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Constructive Dismissal!! What exactly amounts to constructive dismissal and what does an employee have to prove? What remedies does a constructively dismissed employee have at law?



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Sometimes employees find themselves in an unfortunate event of having to unwillingly resign due to the intolerable conduct of their employers. The question is, are those employees without remedy. This paper aims at discussing the concept of constructive dismissal in which it



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will be demonstrated that such resignations amount to an unlawful dismissal. Furthermore this paper shall cover the requirements at law for a successful claim of constructive dismissal and the remedies employees who have been constructively dismissed have.

Constructive dismissal is tantamount to forced resignation. If an employer makes continued employment intolerable, it may lead to the resignation of an employee. The resignation thereof, may amount to a dismissal. Resignation in these circumstances is often referred to as constructive dismissal and adjudged wrongful by the employment and labour laws of Botswana. In such circumstances an employee has the right to receive compensation as they have been unfairly dismissed. See **Modise v Sporting Holdings 2018 All Bots**

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Notwithstanding the foregoing, an employee may not lightly resign and claim constructive dismissal. If an employee has been unfairly dealt with at work, the employee should utilize available mechanisms to deal with grievances. It is only when continued employment is intolerable, that an employee will be entitled to resign and legitimately claim constructive dismissal. **Modise v Sporting Holdings 2018. All Bots.**

The overarching question in constructive dismissal cases, is whether the Employer has repudiated (breached) the contract of employment to render continuation of the employment relationship unbearable or intolerable. **Thapisa v Limkokwing University of Creative Technology 2009 (1) BLR.**

REQUIREMENTS FOR A SUCCESSFUL CLAIM OF CONSTRUCTIVE DISMISSAL

1. The employee must prove that he/she resigned or has terminated the contract of employment,
2. That the conduct of the employer rendered the continued employment intolerable
3. That the employee resigned as a result of the intolerable behaviour of the employer

4. That the resignation was a matter of last resort.

The foregoing requirements shall be discussed in depth hereinafter.

1. Resignation and or termination of a contract of employment by an employee

Firstly, an employee has to show that he/ she resigned. Resignation means a unilateral termination of a contract of employment by an employee, which is effected by way of a notification that conveys the employee's clear and unambiguous intention to leave work for good. The notification can either be written or oral.

It must be emphasized that the notice of resignation must be clear, unambiguous and unequivocal. It must indicate clearly that the employee is resigning, and not coming back to work. See **Kristin Larsson And Another O'shaughnessy's (Pty) Ltd case No. ICF 83/15 (unreported)**

2. Employer rendered the continued employment intolerable

Secondly, the employee must show that the employer created an intolerable working environment and or relationship and the employee had no alternative but to resign. Under this leg of

requirements, an employee must point out with sufficient particularity what the employer did that made it intolerable to continue working. Courts of law have defined intolerable conduct as a situation that is more than can be tolerated or endured, it is something that is too great to bear or beyond the limits of tolerance. **See Kgobe v Dikoko tsa Botswana (Pty) 2021 All Bots 97 (IC)**

3. **Employee resigned because of the intolerable behaviour of the Employer**

On the third hurdle, an employee must show that, the reason for the termination of the contract was that the continued employment was intolerable for the employee. Simply put, there must be a causal nexus between the employer's intolerable conduct and the circumstances that induced the employee to resign.

Courts of law have emphasised that constructive dismissal is not a remedy made to compensate employees who resign due to fickle mindedness, those who with the benefit of hindsight would not have resigned. It is for those who, even if events are reversed would have resigned nonetheless.

4. **Resignation was a matter of last resort.**

Lastly, it is crucial that before resigning as a result of intolerable conduct by the employer,

employees must try to exhaust internal grievance mechanisms. Whilst the courts are protective of employees who are constructively dismissed, the expectation is that resignation must be last resort. The employee must satisfy the court that he/she had exhausted the internal dispute resolution mechanisms put in place by the employer before taking the decision to resign. **See Rice v G and S Projects (Pty) Ltd 2012 (2) BLR**

For a successful claim of constructive dismissal, the above-mentioned requirements must all be present.

REMEDIES FOR CONSTRUCTIVE DISMISSAL

COMPENSATION

Where an employee has successfully proved a claim for constructive dismissal before a court of law, he or she would be entitled to claim compensation for unfair dismissal.

A reasonable range of compensation to be considered by the Industrial Court in most cases of unlawful dismissal would be between 1 month's pay and 6 months' pay, depending upon the circumstances of each case, subject to upward adjustment in exceptional cases. **See Khoemacau Copper Mining (Pty) Ltd v Stuart Wallace 2019 2 BLR 565 (CA)**

In summary constructive dismissal is proved by the following elements; that the employee must have resigned, that the reason for ending that contract must be that the employer's conduct rendered a continued working relationship intolerable and that the employee had no reasonable alternative than to terminate the contract.

If you have interest in an in-depth discussion on this subject matter or any employment and labour issues, feel free to contact us at info@gobhozalegalpractice.co.bw
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