

**AN ANALYSIS OF INTOLERABLE CONDUCT AS A GROUND FOR
CONSTRUCTIVE DISMISSAL**

By

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DECLARATION

I, Siphon E. Ngcobo, 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 qualification.

Furthermore, this work may be made available for photocopying and for inter-library loan

Signed at Pietermaritzburg on the..... day of.....2016.

Signature.....

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ABSTRACT

Constructive dismissal with particular reference to s 186(e) of the Labour Relations Act 66 of 1995 forms the main subject of this Dissertation. The section explains 'dismissal' to incorporate a position where a worker resigns as a result of the conduct of the employer who made continued employment intolerable. The study explores case law on this issue, considers and describes the forms of behaviour that have been and those that will be considered by the courts to be offensive conduct on the part of the employer, and to what end these can be said to necessitate a case of constructive dismissal.

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1 CHAPTER ONE

1.1 Introduction

The notion of ‘constructive dismissal’ was introduced into the South African legal system by English law in 1986¹ by means of the case of *Small & others v Noella Creations (Pty) Ltd.*² In this case, workers in a clothing boutique resigned as they were not willing to work for the company under a contractual stipulation which entailed that they would have to pay for “stock shortages at the end of every month”. After the workers’ services were terminated, they were reinstated in terms of s 43 of the Labour Relations Act³ (hereinafter referred to as ‘the Act’). The concept of constructive dismissal thus fell under the umbrella of unfair dismissal, in our law. It has been given legal force in the Act⁴, whereby a situation where the termination of contract of employment by a worker, with or without notice, as a result of the employer making the continued employment intolerable for the worker, now falls within the meaning of dismissal and unfair labour practice. It is recognised as one of the forms of dismissals in terms of the Act.⁵

Both the Act and common law did not provide a definition for intolerable conduct. The courts had to assess the merits of each case in determining whether the conduct could be held to be intolerable. The law of constructive dismissal in South Africa as we know it today came from the United Kingdom in the case of *Woods v WM Car Services (Peterborough) Ltd*⁶ which paved the way for the adoption of rules concerning the concept.⁷ The court in *Woods* case⁸ averred 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 stance was adopted in the following cases, all of which relied on the principle held in the *Woods*⁹ case: *Halgreen v*

¹ *Murray v Minister of Defence* 2009 (3) SA 130 (SCA); (2008) 29 ILJ 1369 (SCA) 8.

² *Small & Others v Noella Creations (Pty) Ltd* (1986) 7 ILJ 614 (IC) 615 H-I.

³ Labour Relations Act 28 of 1956.

⁴ Section 186(e) of the Labour Relations Act 66 of 1995 (hereafter “the Act”)

⁵ Section 186(1) (e) of the Act.

⁶ *Woods v WM Car Services (Peterborough) Ltd*⁶ [1981] IRLR 413 (CA) 374-350.

⁷ JJ Van Loggerenberg Constructive Dismissal in Labour-content Pro IRX, <http://contentpro.seals.ac.za/iii/cpro/app?id=4524601186723958&itemId=100565> (accessed December 27, 2016), JJ Van Loggerenberg

⁸ *Small & Others v Noella Creations* (note 6 above) 415.

⁹ *Woods v WM car Services (Peterborough) Ltd* (1981) IRLR 413 CA 350-374

Natal Building Society,¹⁰ *Jooste v Transnet Lt/a South African Airways*,¹¹ and *Dallyn v Woolworths (Pty) Ltd*¹². The Labour Appeal Court in these cases cited the *Woods* case as a compelling case. Prior to these cases, the courts took a different stance in that they held that any conduct by an employer might justify the employee resigning and then claiming constructive dismissal as long as the conduct of the employer is unreasonable. The term was defined by the court thereafter in the case of *Howell v International Bank of Johannesburg Ltd*¹³, where it was held that ‘conduct by the employer which drives a worker to quit work will measure to a constructive dismissal’. It is accepted that a termination of the contract of employment will constitute dismissal within the Act if the worker has a right to end the relationship emanating from the intolerable behaviour of the employer.¹⁴

1.2 The research problem and recommendations

This work concentrates on the subject of constructive dismissal as detailed in s 186(e) of the Act.¹⁵ The main focus of this work is on the worker who terminates the employment relationship as a result of the employer’s unlawful conduct. The study will further look at the remedies available to workers who have suffered from this conduct. Lastly, recommendations will be made on how to best avoid behaviour that violates the worker’s right to not be treated fairly.

The definition in s186(e) is purposed on protecting workers who resigned as a last resort, due to the employer conducting himself in an unlawful manner thereby making the continued employment intolerable. The efficient management of intolerable behaviour by employers is a challenging phenomenon that impacts on workers and the general public.

1.3 The purpose of the study

The essential objective of this study, is to examine the legal implications of employers who practice this horrendous and intolerable conduct against workers. The study will also

¹⁰ *Halgreen v Natal Building Society* (1986) 7 ILJ 769 (IC) 775 D-7761; the case was with the approval in J Grogan & J Riekert. *Riekert’s Basic Employment law*, 2ed (1993) Cape Town, Juta & Co 69

¹¹ *Jooste v Transnet Lt/a South African Airways* (1995) 16 ILJ 629 (LAC) 638 G.

¹² *Dallyn v Woolworths (Pty) Ltd* (1995) 16 ILJ 696 (IC) 105

¹³ *Howell v International Bank of Johannesburg Ltd* (1990) 11 ILJ 790 (IC) 795 C-D.

¹⁴ J Van Loggerenberg *Constructive Dismissal in Labour Law*, (unpublished LLM thesis), University of Port Elizabeth (2003) 1.

¹⁵ Labour Relations Act 66 of 1995

explore precedent on this subject, consider and describe what forms of behaviour have been and will be viewed as intolerable conduct by our courts of law in deciding on whether the case of constructive dismissal has been made. The study examines whether the intolerable conduct should only be that of the employer, and also whether it encompasses the intolerable conduct of others, that the employer could have prevented but nevertheless did not. The intolerable conduct test is an approach that does not apply in instances where the worker has always intended to discontinue the employment relationship. This is because the employer did not cause the repudiation of contract, but it was the worker himself that did. It will also focus on the types of liability that employers who expose their worker to unlawful conduct would possibly incur

1.4 Research question(s)

This dissertation seeks to answer the following question: ‘What does intolerable conduct constitute?’ In endeavouring to answer this research question, the following issues are examined:

- What is the origin of the concept of a constructive dismissal?
- What is the difference between constructive dismissal in terms of the Act and the common law?
- What requirements must be met for constructive dismissal claims to succeed?
- What remedies can be awarded for unfair constructive dismissal?

1.5 Structure of the dissertation

The dissertation will consist of six chapters. Chapter one provides an overview of the research. Chapter Two will discuss the broad concepts of constructive dismissal by looking at its origins, development and application. Chapter Three will focus on intolerable conduct as the reason for the resignation. The study will also look at what constitutes intolerable conduct. Chapter Four will look at the termination of the employment relationship by the worker. Chapter Five will consider the liability of the employer and the remedies available to the worker. The final chapter comprises of a closing argument drawn from the preceding discussion.

1.6 Research Methodology

The research method used is qualitative analysis. The methodology used in this study will comprise of a review of existing literature including statutes, case law, journals and books. The research will include a comparative analysis of the legal position in South Africa with that of other jurisdictions such as England and the United States of America.

1.7 Research

The study is based on research, exploration of other writer's views and case law on the issue of intolerable conduct in the workplace.

1.8 Conclusion

The discussion looks at the tests used by our courts to assess if a case for constructive dismissal has been made. The test according to Grogan is that it is 'partly objective and partly subjective'.¹⁶ The worker's subjectivity needs to be examined and this entails considering the apprehension of the worker at the time of termination of the contract of employment.¹⁷

A discussion on the 'two-stage' enquiry will be undertaken. These two stages are not always easily distinguishable, as an assessment into whether the worker intended to terminate the employment by accepting the repudiation, will often entail an enquiry into whether such resignation was voluntary. The main question is whether the worker, at the time of termination of the contract, had the intention to end the employment relationship, or alternatively, whether he had no option other than to terminate. In terms of s 192(1)¹⁸, the worker bears the duty of proving to the court or tribunal that he had indeed been dismissed. He must also satisfy the court or tribunal that the circumstances were indeed so unendurable that his resignation amounted to a dismissal within the ambit of s 186(e)¹⁹. If it is established by the court that the worker had the intention to terminate, then this enquiry comes to an end. However if he does discharge the burden of proof, the question that follows, is whether the actions of the employer amounted to constructive dismissal of the worker.²⁰

¹⁶ J Grogan Dismissal, *Discrimination & Unfair Labour Practices* 2ed ((2008) 199.

¹⁷ *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others* (2008) 29 ILJ 356 (LC) 7.

¹⁸ Labour Relations Act 66 of 1995.

¹⁹ *Ibid* (note 20 above).

²⁰ *Jooste v Transnet t/a South African Airways* (1995) 5 BLLR 1 (LAC) 639B.

The assessment for a constructive dismissal is based on the intolerable conduct of the employer. It is implied that the rule be that the behaviour is 'tolerable'.²¹ It is also essential that we ascertain whether the behaviour has damaged the relationship of trust between the worker and the employer.²² Finally it is accepted that the intolerable conduct may only be ascertained based on the merits of each case. Analysis of constructive dismissal reveals that the worker ought to have ended the employment contract and that the behaviour of the employer must have been so offensive to the worker that he could not continue with the employment relationship. This must be assessed both objectively and subjectively; the subjective intention of the worker is only the first leg into the enquiry. This part of the enquiry seeks to determine whether, after all in-house remedies and procedures have been exhausted²³, the worker would have remained in the employment relationship, save for the intolerable conduct of the employer. For example the worker should give the employer an opportunity to rectify the problem, failing which the worker should launch a grievance. Only if this also fails, should the contract of employment be terminated by the worker.

The second leg of the enquiry involves an assessment into the conduct of the employer. This enquiry is objective as it would be prejudicial to an employer to permit the worker, when determining the fairness of the employer's conduct, to put forward his subjective views. This is especially relevant where these views are in fact without basis. It has been declared by the labour courts that unfairness, whether physical or verbal, constitute constructive dismissal. In the English case of, *Palmanor Limited v Cedron*,²⁴ the manager of the night club incorrectly accused the worker of coming late to work, whereas Cedron "the worker" made an arrangement with one of his colleagues that he was going to be late. He was sworn at by the manager, the worker criticised the manager for his foul language and was told if he did not like the language he could go. He resigned and claimed constructive dismissal. The court agreed with the worker that such language amounted to constructive dismissal. The manager then became offensive saying, 'You are a big bastard, a big c... you are pig-headed, you think you are always right'. The worker objected and the manager reacted, 'I can talk to you any way I like, you big s...t' and 'if you leave me now, don't bother to collect your money, papers and anything else. I'll make sure you don't get a job anywhere in London'. The worker resigned and claimed that he had been constructively dismissed, by reason of

²¹ A Rycroft "The Intolerable Relationship" (2012) *ILJ* 2272.

²² A Rycroft "The Intolerable Relationship" (2012) *ILJ* 2287.

²³ A van Niekerk & others *Law@ work* 2ed (2012) 223.

²⁴ *Palmanor Limited v Cedron* (1978) *IRLR* 303, 202.

the abusive behaviour of the employer. His claim was upheld by the Employment Appeal Tribunal.

In the case of *Haworth v Quigney Spar & Another*,²⁵ the employer not only verbally abused the worker, but also threatened her as follows: “I have an f...n problem with you. For your type, I don’t have time. You are an f...n piece of scum. I can tell you now your time at Spar won’t be much longer. ‘You can run back to them now and tell them I’m threatening you’. He went on by saying ‘try and send people after me again I’ll f...n show you what I’ll do to you’. The employer also stuffed his keys into the worker’s mouth. The worker resigned and claimed that he had been constructively dismissed. In the case *Milady’s v Naidoo*²⁶, the worker had an argument with her employer about the performance of the branch. On the basis of abusive language and management style, she resigned and claimed constructive dismissal.

In both these cases constructive dismissal was found to exist not so much because of the language used but because of the threats that were made during the violent outbursts and exchange of words.

However, I respectfully submit that the vulgar language was yet another factor indicative of the fact that there was a breakdown of the employment relationship. The authority laid down in the cases of *Haworth and Milady*, are examples of the forms of behaviour that could constitute a constructive dismissal. They show that there are remedies available to the workers once the requirements of constructive dismissals have been established. Remedies could include either reinstatement or re-employment of the worker.

The Constitution of the Republic of South Africa Act 108 of 1996, under s 23²⁷ assures ‘everyone the right to just labour practices’. The extent of this constitutional provision has been shaped by statutory devices, legal explanation, various employment agreements and public practice. The Act describes the worker as a person, includes an independent contractor, who works for different persons or the government and gets or is entitled to get, remuneration for work done. An employer is not defined in the Act.²⁸

²⁵*Haworth v Quigney Spar & Another* [2001] 10 CCMA 6.13.4.

²⁶*Milady’s, a Division of Mr Price Group Ltd v Naidoo & Others* (2002) 11 (LAC) 6.13.3.

²⁷The Constitution of the Republic of South Africa Act 108 of 1996

²⁸T Cohen “Placing Substance Over Form-Identifying the True Parties to an Employment Relationship” (2008) 29 *ILJ* 864.

2. CHAPTER TWO

2.1 Introduction

It is trite that the 1996 Constitution²⁹ grants ‘everyone the right to fair labour practises’.³⁰ In the same vein, the Act³¹ states that ‘every worker has a right not to be unfairly dismissed and not to be submitted to unfair labour practice’.³² In the cases of *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen and Murray v Minister of Defence*,³³ the Labour Appeal Court settled that the Constitution and the Act ‘imposes an ongoing obligation’³⁴ of justice on the employer towards the worker in making rulings concerning the employee in his work.³⁵ The main purpose of labour law is to promote, protect and uphold the principles of justice, reasonableness, lawfulness and fairness in employment relationships, that involves balancing the competing interests of the worker and employer.³⁶ This dissertation seeks to identify guidelines that will ensure fair and sufficiently equitable treatment for both employers and workers and to clarify the circumstances in which liability on the part of the employers arises in constructive dismissal claims.

2.2 Meaning of ‘Constructive Dismissal’

Constructive dismissal is where a worker quits, with or without warning, as a result of undue stress, irrational directive or unacceptable behaviour on the part of the employer.³⁷ Constructive dismissal is dealt with just in the same manner as any other kind of unfair dismissal and thus the worker qualifies to be supported in terms of the Act. The constructive dismissal concept was foreign to South African law until its incorporation of such from English law into our law.³⁸ The court, in *Jooste v Transnet Ltd*,³⁹ pointed out that the

²⁹ 1996 Constitution.

³⁰ *Ibid* section 23(1).

³¹ The Labour Relations Act 66 of 1995.

³² *Ibid* section 186

³³ *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 18 *ILJ* 361 (LAC) 366A. See also *Murray v Minister of Defence* (2008) 29 *ILJ* 1369 (SCA) 10.

³⁴ The obligation has both a formal procedural and substantive dimension. See *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22 (CC) 106-110.

³⁵ *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* 366A.

³⁶ Otto Kahn-Freund said ‘The main object of labour law is to be a countervailing force to counteract the inequality in bargaining power which is inherent and must be inherent in the employment relationship’.

³⁷ Examples of such conduct include victimisation, bullying, humiliating treatment, capricious behaviour, failure to resolve grievances, unsafe working environment, isolating the employee or no work no payment, and whistle-blowers being ignored.

³⁸ The English law concept of constructive dismissal is now entrenched in South African labour law. Here ‘constructive’ signifies something the law deems to exist for reasons of fairness and justice, such as notice, knowledge, trust, desertion.

³⁹ *Ibid* (note 13 above) 639A-B.

Common Law did not see the concept of constructive dismissal in the old Act,⁴⁰ alternatively in some other South African law that existed at the time. Before the incorporation of the concept of constructive dismissal into our law, the worker's resignation was compared to the common law termination of a contract of employment by a worker because of the employer's breach of the contract of employment.⁴¹ However, as a result of the legal development of the common law and the enactment of new labour laws,⁴² it is no longer necessary to rely on the breach of the employment contract in imputing liability on the employer.⁴³

When the courts incorporated the constructive dismissal concept into our labour law from English law, they selected the English path that is interpreted into the agreement of employment. As a collective phrase that 'the employer would not without acceptable and decent manner behave himself in a style prone or incline to damage or severe harm the employment relationship and expectation with the workers. Violation of the agreement entails rejection of the agreement which justify the worker in ending and asking payment for dismissal'.⁴⁴ It is against this background that the Act incorporated the unfair employer-initiated resignation as a dismissal.

2.3 Constructive dismissal as an unfair dismissal

Section 186(1) (e) of the LRA,⁴⁵ details dismissal as the termination of the employment contract by the worker, with or without notice, because the employer made continued employment intolerable for the worker.⁴⁶ This is known as constructive dismissal. It is currently common that unlawful behaviour on the part of an employer that causes a worker to terminate employment is regarded as a dismissal.⁴⁷

⁴⁰ Labour Relations Act 28 of 1956.

⁴¹ *Mafomane v Rustenburg Platinum Mines* (2003) 10 *BLLR* 999 (LC) 47 where it was held that: 'The codification under the LRA has amongst other things severed the link between constructive dismissal and wrongful repudiation of a contract at common law. It is now a statutory concept in its own right which does not need to retain its link to the common law doctrine of wrongful repudiation for its justification'.

⁴² Such as the Basic Condition of Employment Act, Equity Employment Act, Promotion of Equality and Prevention of Unfair Discrimination Act, Labour Relations Act etc.

⁴³ The common law test of the employer's breach of contract by making employment intolerable was replaced by section 186(1) (e) of the Labour Relations Act 66 of 1995 which acknowledged the constructive dismissal concept.

⁴⁴ *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 (HL) 58-61.

⁴⁵ Labour Relations Act 66 of 1995.

⁴⁶ However it is generally the employer who gives notice for dismissal and if the employee terminates the employment contract, this will constitute a resignation and not a dismissal, unless the termination falls under s 186(1) (e) of the LRA.

⁴⁷ Section 186(1) (f) of the LRA, inserted by s 45 of the Labour Relations Amendment Act 12 of 2002.

An amendment to Section 186 of the Act⁴⁸ introduced a new form of constructive dismissal.⁴⁹The term ‘dismissal’, was stretched to include the termination of an agreement of employment by a worker, with or without notice, because the new employer after a transfer of a business in terms of sections 197 or 197A of the Act⁵⁰, afforded the worker with surroundings or income that were much less beneficial. However, this dissertation will only analyse the constructive dismissal as envisioned in section 186 (1) (e) of the Act.

For a worker to win a case of constructive dismissal, the worker must establish that the employment contract became intolerable because of the employer's behaviour. In the case of *Eagleton & Others v You Asked Services (Pty) Ltd*⁵¹, the Court regarded the three elements that a worker must establish to petition constructive dismissal. The essentials are:

- a) The worker terminated the contract of employment;
- b) Continued employment had become intolerable for the employee; and
- c) The employer must have made continued employment intolerable.

The responsibility is on the worker to demonstrate that the resignation formed a constructive dismissal.⁵² Secondly it must be proved that the worker did not act voluntarily. Lastly, it must be shown that the worker did not plan to resign.⁵³ Once this is confirmed, the assessment is whether the employer had just and legitimate belief, in that the worker honestly believed his thinking to be correct, and that the employer would act in the manner anticipated to damage their relationship. If we look at the employer's behaviour as a whole and the impact it will cause, and judge this as reasonably as we can, would we come to the decision that the worker could not be expected to put up with the behaviour. The question is whether, if determined reasonably and sensibly, that the employer's behaviour and its impact are such that the worker could not be anticipated to put up with it.⁵⁴ Section 192 (1),⁵⁵ states that “the duty is

⁴⁸Labour Relations Act 66 of 1995.

⁴⁹In terms of section 186(1) (f) of the LRA, inserted by s 45 of the Labour Relations Amendment Act 12 of 2002.

⁵⁰*Ibid* (note 47 above).

⁵¹*Eagleton & Others v You Asked Services (Pty) Ltd* (2009) 30 ILJ 320 (LC) 8.

⁵²*Armaments Corporation of South Africa Ltd v Nowosenetz N.O. and Others* (JR1579/11) (2015) ZALCJHB 24.

⁵³ The LRA provides in section 192, that in any account regarding any discharge, the worker must prove ‘the existence of the dismissal’, once this is accomplished, ‘the employer must prove that the discharge is just’.

⁵⁴*Ibid* (note 30 above) 630 I (*Milady's, a Division of Mr Price Group Ltd v Naidoo & Others* (2002) 11 (LAC) 630.

⁵⁵Labour Relations Act 66 of 1995

on the worker to show there was a dismissal". If this is established, section 192 (2),⁵⁶ places the burden upon the employer to show that dismissal is substantively and procedurally just.

2.4 The nature of constructive dismissal

The constructive dismissal concept protects workers against an employer who intentionally makes their lives so intolerable that they resign, and as a result, forfeit their right of recourse against the employer.⁵⁷ The most distinguishing feature about constructive dismissal is that even though it is the worker who resigns, the causal blame for the termination of the employment agreement is the employer's intolerable conduct. The employer thus continues to be responsible for all damages incurred thereafter, as the employer was the cause of the workers termination.⁵⁸

Intolerable conduct can be taken to mean- the unsupportable or unacceptable way that in effect has cut the employment contract and which makes continued employment intolerable.⁵⁹ Had the intolerable situation not been created, the worker would have carried on working indefinitely. The worker's resignation symbolises a severe breakdown in the employment contract which he can no longer endure.⁶⁰

2.5 Employer's Intolerable Conduct

The Act does not explain the extent or boundaries of what might be regarded as undesirable behaviour on the side of the employer, and to determine this will no doubt be an evaluation judgement based on the details of each case.⁶¹ The enquiry of what composes intolerable behaviour is two-fold. Primarily, the worker must justify that there was no deliberate motive to terminate the relationship. Secondly, the Labour Court must look at the action of the employer in its totality.

⁵⁶Labour Relations Act 66 of 1995

⁵⁷*The President of the Republic of South Africa v Reinecke* (2014) 3 SA 205 (SCA) 3.

⁵⁸TG Nkosi 'Constructive dismissal, common law remedies and the changing identity of the employer: A Critique of some of the findings made by the Supreme Court of Appeal' (2015) 48 Vol 1 De jure 232. Available at <http://www.dejure.up.ac.za/index.php/volumes/48-vol-1-2015/39-volumes/48-volume-1-2015/285-the-president-of-rsa-v-reinecke> .It looks like a resignation or ending of the employment agreement by the worker, yet it is a discharge by the employer.

⁵⁹JJ Van Loggerenberg Labour guide, Constructive Dismissal (Jan 2002). Available at <http://www.labourguide.co.za/download-top/75-infosheetsconstructive20dismissal20-20jan2020021> . (Accessed October 2015).

⁶⁰Taylor, Steenkamp & Kantor *Unfair dismissal: misconduct, incapacity and automatically unfair dismissals* Thompson & Benjamin, South African Labour Law Vol 1 (Juta, 2010) AA1-408.

⁶¹Basson & others *Essential Labour Law*. Vol 1 (1998) 111.

The above questions (as per research proposal) are crucial to this study because the most significant element of 'intolerability' in cases of constructive dismissal is that resignation is a matter of last resort.⁶² This criterion is necessary to ensure a strict standard for intolerability.⁶³

It is noteworthy to remember that constructive dismissal claims will only be possible where all internal processes have been exhausted before resignation.⁶⁴ In the case of *Albany Bakeries v Van Wyk and Others*,⁶⁵ the LAC held 'that it would be opportunistic for a worker to leave and claim that it was a result of intolerability when there was a legitimate avenue open to solve his problem'.⁶⁶

2.6 The Test for Constructive Dismissal

The test for assessing the existence of constructive dismissals was detailed in the case of *Pretoria Society for the Care of the Retarded v Loots*⁶⁷ where it was held that 'the enquiry is whether the employer, has created a situation that the worker cannot be anticipated to take it anymore'.

The Constitutional Court also affirmed in the *Liquor Service*⁶⁸ case that the test does not demand that the worker had no discretion in quitting, save only that the employer made continued employment intolerable.⁶⁹

In the case of *Jooste v Transnet*,⁷⁰ it was stated that the worker must demonstrate that the employer's behaviour drove him to end the relationship. This demands a review of the worker's state of mind which is a subjective test. After the worker has discharged the burden of proof, onus then shifts to the employer to establish that the worker's reply was wrong. This is an objective test. In other words, the question is-will such behaviour of the employer is of such degree to have honestly left the worker with no choice but to terminate.

Following from Chapter One, the following chapters are set as follows:

⁶²*Old Mutual Group Schemes v Dreyer and Another* (2009) 20 ILJ 2030 (LAC) 18.

⁶³*Ibid* 18.

⁶⁴*Albany Bakeries v Van Wlyk and others* (2005) 26 ILJ 2142 (LAC) 28.

⁶⁵*Ibid* 28.

⁶⁶*Pretoria Society for the Care of the Retarded v Loots* (1997) 6 BLLR 721 (LAC) 985 A-B.

⁶⁷(Note 54 above) 985 A-C.

⁶⁸*Liquor Services v Mvumbi NO & others* (2009) 30 ILJ 1526 (CC) 4.

⁶⁹*Ibid* 4.

⁷⁰Note 43 above 630 G-H.

- Chapter Two will discuss the broad concept of constructive dismissal, looking at its origins, development and application.
- Chapter Three will focus on intolerable conduct as the reason for the resignation. It will also look at what constitutes intolerable conduct.
- Chapter Four will look at the termination of the employment contract by the worker or the resignation of the worker from work.
- Chapter Five will consider the liability of the employer and the remedies available to the worker.
- The final chapter is the conclusion.

3. CHAPTER THREE

3.1 Introduction

The idea of constructive dismissal is popular in our labour law, and it was recognised long before the promulgation of the Act, albeit in a different form. Before the enactment of the Act, there was no express recognition of the concept. Our courts formerly held that in situations where the worker quits owing to the behaviour of the employer, the ending of the agreement by the worker should be deemed as a dismissal by the employer.⁷¹ The termination of the employment agreement was similar to the termination afforded at common law by one of the parties to the relationship, because of the wrongful cancellation of the agreement by another.⁷²

Thus, if the employer rendered the worker's continued employment unacceptable, 'the employer was terminating the employment relationship and the worker had a preference to accept the contract or accept the cancellation'.⁷³ Based on the above it can be contended that there should be bond a link between constructive dismissal and the wrongful cancellation, because if one just resigns and there is no cause to do so, there would be no constructive dismissal within constructive dismissal at common law, which was abolished by the

⁷¹*Jooste v Transnet Ltd* (1995) 16 *ILJ* 629 (LAC) 639A-B. Myburgh J held that 'in reviewing the history of the concept that constructive discharge is not established in the non-statutory rules, the Labour Relations Act, or in any other South African statute; however the industrial court had far-reaching authority to settle unjust labour practice disagreement regarding the 'worker'; and that the worker should have not had intention to terminate the employment relationship'.

⁷²*Mafomane v Rustenburg Platinum Mines* [2003] 10 *BLLR* 999 (LC) at 47.

⁷³Note 55 above at 724 G-H.

introduction of s 186 of the Act.⁷⁴ It is trite that constructive dismissal is now an established legal principle on its own and is not required to maintain its attachment to the non-statutory rules of unfair cancellation, for its protection.⁷⁵

The issue of constructive dismissal usually raises the issue of constitutional rights, such as the breach of the right to acceptable labour practices that are sanctified in s 23 of the Constitution.⁷⁶ When a worker is constructively dismissed his or her right to fair labour practice is violated. On the other hand, s 186(2) of the Act prohibits any unlawful conduct.⁷⁷ It is important to note that in terms of the Act, constructive dismissal is now arranged in subsection 186(1) (e) and (f) of the Act. Subsection 186 (1) (e) includes in the definition of a constructive dismissal, an incident where ‘a worker ended an employment contract, with or without the warning since the employer made employment intolerable for the worker’.⁷⁸

The Act allows for ‘construction of dismissal’ to provide relief for the worker who was forced (directly or indirectly) to terminate.⁷⁹ The purpose of subsection 186(1) (e) ⁸⁰is to give effect to the rights of workers in terms of s 185(b) of the Act⁸¹, and finally in terms of s 23 (1) of the Constitution, the right not be forced to unfair labour practice.

It is critical to note that the Amendment Act, No 12 of 2002 subsection 186 (1) (f), adds different types of constructive dismissal.⁸² the term “dismissal” was extended to include the termination of the contract of employment by the worker, with or without notice, as a result of the new employer changing the worker’s position in terms of section 197 or section 197A of the Act⁸³, thus presenting the worker with quality or income that were substantially less beneficial to the worker than those granted by the previous employer.⁸⁴ However, since the primary focus of this research is a constructive dismissal in terms of subsection 186(1) (e) of the Act. Subsection 186(1) (f) will not be discussed in detail.

⁷⁴*Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO and Others* (1998) 19 ILJ 1240 at 1242.

⁷⁵*Trengov Mafomane v Rustenburg Platinum Mines Ltd* (2003) 10 BLLR 999 (LC) at 47.

⁷⁶ The Constitution of the Republic of South Africa, 1996.

⁷⁷ S186 of the Labour Relations Act 66 of 1995,

⁷⁸ S186 (1) (e) (f) of the Labour Relations Act 66 of 1995...

⁷⁹ *Murray v Minister of Defence* (2009) 3 SA 130 (SCA) 9 Vol 3.

⁸⁰ Labour Relations Act 66 of 1995

⁸¹ Labour Relations Act 66 of 1995

⁸² Inserted by s45 of the Labour Relations Amendment Act, No 12 of 2002.

⁸³ S197 and 197A of the Labour Relations Act 66 of 1995.

⁸⁴ Section 186(1) (f) of the Labour Relations Act 66 of 1995. See also AH Dekker ‘*Did he jump or was he pushed? Revisiting Constructive Dismissal*’ (2012) *SA Mercantile Law Journal*. 24: 346.

3.2 The Meaning of Constructive Dismissal

Constructive dismissal is defined in Black's Law Dictionary,⁸⁵ as 'a termination of employment caused by the employer offering the workers' working environment intolerable that the worker feels compelled to leave'. In *Turner v. Anheuser, Busch, Inccase*⁸⁶ a United States case, constructive dismissal was defined as follows, 'to establish a constructive dismissal, a worker must plead and prove, by the usual prevalence of the evidence, the testimony must illustrate that the employer either intentionally created or knowingly permitted working conditions that were so intolerable at the time of the worker's termination that a reasonable employer would realise that a sensible person in the worker's position would be compelled to resign'.⁸⁷

The definition of constructive dismissal as stated above highlights that the worker would not have terminated employment of his accord, but rather was forced to do so due to the behaviour of his employer that rendered the continued employment relationship intolerable.

Constructive dismissal as a concept is derived from English law and⁸⁸ was imported into our law in the 80's. English case law had a massive impact on the improvement and investigating of the provisions associated with constructive dismissal in South Africa.⁸⁹ In *Murray v Minister of Defence*⁹⁰, the phrase was explained as follows:

'Constructive dismissal' like in English law, has turned into a well-established concept in our law.⁹¹ In reality, even if the worker terminates, the employer is still the cause for the worker's termination of service, therefore, the employer continues to be liable for the outcome'.⁹²

The unique feature of dismissal concerning constructive dismissal is that it is the worker who terminates, but the termination is not voluntary. Thus, it can be debated that, but for

⁸⁵BA Garner, *Black's Law Dictionary*, Pocket Edition, 4ed, Thompson West (2011).

⁸⁶*Turner v Anheuser, Busch, Inc. California. Supreme Court* 4th 1238, 1251, 876 P.2d 1022 (1994).

⁸⁷*Ibid.*

⁸⁸AH Dekker "Did he jump or was he pushed? Revisiting Constructive Dismissal" (2012).SA Mercantile Law Journal.24: 346.

⁸⁹ See the case of *Malik v Bank of Credit and Commerce International SA* (1998) AC 20 (HL) 58-61.

⁹⁰*Murray v Minister of Defence* (2009) 3 SA 130 (SCA) 12.

⁹¹ Oxford Dictionary of Law 4ed, (1997) under 'constructive': 'describing anything that is deemed by law to exist or to have happened, even though that is not in fact the case'.

⁹²*Murray v Minister of Defence* (2009) 3 SA 130 (SCA) 8.

the intolerable conduct of the employer, the worker would not have terminated. The fundamental principle of constructive dismissal is that, if the employer makes the employment relationship intolerable for a worker, causing the worker to cancel the contract of employment, it will create a dismissal.

Dekker⁹³ suggests that constructive dismissal protects workers against the employer who makes their lives so unbearable that they resign and as a result, forfeit their right of recourse against the employer.⁹⁴ It is noteworthy that the employer's interests should also be protected from disgruntled workers who terminate and use constructive dismissal as a way of getting back at the employer.⁹⁵ This is the reason why the test to decide if the employer created continued employment intolerable is strict.⁹⁶

In *CEPPAWU & Another v Aluminium 2000 CC*,⁹⁷ the LAC examined and interpreted the content of section 186(1) (e) as follows:

‘Constructive discharge means the termination since the working conditions have developed into offensive for the worker as a result of the employer’s behaviour’.⁹⁸

Thus, in our system of labour law, constructive dismissal occurs when a worker is a person who terminates the employment contract and does so due to continued employment having been made intolerable for him owing to the behaviour of the employer.

To successfully rely on constructive dismissal, a worker has to prove three elements, namely⁹⁹:

- a) That the worker ended the employment agreement;
- b) The grounds for the ending thereof was because the continued employment had become intolerable for the worker; and finally;
- c) It was the employer who rendered employment intolerable.

The onus of proving a dismissal is placed on the worker in terms of section 192(1) of the Act, which declares that in any dismissal proceedings, the worker must show the presence

⁹³AH Dekker. ‘*Did he jump or was he pushed? Revisiting Constructive Dismissal*’ (2012) SA Mercantile Law Journal 24: 346.

⁹⁴*Ibid* 346.

⁹⁵*Ibid* 346.

⁹⁶*Ibid* 347.

⁹⁷*CEPPAWU & Another v Aluminium 2000 CC* (2002) 5 BLLR 399 (LAC) 30.

⁹⁸Note 28 above, 30.

⁹⁹Note 82 above, 24: 34.

of that dismissal.¹⁰⁰ This means that a worker who relies on a claim of constructive dismissal will bear the duty of proving all the elements of constructive dismissal, as set out in section 186(1) (e).¹⁰¹

A case of unfair dismissal, either actual or implicit, generally requires a two-stage enquiry.¹⁰² In the first stage, where a determination as to whether the constructive dismissal had taken place. An important question in the second stage is whether the dismissal was unjust. To prevail on the demand that the worker was constructively dismissed, the worker has to prove that the provisions at the workplace were so intolerable that he was left with no other choice but to discontinue the employment contract¹⁰³

3.3 *The Test for Constructive Dismissal*

The test to verify whether or not a worker was constructively dismissed is set out in *Pretoria Society for the Care of the Retarded v Loots*¹⁰⁴ where the court stated that in deciding whether there has been a constructive dismissal:

‘The question to be asked is whether the employer, without sound and proper motive, directed himself/herself in a way likely or prone to damage or severely harm the relationship of trust and hope between employer and the worker’.¹⁰⁵ It is not necessary to prove if the employer planned to cancel the agreement, as stated in the case of *Murray v Minister of Defence*¹⁰⁶. Here, Cameron JA held that with constructive dismissal, once the worker has proved that termination was not voluntary, ‘the question that follows is whether the employer ... had without sound or proper cause behaved himself in a way anticipated or prone to damage or severely harm the relationship of confidence and trust with the worker’.¹⁰⁷

In the case of *Malik v Bank of Credit and Commerce International*,¹⁰⁸ it was held that ‘the employer would not, without sound and proper cause, behave himself in away prone to damage or seriously harm the relationship of confidence and trust between employer and the worker’.¹⁰⁹

¹⁰⁰ *Janda v First National Bank (2006)* (JS511/04) ZALC (84) 11.

¹⁰¹ *Ibid* note 104 above at 11

¹⁰² *Mafomane v Rustenburg Platinum Mines Ltd* (2003) 10 BLLR 999 (LC) 52.

¹⁰³ *Ibid* 52. See also *Eagleton and Others v You Asked Services (Pty) Ltd* [2008] 10 BLLR 1040 (LC) 34.

¹⁰⁴ Note 61 above

¹⁰⁵ *Ibid* 985, A-B.

¹⁰⁶ *Murray v Minister of Defence* [2009] 3 SA 130 (SCA) 8.

¹⁰⁷ *Ibid* 12.

¹⁰⁸ *Malik v Bank of Credit and Commerce International* [1998] AC 20 (HL) 462.

¹⁰⁹ *Ibid* 58-61.

It is the court's role to view the employer's behaviour in its totality and decide if its impact assessed fairly and sensibly, is such that the worker cannot be anticipated to put up with it.¹¹⁰

So, to successfully raise the constructive dismissal claim, the worker must prove at least two things. Firstly, that the employment setting had turned so intolerable that the worker cannot be anticipated to withstand it.¹¹¹ Secondly, the worker had no alternative left in the matter apart from ending the relationship.¹¹²

It is critical to note that when the issue of termination by the worker is considered, the termination of the employment relationship is normally reserved as a solution of the last hope.¹¹³

It has been contended that a worker that quits to avoid an intolerable employment environment, whilst there are obviously other avenues the worker could use to seek relief, would find it very difficult to prove the termination of the work relationship as a constructive dismissal.¹¹⁴ The final examination is to ascertain if the termination was just to end the agreement, in order to avoid the intolerable employment environment, or whether there was some motive not related to the employer's conduct.¹¹⁵ The issue of whether continued employment has become intolerable is based on a value judgement that sometimes depends on the perspective from which it is made. Having learned what the terms are for a constructive dismissal, the question of whether the worker was constructively dismissed or not must be established justly.¹¹⁶

3.4 *The two-stage inquiry*

The determination as to whether a worker is constructively dismissed depends on a two-stage enquiry rooted in the burden of the proof provision enclosed in section 92 of the Act. Firstly, the worker must establish a prima facie case of constructive dismissal by proving that he or she did not resign voluntarily, but rather because the employer dismissed him or her by creating continued employment intolerable.¹¹⁷ In discharging the duty of dismissal,

¹¹⁰J Grogan *Workplace Law* 11ed (2014) 178.

¹¹¹*Mafomane v Rustenburg Platinum Mines Ltd* (2003) 10 BLLR 999 (LC) 49.

¹¹²*Ibid* 49.1.

¹¹³*Ibid* 49.1

¹¹⁴*Ibid* 49.2.

¹¹⁵*Ibid* 49.2

¹¹⁶*Ibid* 49.3.

¹¹⁷*Secunda Supermarket CC t/a Secunda Spar & another v Dreyer NO & others* (1998) 19 ILJ 1584 (LC) 121.

the worker is required to be objective when assessing the employer's conduct. Failure to discharge the above duty of proof has the effect of undermining the worker's case.¹¹⁸ Secondly, the employer must prove that the worker's perceptions of his behaviour were irrational in the circumstances.¹¹⁹ Alternatively, it must be proven that the dismissal of the worker was nevertheless fair. Thus, only once the labour court is satisfied that the worker has made out a case of constructive dismissal does it then evaluate the legitimacy of the dismissal. The responsibility of proof rests with the worker, not with the employer. It remains the worker's burden to prove that the employer made the continuation of the employment relationship intolerable. The worker must have depleted all internal systems to correct the condition before resorting to termination of the contract of employment, on the grounds that the behaviour of the employer was improper, unlawful or both.

It is critical to note that the above two stages of inquiry are, however, not independent of each other and 'are not necessarily water tight compartments'.¹²⁰ In the case of *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & Others*,¹²¹ it was held that 'there are two stages in the same journey and the facts that are relevant in regarding the first stage may also be relevant regarding the second stage. Moreover, there may well be cases where the facts relating to the first stage are determinative of the outcome of the second stage. Either or not this is so is, however, a matter of fact and no general principle can or should be laid down'.¹²²

The purpose of the provision of section 186(1) (e) means the worker needs to have terminated because the employer created continued employment intolerable. There has to be a causal correlation in the intolerable working environment on the one hand and the termination on the other. Only if the worker terminates the employment relationship since continuing employment is intolerable, the termination may comprise a constructive dismissal. If the worker ends the relationship for another purpose, the termination does not include constructive dismissal, regardless of whether the worker's continued employment has been rendered intolerable.

The case of *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd*¹²³ is one such case where the worker did not convince the tribunal about its claim of constructive discharge. The employer, in this case, had changed the worker's conditions and

¹¹⁸Note 105 above.

¹¹⁹*Masondo v Crossway* (1998) 19 ILJ 171 (CCMA) 1791-J.

¹²⁰*Ibid* 61 above, 9841 G.

¹²¹*Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & Others* (1998) 19 ILJ 1240 (LC) 1250-E.

¹²²*Ibid* 1250E.

¹²³*Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd* (2010) 19 (LC) 6.13.1.

requirements of employment and held to be a constructive dismissal. The worker worked in the office of the respondent's CEO as a manager for a year. Another person was appointed as a CEO instead. He was then told that a position of personal assistant to the CEO had been advertised, and she was accorded a preference within two posts in the Human Resource Department. The worker complained that the employer did not want to disclose the particulars of the different positions. Following that, the respondent requested that she take one of the two vacancies and the plaintiff then terminated the employment agreement. She averred that she had been constructively discharged and that the dismissal was automatically unfair as it was positioned on her ethnic background. The Court remarked that the worker was at the outset willing to relocate from the office of the CEO, but had requested that she be assigned to the marketing department. The worker had also been happy to take a change of position in the human resources department, on the equal wages, but had only requested the particulars of those vacancies prior to her termination. The worker's testimony that she had been refused access to a phone was deemed doubtful. However, the behaviour of the employer was found to be justified and the working environment to be tolerable. The demand was dismissed, with no award to payments. In *Chabeli v CCMA & Others*,¹²⁴ the worker alleged to have been constructively dismissed but did not provide any reason in his letter of termination. Only in his founding affidavit did the worker allege that he had terminated since the employer had caused his employment intolerable by making one-sided decisions about his job. The request was however dismissed.¹²⁵

In the case of *Jordaan v Commission for Conciliation, Mediation and Arbitration and Others*,¹²⁶ stated that "with a working relationship, significant altitude of sensitivity, dissatisfaction and pressure certainly happen for an extended course".¹²⁷

3.5 Conclusion

It has been a general practice in the labour market that employers 'throw the book' at workers who for some accidental causes, are 'no longer suitable'. This is a strategic way of getting rid of workers by employing cheaper workforce and pretending that the workers are no longer needed. In most cases, the truth is that cheaper labour can be found without

¹²⁴*Chabeli v CCMA & Others* (2009) 18 LC 6.13.1.

¹²⁵*Ibid* 6.13.1.

¹²⁶*Jordaan v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 2331 (LAC) 2338 C-D.

¹²⁷*Ibid* 2336 D.

difficulties. That's the reason employers can afford to dismiss workers at their leisure. However, employers must take note that although constructive dismissal may be hard to prove, it is not unlikely. Using victimisation, harassment, coercion and undue pressure on the worker and so on, hoping that the worker will eventually terminate, will not work, as protection of workers by the Act is one fundamental piece of legislation that empowers the courts to intervene.

4. CHAPTER FOUR

4.1 *What constitutes intolerable conduct?*

In terms of s 186(1)(e) of the Act, constructive dismissal is where, 'the worker terminated a contract of employment with or without notice because the employer rendered continued employment intolerable for the worker'.

Apart from dishonesty, and breach of trust, misconduct on the part of the employer is also a cause for termination of the contract of employment. As noted in the discussion above, the worker bears the onus of proving that the harm was of such significance that it made it difficult for the worker to carry on with employment. The most difficult challenge faced by the labour courts is to outline what constitutes intolerable conduct for the purposes of constructive dismissal.¹²⁸ The court in *Value Logistic Ltd v Basson and Others*¹²⁹ considered the word 'intolerable' to signal the serious collapse of the employment relationship, which entailed that the worker could not carry on with the employment.¹³⁰

According to Grogan,¹³¹ 'Any kind of severe and continuing unethical behaviour compose cancellation broadly speaking from the worker or employer'. In whichever way, the employment relationship is made intolerable. The worker, in this case, would be left without any alternative but to end the employment contract so as to safeguard his interest. Many employers, once they have proven an act of serious misconduct, assume that there is no need to investigate further by ascertaining if the employment relationship has become intolerable. These employers believe that the intolerability of certain kinds of misconduct is so obvious that it does not need to be spelt out.¹³² However, in some cases where facts

¹²⁸*Minister of Home Affairs v Hambidge* (1999) 20 ILJ 2632 (LC) 12.

¹²⁹*Value Logistic Ltd v Basson and Others* (2011) 10 BLLR 1024 (LC) 60.

¹³⁰*Ibid* 60.

¹³¹J Grogan *Workplace Law 9ed* (1996) 114.

¹³²A Roycroft "The Intolerable Relationship" (2012) 33 ILJ 2271.

are strongly self-demonstrative, there would be no need to prove intolerability as a separate issue.¹³³

In *Dawtre & Another v BBR Security (Pty) Ltd*¹³⁴ the court after careful examination, averred that the word ‘intolerable’ in terms of the Act, has a wider meaning. The court found the meaning to include duress or a breach of an employment contract; this implies that behaviour ‘is not to be suffered’¹³⁵ In the *Jooster*¹³⁶ case, the court equated the term and the principle of ‘behaviour not to be suffered’ with behaviour that the worker cannot be anticipated to put up with. Various courts before the development of the Act¹³⁷ supported the notion of intolerable behaviour as a justification for dismissal.¹³⁸ The most influential source of the idea of intolerability emanated from the case of *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*¹³⁹ where it was averred that,

‘The question to be considered was whether or not what the respondent did have the effect of destroying or of severely damaging the relationship between employer and a worker so that the carryon of that relationship could be regarded as intolerable.’

The idea of ‘intolerability’ is not subjective, as only an employer may view a particular conduct as not being intolerable whereas the judge who is looking at the issue from a different aspect may find it to be intolerable. To the contrary, the court in the case of *Victor v Finro Cash & Carry*¹⁴⁰ held that the test to establish whether the relationship has become intolerable is an objective criterion. The objective test looks at the worker’s understanding of the incident that proves ‘intolerability’ imputed by the employer’s attitude, must be observed with an actual intent.

Van Niekerk et al. ... in *Law@work*¹⁴¹ held that ‘the courts have approved the doctrine that the solution of constructive dismissal is one that the worker pursue to obtain termination and must be carefully understood as contrary the worker’. This suggests that the test is both objective and subjective and is placed at a more advanced stage; and that termination by the worker must

¹³³*Theewaterskloof Municipality v SALGBC (Western Cape Division) & others* (2010) 31 ILJ 2475 (LC) 38.

¹³⁴*Dawtre & Another v BBR Security (Pty) Ltd* (1998) 8 BALR 988 (CCMA) 6.13.10.

¹³⁵ Chambers 20th Century Dictionary 661.

¹³⁶Note 109 above, 629.

¹³⁷Labour Relations Act 66 of 1995.

¹³⁸*Humphries & Jewell (Pty) Ltd v Federal Council of Retail & Allied Workers Union & others* (1991) 12 ILJ 1032(LAC) at 1037 F-H.

¹³⁹*Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC) 589 G-H.

¹⁴⁰*Victor v Finro Cash & Carry* (2000) 21 ILJ 2489 (LC) 2495 I- 2496 A.

¹⁴¹ Van Niekerk & others *Law@work* (2008) at 213.

be a means of last resort. If the worker can prove that the relationship had reached an intolerable stage, making it difficult for the relationship to continue, an arbitrator may find the dismissal to be unfair. But if the employer can prove significant harm to the relationship induced by the misconduct of the worker, the court will construe the dismissal as being fair. In *Numsa oboKhumari v Harvey Roofing Products (Pty) Ltd*,¹⁴² a worker requested permission to make use of a work tool to fix his geyser at home. The worker was not given a reply but he proceeded to take the equipment he needed to fix his geyser home, and he was subsequently dismissed. It was held that the worker had merely borrowed the tool and that this cannot be equated with serious misconduct that could be regarded as intolerable. The dismissal was observed to be unfair.

4.2 Intolerable conduct as the reason for the resignation

It is self-evident from judgements and arbitrations that trust is at the heart of the employment relationship. This means that trust is an essential element.¹⁴³ Once trust has broken down, the working relationship between the employer and the worker becomes unbearable. If the employer is the cause for collapse of the bond in all probabilities the worker is justified in bringing an end to the employment relationship, as without trust the relationship often becomes intolerable. The lack of trust between employer and an employee is an indication that the relationship has become intolerable. In *Amalgamated Pharmaceutical Ltd v Grobler NO & Others*,¹⁴⁴ the employer could not prove that the workers were to blame for loss of stock and yet he had lost confidence in them. It was held that mere suspicion is not a justifiable reason not to reinstate workers.

In a situation where there is long standing trust between the worker and the employer, misconduct by the worker can immediately change the way the employer perceives the worker. In *Holch v Mustek Electronic (Pty) Ltd*¹⁴⁵ it was held that regardless of seven years of committed employment and even though the falsified qualifications were irrelevant to the worker's position, it was rightful for the employer, to consider the worker's dishonesty severe enough to have irreparably damaged the trust relationship. The fraud seriously undermined the relationship and made continued employment intolerable.

¹⁴²*Numsa obo Khumari v Harvey Roofing Products (Pty) Ltd* (CLL Vol. 15 No. 10 May 2006).

¹⁴³*Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) 26E-G.

¹⁴⁴*Amalgamated Pharmaceutical Ltd v Grobler NO & Others* (2004) 25 ILJ 523 (LC) 13.

¹⁴⁵*Holch v Mustek Electronic (Pty) Ltd* (200) 21 ILJ 365 (LC) 66.

The difficulty with the concept of constructive dismissal is determining the point at which the employment relationship has become intolerable. Our law has not been developed in this regard and the courts have preferred to deal with each case on its merits.

In the case of *Puren v Victorian Express*¹⁴⁶, the worker, a floor manager at a restaurant run by the employer, was on duty when the owner of the restaurant had an exchange of words with a senior manager. The owner assaulted the latter by hitting him in the ribs and kicking him in the ‘testicles’. The floor manager lost all respect for the employer and, fearing a similar attack, decided to terminate the contract of employment. She instituted a claim for compensation on the grounds that the employer had created continued employment intolerable for her, therefore leading to her to be constructively dismissed. It was averred that since the employer-worker relationship was based on trust, confidence, and respect, a worker’s witnessing of an employer’s assault on a co-worker could destroy or severely damage that relationship. The Commissioner accepted the subjective belief of the worker that she might be a victim of such an assault in the future. It was held further that the employer’s behaviour, judged objectively, made employment intolerable. The objective evaluation of the employer’s action that might have created an intolerable working situation must be evaluated in its entirety, as stated in *Chabeli v CCMA & Others*¹⁴⁷. This stance was later confirmed by the Supreme Court of Appeal. It held that courts are to examine an employer’s behaviour in its entirety to decide whether, if examined fairly and realistically, would be so bad that the worker could not be expected to handle it.¹⁴⁸

Despite these gains in an attempt to clarify things, there is still a lot of uncertainty about the principle of objectivity. In the case of *Pretoria Society for the Care of the Retarded v Loots*,¹⁴⁹ it was affirmed that the test is objective and that the personal doubt of a worker (in other words subjectivity) cannot be a final deciding factor. It would be unjust to an employer to permit a worker’s subjective perception of his behaviour (especially when the opinion turns out to be incorrect), to be the deciding element in punishing the employer in terms of the Act.

¹⁴⁶*Puren v Victorian Express* (1998) 19 ILJ 404 (CCMA).

¹⁴⁷*Chabeli v CCMA & Others* (2010) 31 ILJ 1343 (LC) 17.

¹⁴⁸*Murray v Minister of Defence* (2008) 11 BCLR 1175 (SCA) 12.

¹⁴⁹Note 93 above, 981 (LAC).

In the case of *Courtaulds Northern Textile v Andrew*,¹⁵⁰ the supervisor humiliated the worker so much so that the worker terminated the contract of employment and claimed constructive dismissal. The Employment Appeal Tribunal established that the supervisor's remarks did not reflect an actual assessment of the worker's ability and held the following,

‘there is an implied term of the contract of employment that employers will not do without sound and proper cause, conduct themselves in a manner calculated or prone to destroy or seriously harm the relationship and confidence and trust between the parties, this must be a substance that goes to the root of the contract’

From this assertion of the Employment Appeal Tribunal, one can draw an inference of intolerable conduct to have a wider scope than behaviour that merely requires a breach of contract or some coercion or duress. In other words, intolerable includes unacceptable or painful conduct. About employment, one could suggest that it concerns the circumstances in which the relationship between the worker and his employer has deteriorated due to the behaviour of the employer. By and large, it can be deemed to embrace the circumstances in which the employer's action created the continual and future bond between the worker and the employer impossible.

In the *Pretoria*¹⁵¹ case, the Labour Appeal Court dealt with constructive dismissal in terms of s 17 (21A)(a) of the Act¹⁵² because the worker instituted proceedings against the employer in terms of s 46(9) of the Act¹⁵³ and laid down the following points,¹⁵⁴

(a) When a worker ends the agreement of employment because of the intolerable conduct, the worker is alleging that the relationship has developed into an unacceptable state that the worker cannot accomplish his responsibilities, namely to perform his duties. The assertion of the worker must be that he ‘would have carried on working indefinitely had the unacceptable situation not been created.’

(b) The worker terminates the agreement because of a strong belief that the employer is not going to change or give up ‘the tendency of making his life a living hell at work. If the employee is mistaken in his belief and the employer showed that the worker's apprehension were not based on facts and that he has in fact ended the employment contract’.

¹⁵⁰ *Courtaulds Northern Textile v Andrew* (1979) IRLR 84, 86.

¹⁵¹ Note 138 above, 985.

¹⁵² Labour Relations Act 28 of 1956.

¹⁵³ Note 138 above.

¹⁵⁴ Note 139 above.

(c) If the worker establishes the existence of intolerable employment conditions, the worker can claim constructive dismissal on the basis that the employer rejected the agreement officially.¹⁵⁵

(d) It is the employer's wrongful behaviour that brought about the premature stoppage of service and the acceptance by the worker of the employer's rejection of the contract of employment. The two suggested steps are not ever readily dissociable as the interrogation into (i) whether the worker meant to end the employment contract in accepting the rejection, will always involve an examination into (ii) whether the termination was voluntary or not.¹⁵⁶

(e) In deciding if a worker was constructively dismissed the court will first ascertain if we are to trust the worker's evidence of intolerable work environment or if it is the employer's attestation that the worker, in fact, did terminate, which should be trusted.¹⁵⁷

(f) The question that follows is whether the employer behaved himself, without justifiable reasons in a manner that harms the affairs of assurance and hope.¹⁵⁸ It is not essential to demonstrate that the employer meant to reject the agreement. The court must view the employer's behaviour in its entirety and ascertain if the action is so severe that the worker would find it difficult to endure. The previously mentioned considerations do not provide any practical test for deciding when an employer's behaviour is so intolerable that the worker would find it difficult to endure.

The case of *Pretoria Society for the Care of the Retarded v Loots*¹⁵⁹ provided an example of a case in which the Labour Appeal Court found that an employer has behaved so badly that the worker was driven to terminate. While Mrs Loots was on leave, the employer enquired from her subordinates whether they were happy with her. The employer then started compiling a file against her. She was positioned under precautionary suspension pending a disciplinary enquiry. At the time of her suspension, Mrs Loots was refused access to the office and documents she needed to prepare a defence. At the hearing, Mrs Loots was found guilty on some charges including misconduct and poor work achievement and sanctioned with a final written warning a month later when she was allowed to return to work. On her return, she was deprived of her office keys and relieved

¹⁵⁵*Ibid* 139.

¹⁵⁶*Ibid* 139

¹⁵⁷*Ibid* 139

¹⁵⁸*Ibid* 139

¹⁵⁹Note 140 above, 983 G.

of her duties. To add 'insult to injury', the final warning with which she was issued was published in the employer's newsletter without mentioned the fact that Mrs Loots had appealed against the sanction. Mrs Loots terminated the contract of employment and launched a case of constructive dismissal against her employer. The finding of the court is that the employer had engaged in a course of action in which Mrs Loot's termination amounted to a constructive dismissal. With the above said, there has to be some link between the employer's behaviour and the situation that influenced the worker to terminate.¹⁶⁰ Such situation may be as the result of an act or failure on the part of the employer. The same assertion was confirmed in *Murray V Minister of Defence*¹⁶¹ case; the tribunal stated that the employer is not only answerable for the situations that influence the worker to terminate, but must also be held against those circumstances. The court found that while the Navy could not be blamed for court-martialing Commander Murray due to allegations made by displeased subordinates, it had made his life intolerable by downgrading his position. The court held that the Navy had breached its common law duty to treat Murray somewhat fairly, and rendered his termination a constructive dismissal.

In *Van Tonder v Barnard & Van der Merwe*¹⁶² attention is drawn to another type of conduct by the employer. The Commissioner was tasked with determining if the worker was constructively dismissed. The worker was employed by the respondent's medical practice as a general practitioner. She had a romantic relationship with one of the associates. Here the worker was forced by the employer to terminate after the employer's wife found out that the worker and her husband (the employer) were having an affair. The court stated that the reality that there was an affair between the two of them did not afford the employer the right to apply pressure on the worker. Therefore, she was dismissed constructively¹⁶³ and as a result she was compensated.

It is not possible to draw up a complete list of examples of employer's behaviour that renders the situation intolerable for workers. The following is conduct that has been confirmed by the courts and arbitration institutions in ruling in favour of constructive dismissal cases; (i) contain a proposition of substandard employment combined with a threat of dismissal if the worker did not welcome the proposal, (ii)

¹⁶⁰ *Mafoane v Rustenburg Platinum Mines Ltd* (2003) 10 BCLR 999 (LC) 57.

¹⁶¹ *Murray V Minister of Defence* (2008) 29 ILJ 1369 (SCA) 25.

¹⁶² *Van Tonder v Barnard & Van der Merwe* (2007) 9 BALR 847 (CCMA) 59.

¹⁶³ *Groenewald v Cradock Munisipaliteit* (1980) 1 ILJ 269 (E) G.

unauthorised subtraction from a worker's salary.¹⁶⁴(iii) A salary restructuring that resulted in a substantial increase in a worker's tax liabilities would constitute constructive dismissal.¹⁶⁵(iv) The recommendation of another job which has a lower salary scale,¹⁶⁶(v) pressurizing the worker to accept a lower level post at no change in wage or gains;¹⁶⁷(vi) all forms of harassment, include those related to sexual assault(vii) failing to stop workers from smoking where there are asthmatic workers;¹⁶⁸(viii) instructing a worker to execute unlawful acts;¹⁶⁹(ix) smack a worker across the face in the presence of colleagues, and (x) putting undue pressure on the worker to terminate,¹⁷⁰ not an exhaustive list.

Recent development in the law regarding constructive dismissal puts pressure on employers to realise that they must be careful in their dealings with workers in the workplace. Workers should also understand that all requirements of constructive dismissal have to be met before they can be compensated. The basic approach of our courts (and now also of the CCMA) to constructive dismissal has been, and remains to be one of caution. The latest developments indicate that constructive dismissal cases are now given the attention they deserve.

4.3 Conclusion

Misconduct is another condition that could make the continued employment relationship intolerable. Included within 'misconduct' is a breach of trust or dishonesty-which would be a situation where a co-worker sexually harassed another colleague that result in their working relationship damaged or harm the employer's reputation. But the employer carries the burden of proving that the injury was severe enough to create continued employment intolerable.

5 CHAPTER FIVE

5.1 Introduction

¹⁶⁴*Small & Others v Noella Creations* (1986) 7 ILJ 614 (IC) 6-11.

¹⁶⁵*Copeland and New Dawn Prophecy Business Solutions* (2010) 31 ILJ 204 (CCMA) 204.

¹⁶⁶*Mhlambi v CCMA & Others* (2006) 27 ILJ 814 (LC) D.

¹⁶⁷*Bhana and Columbus Stainless (Pty) Ltd* (2005) 26 ILJ 1793 (BCA).

¹⁶⁸*Naude & Stealth Marine* (2004) 25 ILJ 2402 (BCA).

¹⁶⁹*Bonthuys and Central District Municipality* (2007) 28 ILJ 951 (CCMA). With approval in A Rycroft, 'Corporate bullying, Workplace bullying: unfair discrimination, dignity violation or unfair Labour practice'. (2009) 22nd Annual Labour Law Conference 2009

¹⁷⁰*Fourie v Booyens t/a HB Makelaars* (1995) 7 BLLR 55 (IC) 33.

The termination of the employment relationship by a worker has fast become a norm for those who are no longer happy at their current employment. This is done so that there can be a claim of constructive dismissal. When workers terminate their contract of employment, they attach some condition to their termination as a sly way of ‘playing it safe’ for a claim of constructive dismissal. Some workers just refer the matter to the CCMA and claim constructive dismissal. Sadly workers who terminate of their own free will later discover that they have lost their right to claim against the Unemployment Insurance Fund as they were not dismissed. In some instances, the worker then begins to fabricate stories to convince the CCMA that there was constructive dismissal.

Constructive dismissal has many classic forms such as demotion, reduction in remuneration, undue pressure, sexual harassment and many more. If the worker is subjected to some form of pressure to resign this would constitute a constructive dismissal. This chapter will focus on the employer putting pressure on the worker to terminate.¹⁷¹

At times, the employer places undue pressure on a worker to resign. Such action would allow the worker to claim constructive dismissal since this would constitute intolerable conduct. However, the burden to prove that the employer has brought undue pressure on the worker to resign lies with the worker himself. When making out a prima facie case of constructive dismissal, it is important that the worker who has resigned ‘show that he did so because he was subjected to such duress, pressure, force or the threat thereof’.¹⁷² However, in the *Jonker*¹⁷³ case, it was held that ‘even if the court finds that constructive dismissal took place such finding does not mean that the dismissal was unfair’ because constructive dismissal is not regarded as separate from any other dismissals.

In *Schana v Control Instruments (Pty) Ltd*¹⁷⁴ the worker alleged that, even though he resigned, he did not voluntarily do so as he was pressured by the employer’s management through the letter of resignation that had been drawn up by them for the worker to sign. The court did not support this contention as there was insufficient evidence in support of force, fear, pressure or undue influence, but it did find that the worker had enough time to consider his future. The court concluded that the employer was within its rights to protect its interest and to ensure that its Boksburg branch was being properly managed, by holding

¹⁷¹Note 59 above, 638 B.

¹⁷²*Dalgleish v Ampar (Pty) Ltd t/a Sel Energy* (1995) 11 *BLLR* 9 (IC).

¹⁷³*Jonker v Amalgamated Beverages Industries* (1993) 14 *ILF* 199 (IC) 211 H.

¹⁷⁴T Ngcukaitobi <http://www.heinonline.org/HOL/CSV.csv? Index=journals collection=journals>: (Accessed November 2015).

a disciplinary enquiry that could not be interpreted as undue pressure or a form of coercion. In this case, the employer intended to hold a hearing on the ability and mental capacity of the worker to handle the affairs of its business. It is arguable that the worker had signed the letter of his free will¹⁷⁵ since the worker terminated before the enquiry took place. The court held that the worker did not need to terminate the relationship but was required to attend the hearing to answer the alleged charge against him.¹⁷⁶ Further retained that his termination did not emanate from constructive dismissal and that the employer did not carry out whatever unfair labour practice¹⁷⁷ as there was no compulsion placed by the employer upon the worker.

The court in *Dallyn v Woolworth*¹⁷⁸ case held that, to conclude that the worker was forced to resign, certain factors should be taken into consideration. These include “the timing of the resignation, the education and literacy of a worker, and the availability of other assistance”. The worker cannot wait for an extended period while the intolerable behaviour is taking place, and then suddenly terminate the contract of employment and claim constructive dismissal-timing is of the essence. The same applies when the worker still has options other than resignation available, as was stated in *Dark and Ex Hex Boerdery*¹⁷⁹ case where a worker was offered the option of resigning with five week’s pay to avoid possible dismissal for poor performance. It was held that the worker still had the opportunity of defending himself at the disciplinary proceedings so resignation was not his last option. Therefore, his resignation was not a constructive dismissal. However, in *Strategic Liquor Service v Mvumbi*¹⁸⁰ case, the court was satisfied on the evidence presented that the worker was not accorded a real ‘preference’ either to termination or being charged with poor achievement proceedings. The evidence showed that the substitute to termination was counterfeit and that the employer would have found another excuse to dismiss the worker in any event. His resignation was thus deemed to be a constructive dismissal. One can draw the presumption from the above cases that it is not effortless to prove force from an employer on a worker to terminate.

5.2 Resignation to avoid disciplinary action

¹⁷⁵ Schana page 638.

¹⁷⁶ Schana page 644.

¹⁷⁷ Schana page 644.

¹⁷⁸ *Dallyn v Woolworth (Pty) Ltd* (1995) 16 ILJ 696 (IC) 6.

¹⁷⁹ *Dark and Ex Hex Boerdery (Pty) Ltd* (2008) 29 ILJ 3092 (CCMA), g y.

¹⁸⁰ *Strategic Liquor Service v Mvumbi NO and others* (2010) 2 SA 92 (CC) 4.

It looks like there is a developing trend on the part of the workers who are subjected to a punitive action for some perceived wrongdoing; the worker chooses to terminate even prior the discipline being conducted. In most cases, the worker ends the agreement and lays a dispute with the CCMA, claiming constructive discharge.

The long-standing question is whether the worker who is faced with disciplinary action, or who terminates the contract of employment before, during or after such enquiry, can still lay a dispute of unfair dismissal to the CCMA.

The worker has the right to terminate at any time provided that such resignation is not in breach of his contract of employment. A resignation from employment before disciplinary action will not always constitute constructive dismissal. Unless the worker can prove, through proper consideration of the evidence, that the result of the disciplinary action would be that of a dismissal, in any event, the worker cannot claim constructive dismissal.

In *Kynoch Fertilizers Limited v Webster*¹⁸¹ case it was held that when the worker tendered his termination, his intention was to terminate and that the employer's acceptance of his termination constituted an agreement of cessation of the employment agreement. After deciding on his prime, the worker cannot demand to be qualified to both options.

However, if the employer immediately accepts the worker's termination, it might appear as if pressure has been applied since workers do sometimes make hasty, ill-considered decisions. The employer should, at least, allow the worker to reconsider and, if the worker is determined to terminate as he was in this case, per Ramodibedi J, "termination is a unilateral act and no person may be forced to remain in the employment of an employer against his will".¹⁸² The employer may then proceed to accept the termination that should be confirmed in writing.

In *Gobey v Gunkaer-Duraset*¹⁸³ case the court held that the worker's termination following after unfair counselling did not amount to constructive dismissal as, on his admission, he admitted that he had smoked in a non-designated area and that he was aware of the smoking policy in this field.

Three important issues are highlighted by this case:

- (i) There was a designated area for smoking;

¹⁸¹*Kynoch Fertilizers Limited v Webster* (1998) 1 BLLR 27 (LAC).

¹⁸²*Pekeche v Thabane and Others* CIV/APN/259/98.

¹⁸³*Gobey v Gunkaer-Duraset* (2007) JOL (19017) 2.

- (ii) The smoking policy and the consequences for disobeying it was made known to all workers;
- (iii) There was a sanction for breach of such policy.¹⁸⁴

If the worker terminates with immediate effect before a disciplinary hearing, the contract of employment is brought to an end and there is no point in proceeding with the disciplinary procedure relating to the worker who is no longer employed. It is imperative that, in cases of serious wrongdoing, all disciplinary information is kept for at least one year in case the worker decides to demand constructive dismissal. Terminating to escape punitive action would not support a demand for constructive dismissal that requires proof that the employer's behaviour was intolerable. Opted termination will not result in itself constructive dismissal. In *Hickman v Tsatsimpe NO & others*¹⁸⁵ it was held that where a worker "terminates rather than face a disciplinary action" it would not compose constructive dismissal. However, in *SALSTAFF & Another v Swiss Port South Africa (Pty) Ltd & Others* case¹⁸⁶ the court took a different view. The applicant was coerced into terminating and was told that if she did not sign the agreement of termination, her employment would be made unbearable. The court found this to be constructive dismissal, endorsing that workers are not expected to endure horrible employment conditions.

5.3 Failure to follow internal procedures

Courts have made it very clear that employees who find themselves in intolerable situations must by all means seek to resolve the issue with the employer through the available internal grievance procedures. Termination must be utilised only as a last resort, which is the most significant element of intolerability¹⁸⁷ in cases of constructive dismissal. This was confirmed in *Albany Bakeries Limited v Van Wyk*¹⁸⁸ case, where the decision of a worker to leave work because of the abusive work relationship has to be the last resort and that this should not be a platform for the worker to leave his employment and demand that this was as a result of intolerability while there were avenues available to solve the issues. The courts deem that it would be fair for the worker to afford his employer an opportunity to resolve the issues.

¹⁸⁴Note 4 above.

¹⁸⁵*Hickman v Tsatsimpe NO & Others* (2012) JOL 28314 (LC).

¹⁸⁶*SALSTAFF & Another v Swiss Port South Africa (Pty) Ltd & Others* (2003) 3 BLLR 295 (LC).

¹⁸⁷*Van Niekerk & others Law@work* (2008) 213.

¹⁸⁸*Albany Bakeries Limited v Van Wyk* (2005) 26 ILJ 2142 (LAC) 28.

However, it should also be noted that, in some instances, it cannot be reasonable to expect the worker to follow the internal grievance procedure. This point was made clear in *Pretoria Society for the Care of the Retarded v Loots*¹⁸⁹ stated that if the worker justifiably believes that the employer will never reform or stop the behaviour that creates the intolerable work environment; he does not have to subject himself to internal grievance procedures.

In the ordinary course, for a worker to win in the case for constructive dismissal, all internal processes should have been exhausted before termination. In *Aldendorf v Outspan International Ltd*¹⁹⁰ case, a worker who could reasonably have lodged a grievance but failed to do so before terminating could not persuade the arbitrator that he had no alternative but to terminate. However, the court in the *Albany Bakeries*¹⁹¹ case did not follow the decision in the *Aldendorf* case. In *LM Wulfsohn Motors*¹⁹² case, the worker did not follow the internal grievance procedure before she terminated the contract of employment, and demanded constructive dismissal because she knew that it would make no difference. The court held that the failure to lay a complaint did not influence her claim for constructive dismissal as this would have made no sense since the outcome was pre-determined. The court adopted the same view in *Strategic Liquor Services v Mvumbi NO and Others*¹⁹³.

A worker condemned for his poor work performance was given the choice of terminating with a clean disciplinary record or undergoing training and counselling. The worker terminated and alleged that it was pointless to continue in employment if he was to be fired in any case. The court held that section 186(1) (e)¹⁹⁴ of the Act does not link this concept with “the last resort”, therefore intolerable working conditions existed even where there was another option available to the worker. But, as stated by Van Niekerk¹⁹⁵, ‘the most significant element of intolerability’ in cases of constructive dismissal is that termination is a matter of last resort.

5.4 One-sided modification to terms and conditions of employment contract

¹⁸⁹*Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 1 (LAC) 724; *Old Mutual Group Schemes v Dreyer and Another* (2009) 20 ILJ 2030 (LAC) 18.

¹⁹⁰*Aldendorf v Outspan International Ltd* (1997) 18 ILJ 810 (CCMA 176-177).

¹⁹¹*Albany Bakeries Limited v Van Wyk* (2005) 26 ILJ 2142 (LAC) 28.

¹⁹²*LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others* (2008) 29 ILJ 356 (LC) 1.

¹⁹³*Strategic Liquor Services v Mvumbi NO and Others* (2010) 2 SA 92 (CC) 4.

¹⁹⁴Labour Relations Act 66 of 1995.

¹⁹⁵Van Niekerk & others *Law@work* (2008) 213.

The term dismissal was stretched out by section 41 of the Amendment Act 12 of 2002, to include, under section 186 (1) (f) of the Act, termination of a contract of employment by a worker, with or without notice, because the new employer ‘provided the worker with conditions or circumstances at work which were substantially less favourable to the worker than those supplied by the old employer’.

It is usually the case that when one company acquires or takes over another company, the purchaser will restructure certain areas of its new business that will have an inevitable effect on the current workers. Regarding statutory law, employers are prohibited from unilaterally changing the conditions of employment of a worker. Any changes should be made through consultation with workers affected. The Act¹⁹⁶ states that, ‘any worker or trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a):’

(a) Require the employer not to apply the one-sided change to terms and conditions of employment; or,

(b) If the employer has already implemented the change unilaterally, ‘require the employer to restore the conditions of employment that applied before the change’.

In *Staff Association for the Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd*¹⁹⁷ case, it was held that, regarding section 64 of the Act¹⁹⁸, workers should prove that unilateral changes to the terms and conditions were actuated and that there was no consent from workers to the change. ‘One-sided’ in terms of s 64 (4) of the Act¹⁹⁹ means ‘without consent’. Unilateral change is treated as the subject of collective bargaining in the context of s 64(4) of the Act.²⁰⁰ In *SAPU & another v National Commissioner of the South African Police Services & Another*²⁰¹, it was held that workers

¹⁹⁶Labour Relations Act 66 of 1995.

¹⁹⁷*Staff Association for the Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd* (1998) 6 BLLR 616 (LC) 16.

¹⁹⁸Note 194 above.

¹⁹⁹*Ibid* note 194 above

²⁰⁰*Ibid* note 194 above

²⁰¹*SAPU & another v National Commissioner of the South African Police Services & another* (2006) 1 BLLR 42 (LC). See also Unilateral Changes to terms and Conditions of Employment, <http://retrenchmentassist.co.za/index.php/ra-newsletters/113-unilateral-changes-> (accessed December 27, 2015).

are not prohibited from challenging their legal remedies in the labour court or high court, in terms of section 77 (3).²⁰²

5.5 Conclusion

It has become a norm that unhappy workers quit their jobs and claim that they have been constructively dismissed. More and more workers, when they terminate, attach some condition to their termination as a diplomatic means of 'playing it safe' for a demand for constructive dismissal. Once the above have been acknowledged, the workers and employers should take into consideration the implications of unilateral changes to terms and condition of employment that could result in a breach of the employment contract.

6. CHAPTER SIX

6.1 Introduction

The primary target of this chapter would be the three solutions for wrongful dismissal as asserted in section 193 of the Act.²⁰³ They are compensation, re-employment and reinstatement.

Re-employment and reinstatement are central solutions for wrongful dismissal as expressed by s 193 of the Act.²⁰⁴ When s 193 and subsection 2(a) to (d) of the Act are present, which states that?

- (a) 'the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a carry on employment relationship would be intolerable;
- (c) It is not reasonably practicable for the employer to reinstate or re-employ the employee, or
- (d) the discharge is unjust because the employer did not adhere to a proper process" the solutions of compensation would apply. It will be proved, from precedent, how these solutions for wrongful discharge had been explained to accord firmness to the labour relations order'.

6.2 Reinstatement

²⁰² Basic Conditions of Employment Act 75 of 1997.

²⁰³ Labour Relations Act 66 of 1995.

²⁰⁴ Labour Relations Act 66 of 1995.

Unfair dismissal will attract reinstatement as a central resource, but it is not accepted as the correct solution especially in situations encompassing the dismissal that are such that carrying on the employment relationship would be intolerable. Looking at the extreme character of the connection, in a demand of constructive dismissal, I do not accept reinstatement as a correct solution in such a case and such solution would be that in ordinary cases, where the relationship has broken down, this would not be applicable.

In the *Western Cape Education Department v General Public Service Sectorial Bargaining Council and Others*,²⁰⁵ the tribunal had to examine if reinstatement was a useful solution for a worker that claims constructive dismissal. Here, ‘the worker had been employed by the Western Cape Education Department for 23 years’. In 2003, the worker had a heart attack, which caused him being treated with post-traumatic stress disorder and clinical depression. In 2007, the worker requested leave for ill-health and interim incapacity, from the employer. In the period between 2007 and 2009, the worker wrote a letter to the department regarding his application. He was told that, as the result of a mistake caused by the department, they could not find his application. He was asked to re-submit his application for interim incapacity leave. Three months later the worker re-submitted the application. The department refused to accept the application on the basis that it was too late and furthermore, the department informed the worker that leave he had taken would be deemed as unpaid leave and money paid to him would deduct from his salary monthly.

The worker launched a grievance about the manner in which the department handled his application and the results from the grievance were negative. He terminated and referred the matter to the Bargaining Council. The arbitrator held that the worker had been constructively dismissed since the department’s deduction from his salary left the worker with no money thus creating an intolerable circumstance, thereby justifying the worker’s termination. The arbitrator instructed the reinstatement of the worker. The employer referred the matter for re-examination to the Labour Court, contending that the award of reinstatement was contrary to the termination by the worker. The Labour Court found that as the situation that caused the worker’s termination was an excessive deduction that would not prevail anymore, and that reinstatement would be appropriate. After the termination and the intolerable does not exist any longer.

²⁰⁵*Western Cape Education Department v General Public Service Sectorial Bargaining Council and Others* [2013] 8 BLLR 834 (LC) 4.

Section 193(2) of the Act²⁰⁶ states it beautifully, that reinstatement is the favoured solution for wrongfully dismissing a worker, and that payment must be given once the exception in Section 193 (2) (a) to (d) of the Act²⁰⁷ applies. If the indicated exceptions are present, reinstatement cannot be ordered. If the arbitrator is to determine whether the exceptions do apply, such must be done on the grounds of proof, not simply on an opinion without sufficient evidence.

If the arbitrator discovered that a worker had been unfairly dismissed, he/she might instruct the employer to reinstate the worker retrospectively from the date of dismissal. Or the order may be such that, the employer re-employ the worker in the job that the worker was doing at the time of his/her discharge, or in any reasonable good enough job on any terms, from the date of dismissal.²⁰⁸

The term “reinstatement” entails that an order of reinstatement must not be accompanied by conditions or qualification of some sort, other than full retrospectively. . In *Maepe v CCMA & Another*²⁰⁹ CCMA Commissioner was charged with sexual harassment, improper or disgraceful conduct and he was dismissed. On appeal, he was cleared of the sexual harassment and disgraceful conduct charges, but because he lied under oath, he could not be reinstated and the Labour Appeal Court held that it was not appropriate to reinstate him and that:

- The court can take into account the worker’s conduct after the dismissal.
- Part of his duty as a CCMA commissioner was to oversee oaths- the fact that he himself lied under oath was very relevant.
- The court said it could not order reinstatement.

An order of reinstatement does not last indefinitely, as the employer can still at a later stage reassign or amend the conditions of employment in conformity with its lawful rights. In *Jeremiah v National Sorghum Breweries*²¹⁰, the worker objected to the employer’s proposal to reassign him to a different position within the organisation and giving him a dissimilar car. The court believed that regardless of an award of reinstatement, the employer

²⁰⁶Labour Relations Act 66 of 1995.

²⁰⁷Labour Relations Act 66 of 1995

²⁰⁸*Equity Aviation Services (Pty) Ltd v CCMA and Others* (2008) 29 ILJ 2507 (CC) 36.

²⁰⁹*Maepe v CCMA & Another*(2008) 8 BLLR 723 (LAC) 2

²¹⁰*Jeremiah v National Sorghum Breweries* [1999] 20 ILJ 1055 (LC) 1058 I.

still maintained the right to re-deploy the worker or amend his working conditions that emanated from the initial agreement.

In *Trident Steel (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*²¹¹, the employer desired to inspect the verdict of the Commissioner-employing the worker reflective from the date of his dismissal. The worker continued to be off from work from the 4th January to 7th March 2000. What happened was that the firm conducted a disciplinary hearing into his nonattendance at work without leave and dismissed the worker in his absence. When the worker returns to work on the 7th of March 2000, a second disciplinary hearing was conducted by the employer and established that the respondent was blameworthy of nonattendance at work without leave and by not letting the employer know of where he was, and he was subsequently dismissed for the second time.

The worker, during his absence from work, was incarcerated from 23 December 1999 until just before his reappearance at this place of work in March 2000. The Commissioner contended that the first disciplinary inquiry did not follow the correct procedure as the employer knowingly dismissed the worker during the time he was incarcerated. The Commissioner dismissed the employer's disclaimer of its awareness of the worker's incarceration during his absence. The commissioner, however, did welcome the worker's explanation that he was in prison and had no way to contact the employer during the time he was incarcerated, as reasonable. The commissioner considered the fact that the worker had never committed any wrongdoing, the number of years in employment, and took into account that the employer suggested to re-employ the worker if a position became available. As such, the employment bond could not be seen as intolerable. Therefore, the court could not find anything incorrect from the Commissioner's decision to confirm the dismissal to be unfair. Moreover, punishing the worker for unlawful conduct twice, when coming back to work with a valid explanation, was unfair.

The court found, however, that the Commissioner had failed to take into account that incarceration suspends the obligation of the employer to pay the worker a salary for the period of his incarceration. The court as a consequence supported the order condition, of the subtraction of the wage rewarded for the above duration.

²¹¹*Trident Steel (Pty) Ltd v CCMA* (2005) 26 *ILJ* 1519 (LC) 492-493.

*Trident*²¹² case demonstrates a critical mark for employers in the event of their workers who are without leave as a result of incarceration. It also warns employers aiming to bring a disciplinary enquiry against the workers to allow them a chance to give reasons as to why they did not contact their employer e.

6.3 Retrospective reinstatement

This Concept that has split both the Labour Court and Labour Appeal Courts for an extended period, until the Supreme Court of Appeal and the Constitutional Court came to rescue the situation by giving certainty and direction in this area of labour law. In *Kroukam v SA Air link (Pty) Ltd*²¹³, a worker employed by the respondent's company as a pilot, was found guilty of being 'disobedient' and having an unruly influence in the operation of the enterprise'. He was subsequently dismissed. The worker, during the period of dismissal, belonged to the trade union 'Airlines Pilots Association.' He held the position of Chairperson of the union. The worker argued that his dismissal was automatically unfair in terms of s187 (1) (d) of the Act²¹⁴ since he had been dismissed for union-related tasks and instituted a grievance against the employer for the benefit of the union. The Labour Court found the worker's argument to be without value. The worker went to the Labour Appeal Court, despite two judgements, Zondo JP and Davis AJA held that the worker's dismissal was undoubtedly unjust. They followed a dissimilar thinking to the way in which undoubtedly unjust dismissal must be dealt with by the tribunals and the retrospectivity of relief allowed by the courts.

After a thorough evaluation of proof, Zondo JP wrapped up that one of the grounds why the worker launched a grievance against the employer does relate to his union activities. He was of the opinion that where the reasoning or grounds for the dismissal of a worker, involve one or two reasons in terms of section 187 (1) (d) of the Act²¹⁵, the discharge would be undoubtedly unjust. Concerning solution, Zondo JP considered what the worker desired, which was reinstatement, as long as the concerns set out in section 193 (2) (a) to (d) of the Act does not apply. Section 193(2) of the Act states that the Labour Court or the arbitrator should order the employer to reinstate or re-employ the worker except in a situation where:

²¹²Note 197 above.

²¹³*Kroukam v SA Air link* (2005) 12 ILJ 2153 (LAC) 2212 H-I.

²¹⁴Labour Relations Act 66 of 1995t.

²¹⁵Labour Relations Act 66 of 1995.

- (a) 'The worker 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 worker or
- (d) The dismissal is unfair only because the employer did not follow a fair procedure'.

Based on this section, the court was duty-bound to grant reinstatement. It was crystal clear from the expression of section 193(2) of the Act, that the tribunal had no alternative whether or not to award reinstatement in similar situations.

Given the duration of retrospectivity, Zondo JP, differing with Davis AJA's perspective, held that the tribunal is right to order reinstatement²¹⁶ that operates with retrospective consequence till the period of dismissal, no matter whether it exceeded 24 months for disputes of undoubtedly unjust dismissal, and 12 months on different cases of unjust dismissal.²¹⁷ Zondo's perspective of Section 194(1)²¹⁸ of the Act retains the bulk of repayment to a total proportionate to 24 and 12 months payment correspondingly. Zondo JP's²¹⁹ view of section, 193 of the Act, is that it must be deduced to express that, an award of reinstatement can work retrospectively to the period of dismissal or up to 24 months or 12 months reflectively whatever the situation may be. Zondo JP further declared that this development would harmonise the arrangement of section 193 and 194 of the Act.

It is indisputable that re-employment will not be awarded when the employment relationship has collapsed and the situation made by the employer is said to harm the confidence of the relationship. Re-employment will not be awarded in constructive dismissal disputes since it is not an approved remedy for the behaviour that has been made intolerable, the last choice would be to place the worker back in that position.

6.4 Re-employment

The Act²²⁰ is not clear as to what situation re-employment could be awarded, some-what instead of reinstatement, neither is the phrase illustrated in the Act. In *Consolidated Frame*

²¹⁶ Reinstatement in South African Labour Law, Mediterranean Journal <http://www.mcser.org/journal/index.php/mjss/article/download/2636/2604> (accessed December 27, 2015).

²¹⁷ *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd* (2005) ZALAC 14 (LAC).

²¹⁸ Labour Relations Act 66 of 1995.

²¹⁹ *Equity Aviation Services (Pty) Ltd v CCMA and Others* (2008) 29 ILJ 2507 (CC) 36.

²²⁰ Note 125 above.

*Cotton Corporation v President of the Industrial Court*²²¹ it was stated that re-employment should, therefore, be accorded its regular definition: the worker start working anew and benefit gains emanate from the previous employment does not form part of the new working contract.²²²

The distinction separating reinstatement and re-employment is not spelt out in the Act. But, reinstatement in its every day aim proposed that the term of employment separating dismissal and recommencement of employment is presumed undisturbed; re-employment, on the one hand, suggest that the working agreement finishes during the time of ending and restarts at the point of re-employment. It looks like re-employment was granted as a substitute to dismissal to provide for the categories of removal where the worker was the casualty of discrimination or because the employer declined to reaffirm a steady-term agreement. The workers and unions have a right to be engaged²²³ on any issues pertaining to workers, and the employer is obligated to make information regarding the likelihood of the upcoming retrenchment of labour and re-employment of those who were dismissed, available. The Act concerning retrenchment does not precisely compel the employer to grant such an award, or fulfil it, should jobs arise in the future. Section 186(1) (d) of the Act, says that unwillingness by an employer to re-employ a portion of workers who were dismissed for the same reason, is believed to be a dismissal. Workers denied re-employment can object and institute a claim of unfair dismissal. An employer that brings back just a few workers who were retrenched may, accordingly, have to justify its selection not to re-employ the rest of workers on practical reasons.

To decline reinstatement or to re-employ a former worker contrary to an arrangement, is considered to be an unfair labour practice²²⁴ In *OCGAWU v First Pro Engineering*²²⁵, the appellant business mass-produced parts for the motor industry. When the contract came to an end, the company engaged in a retrenchment mission and at the time, three of the employer's workers were part of the reduced staff. An agreement which was made on the 12th February 2002, between the employer and the union, held that he company accepted

²²¹*Consolidated Frame Cotton Corporation v President of the Industrial Court*

²²²W Bernard Reisner Statutory Relief for Unfair Dismissal-Labour Law, <http://www.capelabour.co.za/blog/statutory-relief-for-unfair-dismissal.html> (accessed December 26, 2015).

²²³N Henderson. Workplace Gender Equality Reports-The Services Union, <http://theservicesunion.com.au/generalworkplace-general-gender-equality-report/>(accessed December 26, 2015).

²²⁴South African Legal Information Institute, Republic of South Africa, <http://saflii.g/za/cases/ZALCJHB/2015/274.pdf> (accessed December 26, 2015).

²²⁵*OCGAWU v First Pro Engineering* (2004) 25 ILJ 772 (SCA) 207,298.

that ‘when engaging workers during the subsequent 36 months, it will give preference, as far as practicable, to the re-engagement of those workers who are retrenched’. In April 2003, more workers, including six of the employer’s workers, welcome free-willed retrenchment.

Later in 2003, when the employer commenced to expand its staffing, nine workers were not employed as they did not meet the requirements set by the employer. The arbitrator examined the extent of the arrangement and established that, looking at its full explanation, it entails protecting all the workers, including the ones that accepted retrenchment on voluntary basis in April 2003.

The tribunal had to view the arrangement as a whole to find out the motives of those involved. In the description ‘Selection Criteria in particular’, the arrangement states that commercial and economic elements and the employer’s functional requisite should be considered, along with the worker’s aid, ability and competence. On the term ‘practicable’, the tribunal established that it has to be understood to imply that the worker is capable of performing the work even though he does not have a formal qualification.

6.5 Compensation

The amended Act section 194(3), disposes of the difference in payment for procedural and substantively unfair dismissal, yet it retained 24 Months as a highest pay for unfair dismissal. The higher payment for unfair dismissal illustrates that the legislature planned to arm the courts with the capacity to grant corrective punishment in unfair dismissal situations.

In *CEPWAWU v Glass & Aluminium 2000 CC*²²⁶ it was held that payment granted for an unfair dismissal must show that the worker has a right to full return retrospectively. Apart from securing that the worker misses nothing as a consequence of the dismissal yet to also punish the employer for dismissing the worker for carrying an illegal instruction. If returning is not desired, the benefit must be determined proportionately.

The rejection to take the reinstatement award may have a blow on the worker’s privilege to compensation. In *Mkhonto v Ford No*²²⁷ it was believed that justice is the leading standard in ascertaining if payment should be made to a worker or not. If he rejected to take the reinstatement award, the court added that, the worker’s rejection to take the

²²⁶*CEPWAWU v Glass & Aluminium 2000 CC* (2002) 23 *ILJ* (LAC) 710 H-I.

²²⁷*Mkhonto v Ford No* (2000) 21 *ILJ* 1312 (LAC) 1314.

reinstatement award was undesirable. Similar standard as decided out in *Mkhonto*²²⁸ case was pursued in *Technikon SA v Mojela*²²⁹. Here the worker did not accept an award of reinstatement and the tribunal decided that the worker had no right to any compensation emerging from his dismissal.

It is respectfully submitted that the court in these two cases did not apply its mind. It did not look at the subjectivity of the worker's belief. The worker had believed that the relationship has broken down and as a result, refused reinstatement. In the *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO*²³⁰ case, the worker declared constructive dismissal immediately after she had ended the agreement after an attack by the employer. The tribunal establishes that there was value in the workers disagreement, that it was not fair and not reasonable to offer 12 month's payment as the two, and that the worker and the employer's behaviour added to the depreciation of the employment relationship for a lengthy period. Nevertheless the tribunal established that it will not be supportive towards employers that attack workers. This kind of attack is an intolerably evil act. The tribunal stated that the offer of 12 months payment was not vindictive, but was apparently well-founded by the essence of the unlawful act done by the owner that was the key episode that caused the unfair dismissal.

In *Tibbett & Britten (SA) (Pty) Ltd v Marks and Others*²³¹ case, the court held that the worker's dismissal for unauthorised spending on her employer's credit card was actually substantively fair yet procedurally unfair and the judge, by awarding the worker payment equal to 12 months' wage, was actually pleasing her for unethical behaviour. Revelas J stated that, 'if there is no rational explanation for the order, it must be agreed that, the arbitrator did not use her judgement in a fair manner, or not at all, and the reward was withdrawn on those ground. In the court's perspective, a payment equal to six-month wage was decent in the situation'.

In *Boxer Superstores (Pty) Ltd v Zuma*²³², the Commissioner had established that the worker's dismissal was unfair yet procedurally fair and granted repayment to the value of three months wages. On examination of evidence, the Labour Court discovered that the Commissioner established that the employer unsuccessfully discharged the onus of justifying the actual legitimacy of the dismissal. The one suitable solution was then to

²²⁸*Ibid.*

²²⁹*Technikon SA v Mojela* (2003) 24 ILJ 1737 (LAC).

²³⁰*Le Monde Luggage CC t/a Pakwells Petje v Dunn NO* (2007) 28 ILJ 2238 (LAC) 18.

²³¹*Tibbett & Britten (SA) (Pty) Ltd v Marks and Others* (2005) 54 ZALC (LC).

²³²*Boxer Superstores (Pty) Ltd v Zuma* (2008) 29 ILJ 2680 (LAC) 11.

grant reinstatement of the worker. On appeal, the tribunal recognised that section 193(2) orders an arbitrator or the tribunal to consider the elements that the lower court did not involve with the requisite of section 193(2) of the Act, yet had simply wrapped up that the one suitable solution was to reinstate. The tribunal noticed that the query needed to be involved with the requisite of section 193(2) of the Act and the proof in front of the tribunal as to the character of the relationship between the employer and workers.

Concerning the query of real solution, the tribunal held that the order was invalid as the Arbitrator provided no reason for requesting repayment since the worker's dismissal was substantively unfair. The tribunal wrapped up that there was no proof in its disposal or the tribunal of the first instance, which would legitimise a tribunal to replace a finding of the arbitrator and amend it with its own decision. The Labour Court's judgement was overruled on appeal and the case was sent back to the judge to document his reasoning for the solution and decide a suitable solution.

It is arguable if Boxer²³³ case is not in battle with a Labour Court judgement in *Rowmoor Investment (Pty) Ltd v Wilson*²³⁴ case, where it was held that the tribunal is recommended to decide from the arbitrator's discovery of reality if he or she expected the solution. It is apparent that it was as a result of the fact that the tribunal did not have confirmation on record to back up the arbitrator's decision on repayment that made the tribunal to embrace a dissimilar practice applied by Molahlehi J.

6.6 Conclusion

On a purposive interpretation of Section 193 of the LRA, it is crystal clear that the legislature planned to accord the Labour Court or arbitrator wisdom, in the event of unfair dismissal, to grant reinstatement, re-employment or compensation. Other crystal essence of this section, is that reinstatement and re-employment are the first solution for an unfair dismissal, since it is within the aspirations of the Act. The aspirations that are to progress economic development, social justice, labour's peace and democratisation in the enterprise by accomplishing the essential aims of the Act.

The term 'or' of section 193 (1) (b) of the Act, illustrate that the solution of payment cannot be granted on both reinstatement and re-employment as these are restricted solutions. To precisely explain section 193 of the Act, the rules of interpretation have to be

²³³*Ibid* 235

²³⁴*Rowmoor Investment (Pty) Ltd v Wilson* (2008) 29 ILJ 2275 (LC) 9-11.

complied with, by granting the provisions of the statute their regular and simple interpretation, except if interpretation would advance to vagueness.

It is respectfully submitted that the legislature possessed a motive for the creation of a guideline foundation, by dealing with the solution for unfair dismissal as restrictive, to avoid exposing the employers that face cases of unfair dismissal and unfair labour practice, to extremely large financial burdens when they are rectifying mistakes made to individual workers.

7. CHAPTER SEVEN

7.1 Conclusion

In summary, the test used by our courts to resolve whether a constructive dismissal had occurred is slightly biased and partly unbiased²³⁵. The viewpoint of the worker at the point of ending the agreement, and the situation that led to the ending of contract and how it happened, must be weighed. This entails²³⁶ a two-stage enquiry which ought to be applied. The first real question is, if in terminating the contract, did the worker have the intention to end the working relationship or did he/she have no choice in the matter? The duty is on the worker to show that no plan existed. If the worker is incapable of discharging the duty of proof on a balance of probability, the Labour Court will have no authority to resolve the conflict regarding the asserted unfair labour practice and the case is closed. If the worker accomplishes the duty of discharge, the next question is whether the respondent constructively discharged the worker?²³⁷ Since the criteria to determine a constructive dismissal is that of unacceptable conduct, it is proposed that the rule requires that the treatment of a worker should be 'fair'.

One needs to resolve if the treatment has ruined or gravely harmed the bond of confidence and commitment between the employer and the worker.²³⁸ In reality, these are requirements of the Code of Good Practice in the Act, which require that an employer should display that the wrongdoing is of being a character to make the relationship intolerable. The employer may not just allege or merely claim the failure of the trust

²³⁵ J Grogan *Dismissal, Discrimination & Unfair Labour Practices* 2ed (2008) 199.

²³⁶ Note 186 above, 199.

²³⁷ Note 148 above.

²³⁸ Note 187 above.

relationship. The employer must place enough evidence before the tribunal to convince it that, after taking into consideration the entire situation (containing elements associated with the worker and the employer), the award of dismissal was proper and decent. Against this background, justice must demand an analysis of items concerning the employer and worker.

It was justly recommended in *Edcon Ltd v Pillemer NO (Reddy)*²³⁹, that an employer should not lightly accept that some types of malpractice, mostly those involving an unwillingness to tell the truth, undoubtedly indicate that the relationship of trust and self-reliance has been ruined.²⁴⁰ Until the *EDCON*²⁴¹ case, our courts seem to have welcomed a different view and were ready to entertain discussions without any proof on the issue being accurately placed in front of the arbitrator, but rather by reasoning on what ability be deduced from certain kinds of misconduct. Prior the *EDCON*²⁴² case, employers were obliged to place proof before the arbitration proceedings and the Commissioner had to take the test into consideration in any evaluation of whether the findings of dismissal were just. It then appears that in *Edcon*²⁴³ case, the substantive law did not improve at all.

It is respectfully submitted that intolerable conduct could exclusively be resolved by facts of each claim and that the question of whether a worker should be expected to withstand such action should be judged impartially. Elements of constructive dismissals incorporate that the worker should have cut-off the agreement; the employer's behaviour judged impartially must have been intolerable; the worker would have carried on working but for the unacceptable behaviour of the employer; and worker exhausted every remedy that exist within the organisation.²⁴⁴ Intolerable conduct was first debated with referral to precedential law below each class. It was declared that mishandling, whether this includes bodily harm or spoken violation, constitutes unbearable behaviour and a worker cannot be expected to endure the behaviour. Spoken violation is "a type of oral violation" where an employer is swearing at a worker.

The cases propose that intolerable conduct could be easy to demonstrate yet that it has until now been judged objectively. The examples mentioned above illustrate what

²³⁹ *Edcon Ltd v Pillemer NO (Reddy)* (2010)1 *BLLR* 1, 2009 30 *ILJ* 2642 (SCA) 21-23.

²⁴⁰ Note 191 above.

²⁴¹ Note 220 above.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ A van Niekerk & others. *Law@ work*2ed (2012) 223.

behaviour could represent a constructive dismissal and what means of redress are accessible to employees if the intolerable action has been proved. The courts have established that the determination of proper sanction for misconduct at work requires a value judgement however; they have failed to recognise that critical decision-making requires a real fairness. This is a concern in the area of our labour law that still needs to be developed.

Section 23 of the Constitution²⁴⁵ warrants 'everyone the right to just labour practices'. The Statute, legitimate explanations of the employment contract and public policy have shaped the degree of this constitutional provision. The Act²⁴⁶ describes a worker as a person, bar, an unconstrained contractor, whoever labours for another individual or the government and that gets or is qualified to earn any payment. S 200(a) of LRA, created a presumption that promotes the identification of the workers, and describes factors that are expressive of an employment relationship. An employer is not precisely defined in the Act.²⁴⁷

It is clear as stated above that our laws still have room to be developed to curb employers who are still discriminatory and abusive. The cases above prove that workers are subject to this abuse. The writers like Cohen, Van Niekerk and Grogan²⁴⁸ also expresses their support for such development in our laws.

²⁴⁵Constitution of the Republic of South Africa, 1996.

²⁴⁶Note 226 above.

²⁴⁷ T Cohen 'Placing Substance Over Form-Identifying the True Parties to an Employment Relationship' (2008) 29 *ILJ* 864.

²⁴⁸T Cohen, (2012) the relational contract of employment. *Acta Juridica*. Van Niekerk, A. & Linstrom, K. (2006). *Unfair dismissal*, South Africa: Siber Ink. Grogan, J. *Workplace Law* (2009) 10th ed. Cape Town: Juta & Co.

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