract between us - which is that you shall act as manager of the local branch at Johannesburg - into another contract that you shall act as bookkeeper at the Johannesburg branch. If he does so it is tantamount to breach of contract and to a dismissal, and the employee is then entitled to say, "I will accept this as a dismissal and I will sue you for damages".<sup>374</sup>

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<sup>366</sup> 1922 TPD 324.

<sup>367</sup> *Smith* page 324.

<sup>368</sup> *Smith* page 324.

<sup>369</sup> *Smith* page 325.

<sup>370</sup> *Smith* page 325.

<sup>371</sup> *Smith* page 325.

<sup>372</sup> *Smith* page 325.

<sup>373</sup> *Smith* page 325.

<sup>374</sup> *Smith* page 326.

The High Court stated it seemed that this was a clear case of dismissal.<sup>375</sup> It was ordered that the matter be sent back to the Magistrates Court to decide on the merits.<sup>376</sup> This case clearly illustrates the law on alternation of contracts as being that it is constituted as a dismissal and the employee can claim compensation.

*Ntuli v Natal Overall Manufacturing Co*<sup>377</sup> entailed a case where an employee was asked to perform menial work compared to the past. The employee was a security guard, and her responsibility involved searching female employees at checkpoints and issuing toilet paper to these employees during bathroom breaks.<sup>378</sup> The applicant became an active member of the National Union of Textile Workers and the employer alleged that she handed out pamphlets etcetera on behalf of the union during working time.<sup>379</sup> Consequently she was transferred and was “instructed to discharge duties of an allegedly inferior and degrading nature”.<sup>380</sup> She performed the work under protest for one week after which she refused to perform that work which she believed fell outside her contractual duties and continued to carry out what she contended were her contractual duties.<sup>381</sup> The employer terminated her services without a disciplinary inquiry being conducted.<sup>382</sup>

The court stated that it can be argued that the employee has been unfairly treated by transferring her to the minor establishment and instructing her to perform the work not previously performed by her.<sup>383</sup> This conduct is regarded as intolerable conduct. The court referred to *Smith v Cycle & Motor Trade Supply Co*<sup>384</sup> “in which it was held that where a person is employed to perform a particular class of work and contracts to perform work of a particular character but is thereafter instructed to perform work of a more menial nature, he may be said to have been degraded in his status and such action by his employer may in certain circumstances be regarded as tantamount to dismissal”. The court therefore decided to reinstate the employee.<sup>385</sup>

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<sup>375</sup> *Smith* page 327.

<sup>376</sup> *Smith* page 327.

<sup>377</sup> (1984) ICD (1) 47.

<sup>378</sup> *Ntuli* page 47.

<sup>379</sup> *Ntuli* page 47.

<sup>380</sup> *Ntuli* page 47.

<sup>381</sup> *Ntuli* page 47.

<sup>382</sup> *Ntuli* page 47.

<sup>383</sup> *Ntuli* page 47.

<sup>384</sup> 1922 TPD 324.

<sup>385</sup> *Ntuli* page 48.

An employee that is made to do menial work, in comparison to the employee's previous duties, is regarded as having to put up with conduct that relates to intolerability. Employers cannot change the contractual nature of an employee's job without consent. The court was correct in finding these employees to have been constructively dismissed.

## 6.4 SMOKING IN OFFICES

In *Naude and Stealth Marine*<sup>386</sup> the employee alleged that smoking by other employees in the offices constituted intolerable conduct. The employee worked as a receptionist and was employed for one month before she handed in her resignation.<sup>387</sup> She claimed that she has been constructively dismissed. She suffered from respiratory problems and previous serious health conditions which included asthma attacks as a result of smoking and has since developed an allergy to cigarette smoke.<sup>388</sup> It was alleged that the employers had no designated smoking areas and employees smoked in corridors and reception area which affected the employees health.<sup>389</sup> She raised the issue with her boss who stated that it would be addressed.<sup>390</sup> Nothing was done about the issue and the employee decided to lay a formal complaint in writing about the issues.<sup>391</sup>

Only the employee was at the arbitration hearing, thus the employer's version had not been stated.<sup>392</sup> It was held by the arbitrator that the employer's actions were unlawful in allowing employees to smoke inside the administration building as smoking laws prohibits smoking in offices or public areas.<sup>393</sup> It was found that the employer created an intolerable working environment for the employee.<sup>394</sup> The employee was accordingly held to be constructively dismissed and compensation was granted.<sup>395</sup>

Employers are required to adhere to health and safety statutes with regard to employees as there is a trust relationship between and employer and an employee that should not break down as a result of not following the law. It is not certain whether intolerable conduct could be claimed for other conduct by employees that harm the environment such as smells of food, chemicals, sprays, noise in terms of music etc. What must be remembered is that smoking indoors is illegal thus it would make it easier to claim intolerable conduct as the employees were not supposed to smoke indoors.

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<sup>386</sup> (2004) 25 ILJ 2402 (BCA).

<sup>387</sup> *Naude and Stealth Marine* page 2403.

<sup>388</sup> *Naude and Stealth Marine* page 2403.

<sup>389</sup> *Naude and Stealth Marine* page 2403.

<sup>390</sup> *Naude and Stealth Marine* page 2403.

<sup>391</sup> *Naude and Stealth Marine* page 2403.

<sup>392</sup> *Naude and Stealth Marine* page 2404.

<sup>393</sup> *Naude and Stealth Marine* page 2404.

<sup>394</sup> *Naude and Stealth Marine* page 2404.

<sup>395</sup> *Naude and Stealth Marine* page 2405.

## 6.5 UNLAWFUL ACTS

Anything done by an employee that is unlawful and at the request of the employer can be described as intolerable conduct, especially when an employee is induced to do something that is unlawful. Unlawful acts consist of acts that are illegal and employees should not be asked to perform those functions. *Bonthuys and Central District Municipality*<sup>396</sup> highlights the situation where an employee is asked to perform unlawful acts and claimed that it constitutes intolerable conduct. The employee was employed as director, corporate services on a fixed term contract.<sup>397</sup> The employee was delegated to sign and issue cheques on behalf of her employer.<sup>398</sup> The employee had informed the municipal manager of her concerns in respect of her signing cheques due to possible fraud in this regard.<sup>399</sup> Her concerns were raised after an incident relating to fraudulent cheques issued by the employer's bank and which contained counterfeit signatures of her.<sup>400</sup> The municipal manager had not reacted or taken any action in response to her concerns.<sup>401</sup> She found ten cheques, on which her signature had been forged and asked repeatedly to be released from this duty but to no avail.<sup>402</sup> She found the work conditions to be intolerable<sup>403</sup> and she had exhausted all reasonable alternatives apart from resigning.<sup>404</sup> The treatment from employers made continued employment intolerable.<sup>405</sup> She had endured attempts to have her sign cheques under duress, intimidation, death threats, ignoring her concerns, being laughed at after she informed the municipal manager of repeated death threats and being ostracized, but to name a few.<sup>406</sup> The situation became so intolerable that the employee could no longer fulfill her obligation, namely to work.<sup>407</sup>

It was held that the employee was constructively dismissed.<sup>408</sup> It was also stated that the employer and its designated agents, especially the municipal manager, had acted in manner

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<sup>396</sup> (2007) 28 ILJ 951 (CCMA).

<sup>397</sup> *Bonthuys and Central District Municipality* page 954.

<sup>398</sup> *Bonthuys and Central District Municipality* page 955.

<sup>399</sup> *Bonthuys and Central District Municipality* page 955.

<sup>400</sup> *Bonthuys and Central District Municipality* page 955.

<sup>401</sup> *Bonthuys and Central District Municipality* page 955.

<sup>402</sup> *Bonthuys and Central District Municipality* page 958.

<sup>403</sup> *Bonthuys and Central District Municipality* page 958.

<sup>404</sup> *Bonthuys and Central District Municipality* page 959.

<sup>405</sup> *Bonthuys and Central District Municipality* page 959.

<sup>406</sup> *Bonthuys and Central District Municipality* page 959.

<sup>407</sup> *Bonthuys and Central District Municipality* page 959.

<sup>408</sup> *Bonthuys and Central District Municipality* page 960.

calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.<sup>409</sup>

The commissioner found that it amounted to intolerable conduct and undue pressure to be expected to sign fraudulent cheques and fraudulent quotations or face discipline.<sup>410</sup> The employee had exhausted all internal remedies available to her and was left with the choice between becoming an accomplice to fraud, and protecting her interests.<sup>411</sup> It was accordingly held that the employee was constructively dismissed<sup>412</sup> and she was awarded compensation.<sup>413</sup>

This case clearly illustrates that one cannot be asked to conduct oneself in accordance with illegal conduct as it would relate to intolerable conduct and lead to a constructive dismissal. Any act that opposes statute law is prohibited and should not be requested from an employee. When one is being asked to perform unlawful acts, it breaks down the relationship of trust between an employee and employer.

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<sup>409</sup> *Bonthuys and Central District Municipality* page 962.

<sup>410</sup> *Bonthuys and Central District Municipality* page 963.

<sup>411</sup> *Bonthuys and Central District Municipality* page 963.

<sup>412</sup> *Bonthuys and Central District Municipality* page 963.

<sup>413</sup> *Bonthuys and Central District Municipality* page 965.

## EMPLOYEE'S ACTIONS THAT DOES NOT CONSTITUTE INTOLERABLE CONDUCT

### CHAPTER 7: RESIGNATION ISSUES

#### 7.1 WORKING OUT ONE'S NOTICE PERIOD OR WITHDRAWING ONE'S RESIGNATION

An employee, who volunteers to work out his notice period, cannot claim that the conduct of the employer was constructive dismissal as the willingness to continue working suggests that the conduct of the employer is not intolerable. Similarly, an employee who withdraws his resignation cannot be said to be facing intolerable conduct from the employer. *Eastern Cape Tourist Board v CCMA*<sup>414</sup> is a Labour Court decision stating that working out a notice period does not relate to intolerable conduct. The Chief Financial Officer made changes in the Eastern Cape Tourism Board to the effect that the Chief Executive Officer's financial limit was reduced.<sup>415</sup> This caused tension between the two of them.<sup>416</sup> The employee (CFO) left<sup>417</sup> but was asked to return to the Eastern Cape Tourism Board.<sup>418</sup> A new CEO was appointed<sup>419</sup> and this relationship was also not cordial.<sup>420</sup> The employee resigned after a few issues came to light<sup>421</sup> however she stated that she would work out her notice period.<sup>422</sup> The court found that the conduct of the employer could not be intolerable if the employee is willing to work her notice period.<sup>423</sup> It was thus accordingly held that the employee resigned and that it was not a constructive dismissal.<sup>424</sup>

Where one is willing to work out one's notice period, it does not suggest that the conduct was intolerable as the employee is going back into the same environment to work out the notice period. Similarly in *Maree v Chubb Security*<sup>425</sup> it was held that when one is willing to work out one's notice period, the employment relationship could not have been intolerable. The employee claimed constructive dismissal and referred the dispute to the CCMA.<sup>426</sup> The

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<sup>414</sup> [2010] 11 BLLR 1161 (LC).

<sup>415</sup> *Eastern Cape Tourism Board* par 4.

<sup>416</sup> *Eastern Cape Tourism Board* par 5.

<sup>417</sup> *Eastern Cape Tourism Board* par 6.

<sup>418</sup> *Eastern Cape Tourism Board* par 6.

<sup>419</sup> *Eastern Cape Tourism Board* par 14.

<sup>420</sup> *Eastern Cape Tourism Board* par 17.

<sup>421</sup> *Eastern Cape Tourism Board* par 22.

<sup>422</sup> *Eastern Cape Tourism Board* par 22.

<sup>423</sup> *Eastern Cape Tourism Board* par 53.

<sup>424</sup> *Eastern Cape Tourism Board* par 56.

<sup>425</sup> [2004] 11 BALR 1400 (CCMA).

<sup>426</sup> *Maree* page 1401.

employee was the branch manager of Boksburg.<sup>427</sup> He got transferred to Bedfordview to sort out certain problems; however there was already a branch manager in Bedfordview.<sup>428</sup> The employee was told that his post in Boksburg was no longer available however subsequently the post was advertised as being vacant.<sup>429</sup> After not receiving feedback from his complaints, the employee decided to resign.<sup>430</sup>

The employee was told upon tendering his resignation that he does not need to work his month notice, but however he intended to do so.<sup>431</sup> He was unaware that his previous post was vacant therefore he did not apply.<sup>432</sup> With regard to the fact that the employee was willing to work out his notice period,<sup>433</sup> the commissioner stated that “if continued employment was intolerable, it is inconceivable that an employee would want to work a month notice. To this, I find that the conditions were not necessarily intolerable, warranting an immediate resignation”.<sup>434</sup>

It was held that the employee had failed in proving on a balance of probabilities that the employer made continued employment intolerable.<sup>435</sup> The employee was thus not constructively dismissed.<sup>436</sup> Both these cases above illustrate that one wanting to work out one’s notice period does not necessarily mean that the conduct of the employer was intolerable as the employee is going back to the same conditions.

In *Value Logistics Ltd v Basson*<sup>437</sup> the principle was that when one wants to withdraw one’s resignation, the relationship cannot be said to be intolerable. The employee was not coping with his workload<sup>438</sup> and was later booked off for stress and exhaustion<sup>439</sup> due to the fact that there was a strike at the companies’ premises.<sup>440</sup> The employee resigned “due to continuous unfair and extreme pressure”<sup>441</sup> but subsequently wanted to withdraw his resignation.<sup>442</sup> This

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<sup>427</sup> *Maree* page 1401.

<sup>428</sup> *Maree* page 1401.

<sup>429</sup> *Maree* page 1401.

<sup>430</sup> *Maree* page 1401.

<sup>431</sup> *Maree* page 1402.

<sup>432</sup> *Maree* page 1402.

<sup>433</sup> *Maree* page 1402.

<sup>434</sup> *Maree* page 1405.

<sup>435</sup> *Maree* page 1405.

<sup>436</sup> *Maree* page 1406.

<sup>437</sup> [2011] 10 BLLR 1024 (LC).

<sup>438</sup> *Value Logistics Ltd* par 5.

<sup>439</sup> *Value Logistics Ltd* par 8.

<sup>440</sup> *Value Logistics Ltd* par 7.

<sup>441</sup> *Value Logistics Ltd* par 16.

<sup>442</sup> *Value Logistics Ltd* par 19.



request was denied by the employer.<sup>443</sup> The matter was referred to the Bargaining Council<sup>444</sup> where it was found that there was a constructive dismissal<sup>445</sup> as the employee had been subjected to an “oppressive and unreasonable work environment”.<sup>446</sup> The employee was awarded compensation equal to five months’ salary.<sup>447</sup> Compensation was awarded without determining whether the dismissal was unfair. The biggest issue one needs to consider is that the employee wanted to withdraw his resignation.<sup>448</sup> It was stated that this evidence clearly indicated that the employment relationship was not intolerable.<sup>449</sup> It was thus accordingly held that the employee was not constructively dismissed but that it was a resignation.<sup>450</sup>

Where employees behave in a manner indicating that they are still willing to continue working, the courts will be reluctant to find in favour of the claim for constructive dismissal. Where one is willing to work out one’s notice period or withdraw a resignation, it cannot be stated that the conduct was intolerable.

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<sup>443</sup> *Value Logistics Ltd* par 20.

<sup>444</sup> *Value Logistics Ltd* par 24.

<sup>445</sup> *Value Logistics Ltd* par 26.

<sup>446</sup> *Value Logistics Ltd* par 26.

<sup>447</sup> *Value Logistics Ltd* par 26.

<sup>448</sup> *Value Logistics Ltd* par 52.

<sup>449</sup> *Value Logistics Ltd* par 52.

<sup>450</sup> *Value Logistics Ltd* par 67.

## 7.2 RESIGNED TO AVOID DISCIPLINARY ACTION

Depending on the facts of each case, resigning to avoid disciplinary action would not always constitute a constructive dismissal. One would have to prove that the conduct was intolerable. A free and voluntary resignation would not amount to a constructive dismissal. *Hickman v Tsatsimpe NO & others*<sup>451</sup> states that an employee who resigns rather than face a disciplinary enquiry will not generally be held to have been constructively dismissed.

This case is a review from the CCMA wherein it was held that the applicant had not been constructively dismissed.<sup>452</sup> “The applicant was a 24,5% shareholder in the third respondent, a director of the company and employed as sales director”.<sup>453</sup> Directors, at a meeting, raised unhappiness with the applicant as a shareholder and director and his performance within the company.<sup>454</sup> Following the meeting the applicant tendered his resignation and later claimed constructive dismissal.<sup>455</sup> It was stated in a meeting, that the applicant no longer has a role in the company as a director and shareholder as he has not been performing his role in this regard and there is disbelief between all the shareholders that he would ever fulfil a meaningful role.<sup>456</sup>

The applicant stated that he disagreed with that statement, however he realised that he was outvoted and said that with the sentiment around the table he would rather not be a director and a shareholder and that they should make him an offer for his shares.<sup>457</sup> A notice was handed to the applicant wherein it stated that the company is to decide on whether to proceed with disciplinary action against the applicant for gross misconduct.<sup>458</sup> The commissioner of the CCMA held that the applicant resigned because he was not happy as a shareholder about how the business was run.<sup>459</sup> It was stated by the court “that the applicant was advised by his attorney to resign in order to avert the risk of a dismissal if the disciplinary action was proceeded with. His voluntary conduct was to resign. It was not the employer’s conduct that coerced the resignation”.<sup>460</sup> It was held that “an employee who resigns rather than face a

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<sup>451</sup> [2012] JOL 28314 (LC).

<sup>452</sup> *Hickman* par 1.

<sup>453</sup> *Hickman* par 11.1.

<sup>454</sup> *Hickman* par 11.4.

<sup>455</sup> *Hickman* par 11.4.

<sup>456</sup> *Hickman* par 26.

<sup>457</sup> *Hickman* par 26.

<sup>458</sup> *Hickman* par 29.

<sup>459</sup> *Hickman* par 38.

<sup>460</sup> *Hickman* par 43.

disciplinary enquiry will not generally be held to have been constructively dismissed".<sup>461</sup> It was held in this case that the applicant was not constructively dismissed.<sup>462</sup>

In *SALSTAFF & another v Swiss Port South Africa (Pty) Ltd & others*<sup>463</sup> the employee could not be expected to put up with the intolerable conduct and in this case the resignation did amount to a constructive dismissal. This is a review application<sup>464</sup> of the commissioner's finding that the employee was not constructively dismissed.<sup>465</sup> The employee was a duty controller for the employer.<sup>466</sup> The CEO wanted a meeting with the employee wherein he presented her with a letter of agreement of termination offering payment of six weeks.<sup>467</sup> The CEO told her that she should take the money he was offering or else he would ensure that her life at this employment would be unbearable to the point that she would have to resign sooner than at the end of her contract.<sup>468</sup> After feeling pressurised, she signed the agreement of termination.<sup>469</sup> The employee had stated that the CEO had placed her in such an intolerable situation that she had no option but to resign.<sup>470</sup> The employee claimed constructive dismissal and sought compensation.<sup>471</sup> At the time the employee was pregnant and she was advised by her union representative to sign the termination because of the fear that any emotional stress would cause damage to her pregnancy.<sup>472</sup> The commissioner stated that: "If one examines the CEO's conduct as a whole, it cannot be said that it was conduct which the [employee] could be expected to tolerate".<sup>473</sup> Accordingly the commissioner held that the employee was constructively dismissed and was awarded compensation.<sup>474</sup>

Employees are not expected to put up with conduct that relates to intolerability. Putting pressure on an employee to resign constitutes a constructive dismissal. *Dallyn v Woolworths*

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<sup>461</sup> *Hickman* par 50.

<sup>462</sup> *Hickman* par 66.

<sup>463</sup> [2003] 3 BLLR 295 (LC).

<sup>464</sup> *SALSTAFF & another* par 1.

<sup>465</sup> *SALSTAFF & another* par 2.

<sup>466</sup> *SALSTAFF & another* par 4.

<sup>467</sup> *SALSTAFF & another* par 5.

<sup>468</sup> *SALSTAFF & another* par 6.

<sup>469</sup> *SALSTAFF & another* par 7.

<sup>470</sup> *SALSTAFF & another* par 9.

<sup>471</sup> *SALSTAFF & another* par 10.

<sup>472</sup> *SALSTAFF & another* par 32.

<sup>473</sup> *SALSTAFF & another* par 40.

<sup>474</sup> *SALSTAFF & another* par 46.

*(Pty) Ltd*<sup>475</sup> states that resigning to avoid disciplinary action does not generally constitute a constructive dismissal. The employee contended “that she was subjected to pressure and intimidation and that she was confronted with the choice either to resign or to face certain dismissal”.<sup>476</sup>

After careful consideration of the law, it was the dictum of Brand SM that states that: “I am still not convinced that any conduct by an employer which drives an employee to leave must be considered sufficient to justify a claim of constructive dismissal. In my view the employer's conduct should go to the root of the employment relationship before such a claim can be justified”.<sup>477</sup>

A notice of the disciplinary inquiry was handed to the employee and she was informed that she could resign before the inquiry.<sup>478</sup> The employee resigned as part of a negotiated settlement,<sup>479</sup> that the resignation is free and voluntary<sup>480</sup> and that all charges against the employee by Woolworths will be withdrawn and no record of such charges will be retained on file.<sup>481</sup> As the resignation that the employee had to sign, stated that she resigns freely and voluntarily,<sup>482</sup> the main question to be answered is whether she did resign freely and voluntarily.<sup>483</sup> “The resignation will not be a free one where the employee is compelled to resign by reason of the conduct of the employer”.<sup>483</sup>

The court was not convinced that the employee was compelled to resign by reason of the conduct of her employer.<sup>484</sup> The court stated that the employee maybe felt compelled to resign because she had to face the disciplinary inquiry but there is no convincing evidence showing that the outcome of the disciplinary inquiry was a foregone conclusion.<sup>485</sup> The defence of duress or coercion therefore did not work in the employee’s favour.<sup>486</sup> The court held that the resignation of the employee did not amount to a constructive dismissal and

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<sup>475</sup> (1995) 16 ILJ 696 (IC).

<sup>476</sup> *Dallyn* page 699.

<sup>477</sup> *Dallyn* page 702 at D.

<sup>478</sup> *Dallyn* page 702.

<sup>479</sup> *Dallyn* page 702.

<sup>480</sup> *Dallyn* page 702.

<sup>481</sup> *Dallyn* page 703.

<sup>482</sup> *Dallyn* page 703.

<sup>483</sup> *Dallyn* page 703.

<sup>484</sup> *Dallyn* page 705.

<sup>485</sup> *Dallyn* page 705.

<sup>486</sup> *Dallyn* page 706.

therefore did not constitute an unfair labour practice.<sup>487</sup> One would have to prove that the resignation was not voluntary and that the conduct of the employer made the employee resign.

Unless one can prove that the disciplinary action is a foregone conclusion, one cannot claim constructive dismissal. A resignation from the employee before disciplinary action does not always constitute a constructive dismissal.

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<sup>487</sup> *Dallyn* page 708.

### 7.3 PRESSURE ON EMPLOYEE TO RESIGN

Where an employer puts undue pressure on an employee to resign, it would constitute intolerable conduct that the employee could not be expected to tolerate. The employee has to prove that the employer has put undue pressure on him to resign.

In *Schana v Control Instruments (Pty) Ltd*<sup>488</sup> the employer did not put undue pressure on the employee to resign. The employee worked as the manager of the employer's business.<sup>489</sup> The gravamen of the employee's case is that undue pressure was brought upon him by management to resign,<sup>490</sup> and that the employer's insistence that led to his resignation; constitutes a constructive dismissal and also an unfair labour practice.<sup>491</sup> The employer contended that the employee resigned voluntarily, however the letter of resignation was drawn up by the employer for the employee to sign.<sup>492</sup> The letter contained the terms of settlement and stated that the employee had signed the letter of his own free volition.<sup>493</sup> It was not in dispute that the employee was involved in a motor-car accident whilst travelling home from work.<sup>494</sup> "He sustained serious injuries which required hospitalization, surgery and periods of absence from employment".<sup>495</sup> The employer wanted to hold a disciplinary enquiry as he was mentally and physically incapable of managing the said branch.<sup>496</sup> Once the employee signed the resignation letter, the disciplinary enquiry was not held.<sup>497</sup>

It was held by the court that the employee resigned willingly.<sup>498</sup> The employer was entitled to be concerned about the way its Boksburg<sup>499</sup> "branch was being managed and the decision to hold a disciplinary enquiry cannot be construed as being a form of coercion, nor can the holding of such an enquiry be regarded as a 'threat of some considerable evil'".<sup>500</sup> The employee was free not to resign and instead to have attended the enquiry in order to answer

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<sup>488</sup> (1991) 12 ILJ 637 (IC).

<sup>489</sup> *Schana* page 637.

<sup>490</sup> *Schana* page 637.

<sup>491</sup> *Schana* page 638.

<sup>492</sup> *Schana* page 638.

<sup>493</sup> *Schana* page 638.

<sup>494</sup> *Schana* page 638.

<sup>495</sup> *Schana* page 638.

<sup>496</sup> *Schana* page 639.

<sup>497</sup> *Schana* page 641.

<sup>498</sup> *Schana* page 643.

<sup>499</sup> *Schana* page 643.

<sup>500</sup> *Schana* page 644.

the charges against him.<sup>501</sup> Accordingly it was held that the resignation was not a constructive dismissal and that the employer did not commit any unfair labour practice.<sup>502</sup> There was no pressure on the employee to resign as he could have attended the disciplinary enquiry.

*Gwala v Quality Pik & Pak*<sup>503</sup> is a case where the employee was coerced to resign by the employer. This amounts to pressure from the employer so that the employee resigns. The employee alleged that she was dismissed from her employment; however the employer contended that she had resigned.<sup>504</sup> The employee's version of events is as follows: she had a miscarriage<sup>505</sup> and asked for additional sick leave to recuperate which was granted by the employer.<sup>506</sup> The employee received a sealed envelope containing a card issued in terms of the Unemployment Insurance Act<sup>507</sup> and a certificate of service. Both the unemployment insurance card and the certificate of service card had been completed by the employer and recorded that the employee had voluntarily resigned from her employment.<sup>508</sup> The employer alleges that the employee was unable to work due to sickness and therefore wanted to resign immediately.<sup>509</sup> She was informed her resignation was to be in writing in accordance with policy. She then asked me to draw up the letter of resignation which the employer did in her presence.<sup>510</sup> The employee signed the letter of resignation and the employer accepted her resignation.<sup>511</sup> As there were discrepancies in time lines and deeds, the Industrial Court held that the applicants' version is doubted and as such, no reinstatement of the employee can be ordered.<sup>512</sup>

It can be seen from the facts of each case that it is not easy to prove pressure from an employer on an employee to resign. If an employer does coerce an employee to resign, it would constitute a constructive dismissal.

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<sup>501</sup> *Schana* page 644.

<sup>502</sup> *Schana* page 644.

<sup>503</sup> (1988) 9 ILJ 914 (IC).

<sup>504</sup> *Gwala* page 914.

<sup>505</sup> *Gwala* page 914.

<sup>506</sup> *Gwala* page 915.

<sup>507</sup> 30 of 1966.

<sup>508</sup> *Gwala* page 915.

<sup>509</sup> *Gwala* page 915.

<sup>510</sup> *Gwala* page 915.

<sup>511</sup> *Gwala* page 915.

<sup>512</sup> *Gwala* page 917.

## EMPLOYEE'S ACTIONS THAT DOES NOT CONSTITUTE INTOLERABLE CONDUCT

### CHAPTER 8: NOT EXHAUSTING DOMESTIC REMEDIES

#### 8.1 FAILURE TO USE COMPANY'S GRIEVANCE PROCEDURE BEFORE RESIGNING

Where employees could reasonably have lodged a grievance regarding the cause of their unhappiness, and failed to do so before resigning, they may be hard put to persuade a court that they had no option but to resign.<sup>513</sup> Case law suggests that an employee is to use all alternatives available to him before resigning in order to settle a dispute. Therefore the employee should make use of company grievance procedures before other actions can be taken. *Old Mutual Group Schemes v Dreyer & another*<sup>514</sup> is a Labour Appeal Court decision stating that internal grievance procedures must first be addressed before one can resign and claim constructive dismissal. The employees were employed as insurance advisers for the employer's company.<sup>515</sup> After failing to achieve their targets, they were given verbal warnings to improve their work performance. "They refused to accept written warnings and were suspended pending disciplinary action".<sup>516</sup> After disciplinary hearings they were given written warnings.<sup>517</sup> They failed to make use of the appeal procedure.<sup>518</sup> They handed in resignation notices alleging that they found it impossible to work for the company any longer.<sup>519</sup> They alleged the sales targets set for them had been unrealistic.<sup>520</sup> The Industrial Court found that they had been constructively dismissed and awarded them compensation.<sup>521</sup>

"The Labour Appeal Court found that if the employees had been dissatisfied with the sales targets set for them, they should have used the internal appeal procedure to debate the reasonableness of the demands made by the company".<sup>522</sup> It was further held that they were bound by the company's prescribed internal procedures and should have exhausted them before approaching the court.<sup>523</sup> It was held that an employee cannot resign suddenly and

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<sup>513</sup> J Grogan *Workplace Law* (2012) 154.

<sup>514</sup> (1999) 20 ILJ 2030 (LAC).

<sup>515</sup> *Old Mutual Group Schemes* page 2030.

<sup>516</sup> *Old Mutual Group Schemes* page 2031.

<sup>517</sup> *Old Mutual Group Schemes* page 2031.

<sup>518</sup> *Old Mutual Group Schemes* page 2031.

<sup>519</sup> *Old Mutual Group Schemes* page 2031.

<sup>520</sup> *Old Mutual Group Schemes* page 2031.

<sup>521</sup> *Old Mutual Group Schemes* page 2031.

<sup>522</sup> *Old Mutual Group Schemes* page 2031.

<sup>523</sup> *Old Mutual Group Schemes* page 2031.



contend that the employment relationship has become intolerable.<sup>524</sup> Where the disciplinary procedure is not followed the employer is unable to attend to the employee's grievances.<sup>525</sup> Consequently, the employee will have to inform the court why he failed to follow the disciplinary procedure and convince the court that the employment relationship had become unbearable.<sup>526</sup> The court accordingly held that the employees had resigned to end the employment relationship and was not constructively dismissed.<sup>527</sup>

*Lubbe v Absa Bank Bpk*<sup>528</sup> is another Labour Appeal Court decision and states once again that internal grievance procedures must first be addressed before one can resign and claim a constructive dismissal. The employee was a branch manager of the bank, and strove to ensure that the bank extended credit to his clients. This brought him into conflict with the regional manager and head office credit division. As a result of the pressure arising from this situation, he tendered his resignation, and claimed in an application to the Industrial Court that he had been constructively dismissed. The employer contended that he had resigned of his own free will. The Industrial Court dismissed the application.

On appeal, the Court noted that what had triggered the employee's resignation was an unfavourable report by inspectors of the management of the branch. The employee had responded to this with a memorandum. Before management had had time to consider and respond to it, the employee had resigned. The Court found that the report had not endangered the employee's position. He had had the opportunity to take the matter up with top management if he had wished to do so or to lodge a formal grievance. He had done neither. The appellant's claim that the employer had created an unbearable work environment and was not prepared to rectify the situation was without foundation. The appeal was accordingly dismissed.

It is trite law that one is to use internal grievance procedures before one attempts to claim constructive dismissal for a grievance. The Labour Appeal Court decisions create precedent stating the above. The unreported case of *Regent Insurance Company Ltd v CCMA & others*<sup>529</sup> states that alternatives need to be exhausted before a resignation can take place.

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<sup>524</sup> *Old Mutual Group Schemes* page 2031.

<sup>525</sup> *Old Mutual Group Schemes* page 2031.

<sup>526</sup> *Old Mutual Group Schemes* page 2031.

<sup>527</sup> *Old Mutual Group Schemes* page 2031.

<sup>528</sup> [1998] 12 BLLR 1224 (LAC).

<sup>529</sup> Case No: JR3240/10 dated 15 June 2012.

There was an arbitration award that stated that the employee was constructively dismissed.<sup>530</sup> The employee was employed by the employer for approximately 10 years.<sup>531</sup> The employee refused to sign a final written warning for gross negligence,<sup>532</sup> after which approximately 6 days later the employee tendered her resignation.<sup>533</sup> It was stated that the employee made a number of errors due to lack of attention to detail.<sup>534</sup> A letter was written making the employee aware of the errors<sup>535</sup> after which the employee responded via letter refusing to take responsibility for the errors and only admitting to one.<sup>536</sup> The employee was issued with a final written warning.<sup>537</sup>

The employee gave three reasons for her resignation.<sup>538</sup> “The first reason was based on her evidence that she did not challenge the final written warning because [the manager] had informed her that if she did so she would make the situation worse for herself given that she had in any event refused to sign for the receipt of the warning”.<sup>539</sup> Secondly she indicated: “I was afraid that the situation will end up going to a disciplinary hearing and after a disciplinary hearing it will be a dismissal and I was scared that my job as payroll assistant or employee benefit it would be difficult for me to find another employment outside I was protecting myself”.<sup>540</sup> The third reason was that the employee viewed the pressure in the department too high and stated there was no room for any accommodation of errors.<sup>541</sup>

The judge found the employee’s statements that the manager threatened her to be improbable.<sup>542</sup> In the resignation letter, the employee did not mention the intolerable conduct which she claimed during arbitration proceedings.<sup>543</sup>

The court in this case is faced with a review of the commissioner’s finding that the employee was constructively dismissed.<sup>544</sup> The court referred to the case of *L.M. Wulfsohn Motors (Pty)*

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<sup>530</sup> *Regent Insurance Company Ltd* par 1.

<sup>531</sup> *Regent Insurance Company Ltd* par 2.

<sup>532</sup> *Regent Insurance Company Ltd* par 2.

<sup>533</sup> *Regent Insurance Company Ltd* par 2.

<sup>534</sup> *Regent Insurance Company Ltd* par 10.

<sup>535</sup> *Regent Insurance Company Ltd* par 11.

<sup>536</sup> *Regent Insurance Company Ltd* par 12.

<sup>537</sup> *Regent Insurance Company Ltd* par 13.

<sup>538</sup> *Regent Insurance Company Ltd* par 16, 17, 18.

<sup>539</sup> *Regent Insurance Company Ltd* par 16.

<sup>540</sup> *Regent Insurance Company Ltd* par 17.

<sup>541</sup> *Regent Insurance Company Ltd* par 18.

<sup>542</sup> *Regent Insurance Company Ltd* par 23.

<sup>543</sup> *Regent Insurance Company Ltd* par 32.

<sup>544</sup> *Regent Insurance Company Ltd* par 33.

*Limited T/A Lionel Motors v Dispute Resolution Centre and Others*.<sup>545</sup> In that case, the court found that there had been no constructive dismissal on the basis that a grievance procedure had not been exhausted. The court held that:

“... Where an employee could reasonably be expected to invoke a grievance procedure, the resignation will not be regarded as a constructive dismissal. See in this regard *Lubbe v ABSA Bank BPK* [1998] 12 BLLR 1224 (LAC) where it was held that, because the employee had the opportunity to take up the dispute with other levels of management, the resignation was therefore not an action of ‘the last resort’. I agree with the sentiments expressed by Grogan that this test should not be applied too stringently but that it does protect employers from unscrupulous employees resigning from their employment without informing the employer about their grievance in order to claim compensation from them. Where it appears from the circumstances of a particular case that an employee could or should have reasonably channelled the dispute or cause of unhappiness through the grievance channels available in the workplace, one would generally expect an employee to do so. Where, however, it appears that objectively speaking such channels are ineffective or that the employer is so prejudged against the employee that it would be futile to use these channels, then it may well be concluded that it was not a reasonable option in these circumstances”.<sup>546</sup>

The court held that the employee was not constructively dismissed<sup>547</sup> as “the employee had reasonable alternative options and did not make use of them”.<sup>548</sup> Constructive dismissal can be claimed if one can no longer put up with the intolerable conduct, however one must first use the internal grievance procedure or other alternatives so that the employer can rectify the problem before resignation can be a viable option.

*LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre & others*<sup>549</sup> referred to above again points out the ‘rule’ that grievance procedures need to be followed before any other action is taken by the employee with regard to the resignation. In this case the employee terminated her contract of employment and claimed constructive dismissal after she demanded to have access to, and to be permitted to review some 24 months of clock cards as she had a query as to her overtime payment, and this was not done.<sup>550</sup> The employer swore

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<sup>545</sup> (2008) 29 ILJ 356 (LC).

<sup>546</sup> *Regent Insurance Company Ltd* par 52.

<sup>547</sup> *Regent Insurance Company Ltd* par 54.

<sup>548</sup> *Regent Insurance Company Ltd* par 61.

<sup>549</sup> [2007] JOL 20650 (LC).

<sup>550</sup> *LM Wulfsohn Motors (Pty) Ltd* par 1.

at the employee when she approached him with her request.<sup>551</sup> The arbitrator found that resigning was the only option available to the employee.<sup>552</sup> The court held that the employee should have used the company grievance procedure before resigning<sup>553</sup> and therefore the employee was not constructively dismissed.<sup>554</sup> Once again the point is made that one is to use all procedures available before resigning.

In *Foschini Group v Commission for Conciliation, Mediation & Arbitration & Others*<sup>555</sup> the facts are that the employer wished to have the arbitration award from the commissioner, stating that the employee was constructively dismissed; set aside.<sup>556</sup> The commissioner failed to apply her mind to a number of issues, hence the review, however this summary will only deal with the issue of the employee's failure to use the company's grievance procedure before resigning. Upon returning from annual leave, the employee was faced with five alleged irregularities which management was dealing with.<sup>557</sup> On her way home one day shortly after the allegations, she had a motor accident and was booked off sick by a psychologist after having been diagnosed as suffering from adjustment disorder with depression.<sup>558</sup> The employer advised the employee that a decision had been taken to advertise her position in the light of her extended absenteeism but that a management position would be available for her upon her return.<sup>559</sup> Upon her return back to work, the employer had offered her an alternative post as the psychiatrist's latest report stated that she would not be able to handle the stress of an area manager's position.<sup>560</sup> The employee handed in her letter of resignation<sup>561</sup> and the employer stated that she had made no attempt to resolve the matter at hand prior to her resignation.<sup>562</sup>

The commissioner found that the conduct of the employer caused the employee to resign. The commissioner relied on the fact that the employee's position was advertised subsequent to her

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<sup>551</sup> *LM Wulfsohn Motors (Pty) Ltd* par 4.

<sup>552</sup> *LM Wulfsohn Motors (Pty) Ltd* par 5.

<sup>553</sup> *LM Wulfsohn Motors (Pty) Ltd* par 15.

<sup>554</sup> *LM Wulfsohn Motors (Pty) Ltd* par 18.

<sup>555</sup> (2008) 29 ILJ 1515 (LC).

<sup>556</sup> *Foschini Group* par 1.

<sup>557</sup> *Foschini Group* par 2.

<sup>558</sup> *Foschini Group* par 4.

<sup>559</sup> *Foschini Group* par 6.

<sup>560</sup> *Foschini Group* par 10.

<sup>561</sup> *Foschini Group* par 15.

<sup>562</sup> *Foschini Group* par 16.

illness.<sup>563</sup> The commissioner did not take into account<sup>564</sup> that the reason for the alternative post was that the employee's psychiatrist had said that she could not handle stress.<sup>565</sup>

The court stated: "I believe that it can be stated that it is clear that an employee must resort to the option of a constructive dismissal as a very last resort.<sup>566</sup> It has also become fairly trite law that an employee should make use of the employer's grievance procedure where such is in place to resolve the problem before resigning and alleging constructive dismissal. If an employee fails first to lodge a grievance before resigning and alleging constructive dismissal, she may very well be precluded from claiming to have been constructively dismissed".<sup>567</sup>

"It is accordingly understandable that this court will approach disputes involving an alleged constructive dismissal on the basis that it would expect the employee party to have exhausted all alternative remedies such as the employer's grievance procedure or even referring the matter to the relevant arbitration authority for determination rather than to resign and claim a constructive dismissal. Where an employee resigns and claims a constructive dismissal under circumstances where he did not avail himself of an available grievance procedure or the mechanisms for dispute resolution provided for in the Labour Relations Act, he will have to show very compelling reasons why he failed or refused to follow these procedures available to him prior to resignation".<sup>568</sup>

The employee did not prove that she was constructively dismissed and therefore the appropriate order of dismissing the application is made.<sup>569</sup>

In *Kruger v CCMA & another*,<sup>570</sup> the employee acted impulsively by resigning before using internal methods to resolve the issues. This was a review application from the CCMA where the commissioner found that there was no constructive dismissal present.<sup>571</sup> The employee resigned from work as the employer had made her employment intolerable, by an alleged attack on her credibility in front of her colleagues.<sup>572</sup> The employee claimed that the

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<sup>563</sup> *Foschini Group* par 27.

<sup>564</sup> *Foschini Group* par 27.

<sup>565</sup> *Foschini Group* par 10.

<sup>566</sup> *Foschini Group* par 32.

<sup>567</sup> *Foschini Group* par 33.

<sup>568</sup> *Foschini Group* par 37.

<sup>569</sup> *Foschini Group* par 72.

<sup>570</sup> [2002] 11 BLLR 1081 (LC).

<sup>571</sup> *Kruger* par 1.

<sup>572</sup> *Kruger* par 2.

employer sought to discredit her<sup>573</sup> and raise suspicion about her capabilities in the work environment.<sup>574</sup> The employee was asked to create a business plan, as was the custom for the last 10 years however it was asked to be in a different format.<sup>575</sup> Her supervisor criticised the plan which she was told to redo and resubmit at a later date.<sup>576</sup>

The commissioner concluded that the employee was upset and depressed and had consequently acted impulsively by resigning.<sup>577</sup> It was stated that she had not been able to take criticism about her lack of discipline, responsibility, dedication and management skills, resulting in her decision to resign.<sup>578</sup> The commissioner found that the employee did not exercise alternatives at her disposal.<sup>579</sup> The Court held that where internal remedies have not been exhausted, it is unlikely that an employee can prove a claim of constructive dismissal.<sup>580</sup> Therefore constructive dismissal was not proved in this case.

In the same vein the employee in *Mqolomba v Vodacom Group Ltd*<sup>581</sup> did not file a grievance as ‘she saw no purpose in it,’ and constructive dismissal could not be proved. The employee stated that her employment had become intolerable as she was transferred from Government Relations Department to Compliance Department within Vodacom.<sup>582</sup> “She immediately felt unwanted” in the new department as she was told by her new manager that she had been appointed without sufficient consultation with him.<sup>583</sup> Furthermore, she was overloaded with work, as other employees in the department had left.<sup>584</sup> She was busy studying through UNISA, and was not coping with getting all her work done on time.<sup>585</sup> “The employer then put pressure on her studies, saying that she should stop studying for a year. She feared that he would not allow her time off to write exams. Further, she feared that if she could not complete her studies she would have to pay her employer back for the study loan it had given her”.<sup>586</sup>

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<sup>573</sup> *Kruger* par 5.

<sup>574</sup> *Kruger* par 8.

<sup>575</sup> *Kruger* par 9.

<sup>576</sup> *Kruger* par 9.

<sup>577</sup> *Kruger* par 12.

<sup>578</sup> *Kruger* par 12.

<sup>579</sup> *Kruger* par 14.

<sup>580</sup> *Kruger* par 14.

<sup>581</sup> [2011] 10 BALR 1063 (CCMA).

<sup>582</sup> *Mqolomba* page 1064.

<sup>583</sup> *Mqolomba* page 1064.

<sup>584</sup> *Mqolomba* page 1064.

<sup>585</sup> *Mqolomba* page 1064.

<sup>586</sup> *Mqolomba* page 1064.

The employee was upset about her performance assessment, as she felt that that she had been assessed on the wrong system.<sup>587</sup> “She did not lodge a formal grievance, as she saw no purpose in it” and also did not take her problem to a senior manager. She resigned and served out a month’s notice.<sup>588</sup> In terms of constructive dismissal, the employer must be the one who is making employment intolerable thus the employee must bring the conduct to the attention of senior management so that a remedy can be found.<sup>589</sup> It can be done formally through a grievance process, with grievance documents being served on either senior management or the HR department; or informally serving documents to the same individuals.<sup>590</sup>

In the present case, the employee has not lodged any grievance to HR or to senior management.<sup>591</sup> It was stated by the commissioner that on this aspect alone her case should fail, as it cannot be said that the *employer* has committed anything.<sup>592</sup> Constructive dismissal was thus not proved.<sup>593</sup>

*Coetzee v Sinakho Staff Shop (Pty) Ltd*<sup>594</sup> stated that a formal grievance must be lodged at the time that there is an issue and not after a lengthy delay. The employee was working as a business consultant for approximately four years until she tendered her resignation.<sup>595</sup> The employer reduced the employee’s salary from R15 000 per month to R8 000.<sup>596</sup> The employee was unhappy as she could not meet the set target and had to canvass to bring in new business.<sup>597</sup> Her employment contract included a restraint in trade for a period of one year.<sup>598</sup> The employer did not want to waiver the restraint in trade clause and let her go.<sup>599</sup> She then had no option but to stay at company;<sup>600</sup> which is a big reason why the employee had not resigned from her job previously.<sup>601</sup> She contracted asthma as a result of smoking in

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<sup>587</sup> *Mqolomba* page 1064.

<sup>588</sup> *Mqolomba* page 1064.

<sup>589</sup> *Mqolomba* page 1066.

<sup>590</sup> *Mqolomba* page 1066.

<sup>591</sup> *Mqolomba* page 1066.

<sup>592</sup> *Mqolomba* page 1066.

<sup>593</sup> *Mqolomba* page 1067.

<sup>594</sup> [2009] 5 BALR 447 (CCMA)

<sup>595</sup> *Coetzee* page 448.

<sup>596</sup> *Coetzee* page 449.

<sup>597</sup> *Coetzee* page 449.

<sup>598</sup> *Coetzee* page 448.

<sup>599</sup> *Coetzee* page 450.

<sup>600</sup> *Coetzee* page 450.

<sup>601</sup> *Coetzee* page 449.

the offices as the no-smoking policy was not effective;<sup>602</sup> however she did not lodge a grievance formally in writing to the company.<sup>603</sup>

The court held that: “[I]n labour law jurisprudence suggests that for a constructive dismissal claim to succeed, the employee must exhaust all internal dispute-resolution measures first i.e. lodging a grievance etc, and that resignation must be an act of last resort and not first resort, as was the case here”.<sup>604</sup>

The employer contends that the restraint in trade clause was subject to another clause in the contract which stated that the employee “could take the business she came with to the company but not the business she generated whilst in the employ of the company”.<sup>605</sup> It was contended that the company is a small company and they do not have a formal grievance procedure but have an open door policy which the employee could have used to raise her displeasure.<sup>606</sup> The commissioner held that “the applicant failed to show that the continuation of her employment was objectively intolerable;” and that “her resignation was a last resort or even a reasonable option in the circumstances of the matter”.<sup>607</sup>

Reasons given by the commissioner was that the employee did not even lodge a grievance albeit informally with any of the directors of the company and she only tendered her resignation 14 months after the introduction and implementation of the smoking policy. It was stated by the commissioner that it cannot be argued convincingly that exposure to smoking in the workplace created an intolerable working environment for the employee.<sup>608</sup> A finding was made that the applicant was not unfairly dismissed but resigned on her own accord.<sup>609</sup> The commissioner stated that:

“If the applicant’s resignation was triggered by the unilateral reduction in salary, as she would like me to believe, which I would do with great difficulty, then she should have tendered her resignation there

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<sup>602</sup> *Coetsee* page 449.

<sup>603</sup> *Coetsee* page 451.

<sup>604</sup> *Coetsee* page 459.

<sup>605</sup> *Coetsee* page 451.

<sup>606</sup> *Coetsee* page 453.

<sup>607</sup> *Coetsee* page 455.

<sup>608</sup> *Coetsee* page 456.

<sup>609</sup> *Coetsee* page 457.



and then or even a few months later. For the applicant to tender her resignation after 32 months, and mention a salary cut that occurred 32 months ago as a trigger, is laughable in more ways than one”.<sup>610</sup>

This case is authority for the view that employees must use internal grievance procedures first; however the complaint must be made when the issue is in contention and not a number of months later.

The CCMA decision of *Aldendorff v Outspan International Ltd*<sup>611</sup> suggests that internal procedures must not be undermined and needs to be used before resignation and a claim for constructive dismissal. “[W]here employees could reasonably have lodged a grievance regarding the course of the unhappiness, and failed to do so before resigning, they may be hard put to persuade the court or arbitrator that they had no option but to resign.”

The employee was demoted<sup>612</sup> from manager of the commercial department to procurement manager but without any loss in salary.<sup>613</sup> It was alleged by the employee that the financial director indicated unhappiness with the employee's management of the commercial department; however no formal disciplinary action was taken against him.<sup>614</sup> The employee testified that his demotion left him with no other option but to tender his resignation from the company.<sup>615</sup> Factors that led to his resignation were, but limited to; the employee's suspicion that once he had transferred all to the new employee and taught him the job, he would be made redundant and the action of deleting most of his job description and making the job he had even smaller.<sup>616</sup> The company contended that the employee looked ‘haggard’ and when asked about it, he informed them that he was stressed and had not enjoyed the past six months.<sup>617</sup> “He proposed that it was time to look for his successor”.<sup>618</sup> It was stated that based on this request, and the employee's clear difficulty to cope with the high level of management activity of his current position, and as his expertise was in the field, the decision was made by the company to focus its attention on his strengths in a procurement manager position as part of a bigger restructuring exercise to transform Outspan from a general company to one where

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<sup>610</sup> *Coetzee* page 457.

<sup>611</sup> (1997) 18 ILJ 810 (CCMA).

<sup>612</sup> *Aldendorff* page 812.

<sup>613</sup> *Aldendorff* page 811.

<sup>614</sup> *Aldendorff* page 811.

<sup>615</sup> *Aldendorff* page 812.

<sup>616</sup> *Aldendorff* page 812.

<sup>617</sup> *Aldendorff* page 813.

<sup>618</sup> *Aldendorff* page 813.

each person had a clear area of activity.<sup>619</sup> It was stated that the new position did amount to a demotion, as the employee was no longer to manage a whole department, but had to focus on a smaller area.<sup>620</sup> It was indicated that had the employee used the internal grievance procedure, he could have negotiated an alternative to resigning with the company.<sup>621</sup>

The commissioner held that the employee's resignation was not because the company had made continued employment intolerable for him.<sup>622</sup> It was held that the employee "had ample opportunity to take issue, whether verbally, in writing or via the formal grievance channels available at Outspan".<sup>623</sup> It was held that the employee's resentment of his demotion cannot be held sufficient to find the company responsible for making his continued employment intolerable, especially if they were unaware of the existence of such resentment or unhappiness.<sup>624</sup> The employee freely chose to resign rather than to resolve the matter internally whether informally or formally by making use of Outspan's grievance procedure or in the extreme by using the legal remedies available to him while still in the employ of Outspan.<sup>625</sup>

It was held that "employees should not second guess the outcome of lodging a complaint in terms of an employer's grievance procedure, especially not where the employee is contemplating resignation coupled with an allegation of constructive dismissal and such employee had never raised the issue with the employer before".<sup>626</sup>

In *Smith v Magnum Security*<sup>627</sup> it was made clear that other alternatives were available to the employee before resignation and should be considered, and the employee had to keep that in mind. The employee was employed by the company as a grade B supervisor security guard for just less than a year.<sup>628</sup> The employee "claims that he resigned as a result of the company's unreasonable requirement for him to assume guard duties at Jet Stores, Kempton Park to or from which he did not have transport, however this was just the task for this

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<sup>619</sup> *Aldendorff* page 813.

<sup>620</sup> *Aldendorff* page 814.

<sup>621</sup> *Aldendorff* page 814.

<sup>622</sup> *Aldendorff* page 815.

<sup>623</sup> *Aldendorff* page 816.

<sup>624</sup> *Aldendorff* page 817.

<sup>625</sup> *Aldendorff* page 817.

<sup>626</sup> *Aldendorff* page 817.

<sup>627</sup> [1997] 3 BLLR 336 (CCMA).

<sup>628</sup> *Smith* page 337.

specific day”.<sup>629</sup> He stated that the intolerable conduct “was the requirement on the day of his resignation that he accept a transfer to Kempton Park, a requirement which he deemed to be unreasonable because of the transport difficulties and alteration of his day to day job content from a travelling supervisor to an ordinary guard, though he conceded that he would retain his supervisory grade without loss of benefits”.<sup>630</sup>

It was held that the effect of granting a remedy to every employee with a grievance, would be to allow any employee to resign on that ground and hold his employer liable for the consequences of his own resignation.<sup>631</sup> The commissioner’s finding was that the employers request to help out with guard duty for the day at Jet Stores in Kempton Park was not shown to be an unreasonable one and that, even if it were held to be so, was not such as to constitute conduct by the employer which “made continued employment intolerable for the employee”.<sup>632</sup> The employee had a number of options available to him save from resignation.<sup>633</sup>

An employee is to use a company grievance procedure before resigning or it will be harder to prove a constructive dismissal. The employer is to use the grievance procedure to try and settle a dispute before resignation can take place. The Labour Appeal Court has created precedent with *Lubbe v Absa Bank Bpk* stating that internal grievance procedures should be followed first and foremost.

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<sup>629</sup> *Smith* page 337.

<sup>630</sup> *Smith* page 338.

<sup>631</sup> *Smith* page 340.

<sup>632</sup> *Smith* page 342.

<sup>633</sup> *Smith* page 342.

## CHAPTER 9: REMEDIES

A number of remedies are available to dismissed employees, and these will be discussed individually.

Section 193 gives remedies for an unfair dismissal and unfair labour practice and states:

“(1) If the Labour Court or an arbitrator appointed in terms of *this Act* finds that a *dismissal* is unfair, the Court or the arbitrator may-

- (a) order the employer to reinstate the *employee* from any date not earlier than the date of *dismissal*;
- (b) order the employer to re-employ the *employee*, either in the work in which the *employee* was employed before the *dismissal* or in other reasonably suitable work on any terms and from any date not earlier than the date of *dismissal*; or
- (c) order the employer to pay compensation to the *employee*.

(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the *employee* unless-

- (a) the *employee* does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the *employee*; or
- (d) the *dismissal* is unfair only because the employer did not follow a fair procedure.

(3) If a *dismissal* is automatically unfair or, if a *dismissal* based on the employer's *operational requirements* is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.

(4) An arbitrator appointed in terms of this Act may determine any unfair labour practice *dispute* referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation”.

The preferred remedy is reinstatement however there may be more compelling reasons to grant compensation in stead. Theses remedies are an exhaustive list and other remedies cannot be ordered.

## **Reinstatement**

If employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of the dismissal.<sup>634</sup> Reinstatement may be made retrospectively<sup>635</sup> and will not be made with new contracts expressing new terms and conditions.

Reinstatement will not be granted when the employment relationship has broken down and the conduct created by the employer is such to break the trust relationship. Generally reinstatement will not be granted in constructive dismissal cases as it is not the preferred remedy. As conduct has been intolerable, the last option would be to put the employee back in that situation.

## **Re-employment**

As this term is given its ordinary meaning, employees are to begin afresh to work for the employer and benefits from the previous employment do not extend to this re-employment.<sup>636</sup>

## **When neither reinstatement nor re-employment can be ordered<sup>637</sup>**

According to s193(2), the court must grant reinstatement or re-employment unless a number of factors are present thus neither these options will be available as a remedy.

These exceptions to reinstatement and re-employment include where the employee does not want to be reinstated; continued employment has been made intolerable; it is not reasonable to grant reinstatement or re-employment and unfair dismissal based on unfair procedure.

Generally in a constructive dismissal case compensation will be granted as re-employment and reinstatement cannot be ordered as the trust relationship has broken down between the employee and the employer.

## **Compensation**

Section 194 of the LRA states:

“(1) The compensation awarded to an *employee* whose *dismissal* is found to be unfair either because the employer did not prove that the reason for *dismissal* was a fair reason relating to the employee's conduct or capacity or the employer's *operational requirements* or the employer did not follow a fair

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<sup>634</sup> J Grogan *Dismissal* (2011) 522.

<sup>635</sup> J Grogan *Dismissal* (2011) 524.

<sup>636</sup> J Grogan *Dismissal* (2011) 526.

<sup>637</sup> J Grogan *Dismissal* (2011) 527.

procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the *employee's* rate of *remuneration* on the date of *dismissal*.

(2) .....

(3) The compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' *remuneration* calculated at the *employee's* rate of *remuneration* on the date of *dismissal*.

(4) The compensation awarded to an *employee* in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months' *remuneration*".

Compensation is granted where an employee had been unfairly dismissed. Compensation could also be granted to dismissals that are automatically unfair and the court must make a just and equitable order.

It is clearly stated that the maximum compensation that can be granted by a court is 12 months' remuneration, unless the dismissal was automatically unfair in which case 24 months' remuneration may be granted.

Compensation is generally the preferred remedy and would in most cases be awarded as the employment relationship has become so intolerable that no other remedy would suffice. Once conduct has become intolerable, compensation is the only way in which to assist an aggrieved employee. Sending an employee back to work hardly seems like an appropriate remedy and majority of the cases suggest that compensation is the most appropriate remedy in the circumstances.

## CHAPTER 10: CONCLUSION

As the test for a constructive dismissal is intolerable conduct, it is suggested that the norm would be that the conduct is 'tolerable'. It has been stated that this could mean 'functional' in that the employer receives productivity in terms of work for remuneration paid to the employee.<sup>638</sup> One needs to determine whether the conduct has destroyed or seriously damaged the relationship of confidence and trust between the employer and the employee.<sup>639</sup>

In conclusion it can be stated that intolerable conduct can only be determined based on the facts of each individual case and needs to be judged objectively whether the employee is required to put up with the conduct.

Considerations of constructive dismissals include: the employee must have terminated the contract; conduct must have been intolerable to bear; this must be assessed objectively; the employee would have continued to work but for the intolerable conduct and all internal remedies must have been exhausted.<sup>640</sup>

Intolerable conduct was discussed first with reference to case law under each category. It was stated that abuse, whether physical or verbal constitutes intolerable conduct and an employee cannot be expected to tolerate the said conduct. A form of verbal abuse also relates to employers swearing at employees.

Discrimination against an employee can be divided into two groups; sexual harassment and belief by an employee that he is being discriminated against and the case above was based on race. An employer may not discriminate against an employee on any ground and no sexual harassment will be tolerated in the workplace. Sexual harassment would be inappropriate sexual behaviour of any kind whether verbal or physical and constitutes intolerable conduct from an employer therefore a dismissal would be regarded as a constructive dismissal.

A demotion in job title amounts to a constructive dismissal as it would render the conduct intolerable. Demotions relate to an unfair labour practice and can give rise to a constructive dismissal.

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<sup>638</sup> A Rycroft 'The Intolerable Relationship' (2012) Oct *Industrial Law Journal* 2272.

<sup>639</sup> A Rycroft 'The Intolerable Relationship' (2012) Oct *Industrial Law Journal* 2287.

<sup>640</sup> A van Niekerk et al. *Law @ work* 2ed (2012) 223.

Where an employee is charged with unfair disciplinary action for the sake of making life intolerable, it would also constitute a constructive dismissal. Disciplinary action that is taken unfairly against an employee will not be tolerated.

Unilateral amendments to terms and conditions would constitute a constructive dismissal only if the conduct can be proved to be intolerable.

Generally the non payment of remuneration of an employee constitutes a constructive dismissal and deductions cannot be made unauthorised from employee's salaries according to the Basic Conditions of Employment Act.

Alterations to terms and conditions of a contract constitute a breach of contract and ultimately the employee cannot be expected to put up with that. This will amount to a constructive dismissal.

Conduct which does not constitute intolerable conditions is where an employee works out his notice period or states that he will work out his notice period as this does not prove that the conduct was intolerable. Where one withdraws a resignation it also could prove that the conduct cannot be expected to be intolerable.

Where an employee resigns to avoid disciplinary action, it does not always constitute a constructive dismissal. One needs to prove that the resignation was not a free one based on the conduct of the employer.

It has been stated above that an employee is to use all internal alternatives available to him before resigning, therefore the employee should make use of company grievance procedures before other actions can be taken. Generally the courts want to make sure that the employee has tried to resolve the issue before coming to court with a claim for constructive dismissal.

A number of remedies are available to the courts when faced with a claim for constructive dismissal. The court can grant reinstatement; re-employment and compensation and these were discussed with reference to statute.

The courts have applied the principles of constructive dismissal and the employers are not getting away with making life intolerable for employees. There are a number of areas where employees can claim constructive dismissal and the courts have been successful in holding employers responsible for intolerable conduct.



The cases suggest that intolerable conduct might be easy to prove but that it is still viewed objectively. The cases above are an illustration of what conduct could constitute a constructive dismissal and that remedies are available to employees once the intolerable conduct has been proved.

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21 November 2012

Miss Lara Jansen van Rensburg 208510016  
School of Law  
Pietermaritzburg Campus

Dear Miss Jansen van Rensburg

Protocol reference number: HSS/1248/012M  
Project title: Intolerable conduct in a constructive dismissal

**EXPEDITED APPROVAL**

I wish to inform you that your application has been granted Full Approval through an expedited review process.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number. Please note: Research data should be securely stored in the school/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

Professor Steven Collings (Chair)

/pm

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