

EMPLOYMENT ALERT

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CONSTRUCTIVE DISMISSAL: IS REINSTATEMENT A COMPETENT REMEDY?

The principles relating to constructive dismissal disputes have been laid down by the courts over time.

The essence of constructive dismissal is that, in terms of s186(1)(e) of the Labour Relations Act, No 66 of 1995 (LRA), an employee who resigns as a result of their employer having made their continued employment intolerable is said to have been unfairly dismissed.

Section 193(2)(1) of the LRA instructs Commissioners to reinstate an employee who has been unfairly dismissed unless the circumstances surrounding the dismissal are such that a *continued employment relationship would be intolerable*. It would therefore appear that the remedy of reinstatement would be fatal to a claim of a constructive dismissal.

The Labour Court in *Western Cape Education Department v Julian John Gordon & Others (As yet unreported: 18 March 2013 Labour Court, Johannesburg, Steenkamp J)* was faced with such a question. Can an employee who seeks reinstatement at arbitration convincingly state that his employment was rendered intolerable by his employer?

The facts of the matter are briefly that the employee was employed by the Western Cape Education Department (Department). The employee became ill and made an application for temporary incapacity. A number of years passed and the Department had not processed the employee's application for temporary incapacity. When the application was eventually processed by the Department, it was rejected as a result of the employee failing to obtain the signatures of two persons as witnesses to the agreement.

The employee's claim for temporary incapacity being rejected, the employee returned to the employ of the Department. On his return, the employee was informed that the Department would deduct from his remunerations, monies he owed the Department as a result of having not presented himself to work but having received a salary. The deductions constituted a substantial portion of the employee's salary and the employee accordingly resigned.

The employee referred a constructive dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). The CCMA Commissioner that arbitrated the dispute found that the Department had made the employee's employment intolerable and that

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the employee had been constructively dismissed. The Commissioner found that the Department should reinstate the employee.

When the Commissioner's decision went on review, the court was faced with the question as to whether an order for reinstatement was compatible with a finding of constructive dismissal. The court reiterated that when an employee resigns/terminates a contract of employment as a result of a constructive dismissal this indicates that:

- The situation has become so unbearable that the employee cannot fulfill his/her duties.
- He/she would have continued working indefinitely had the unbearable situation not been created.
- The employee does so, on the basis that he/she does not believe that the employer will ever reform / abandon the pattern of creating an unbearable work environment.

The court in considering the Commissioner's finding relating to reinstatement agreed with the Commissioner that at first glance an employee seeking reinstatement would be destructive to his/her claim for constructive dismissal. The Court considered the two positions to be mutually exclusive.

The finding on reinstatement essentially turned on the Department's failure to present evidence that were the employee to be reinstated, the situation would remain the same. The Commissioner, it was held by the court, had to accept the employee's evidence that were he to return to the employ of the Department he would not be subjected to the same circumstances that prevailed before he resigned.

The court was further in agreement with the Commissioner that although the employee had failed to establish a clear basis for his evidence that the circumstances that prevailed at the time of his

resignation would no longer prevail, the Department had done nothing to refute the evidence of the employee. The court concluded that the employee's desire to be reinstated was not destructive to the finding that the Department had made his continued employment intolerable.

The court further agreed with the Commissioner in his analysis of the effect that the wording in s193(2)(b) has on the employee's claim for reinstatement, and specifically concentrated on "the circumstances surrounding the dismissal." The Commissioner, which the court agreed with, came to the conclusion that the circumstances at the time of the arbitration were not the same as those circumstances that lead to the employee's resignation. They would not be the same circumstances into which he would be reinstated. The Arbitrator found retrospective reinstatement remained the appropriate remedy.

Much of the court's and the Commissioner's decision relating to the appropriate remedy was based on the fact that the evidence of the employee was uncontested and it was only this evidence that the Court/CCMA could rely on.

An employer defending a constructive dismissal claim should show that it was not culpably responsible for the termination of the employment relationship, that the employers conduct did not lack reasonable and proper cause, and that it would be the situation to which an employee would return to were the employee to be reinstated. The court indicated that the conclusion arrived at in this matter was limited to the very peculiar and unusual circumstances of the case, due mainly to the Department's failure to oppose the employees' evidence that the workplace had changed and that, should he be reinstated, the circumstances would no longer be intolerable.

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