

EMPLOYMENT ALERT

19 August 2013

IS REINSTATEMENT A COMPETENT REMEDY FOR CONSTRUCTIVE DISMISSAL?

In the decision of *Western Cape Education Department and General Public Service Sectoral Bargaining Council (C 360/2012) [2013] ZALCCT 5 (18 March 2013)* the Labour Court was asked to consider whether an order for reinstatement was incompatible with a finding of constructive dismissal.

Mr Gordan (employee) had been employed in the Public Service for in excess of twenty three years. At the time of the dispute, the employee occupied the position of deputy director of personnel management. In July 2006, the employee had a heart attack and was subsequently diagnosed with post-traumatic stress disorder and clinical depression. During 2007, the employee applied for ill-health retirement and temporary incapacity leave.

From 2007 to 2009, the employee corresponded with his employer regarding various applications he had made regarding ill-health retirement and temporary incapacity leave. Despite correspondence, the employer informed the employee during 2009 that it would institute 'leave without pay' for the period in which the employee was absent from the workplace.

The employee tendered his resignation with the employer and later referred a constructive dismissal dispute to the Bargaining Council. The arbitration award was handed down on 12 March 2012. The arbitrator found that the employee had been constructively dismissed and ordered that the employer reinstate the employee.

The employer subsequently took the award on review to the Labour Court arguing that the order for reinstatement was incompatible given that the employee had resigned on the basis that the employment relationship had become intolerable.

In terms of constructive dismissal, the case of *Asara Wine Estate & Hotel (pty) Ltd v Van Rooyen & others (2012) 33 ILJ (LC)* states that an employee, who has been constructively dismissed,

terminates the contract of employment on the basis that the situation has become so unbearable that the employee can no longer fulfil his or her duties. The employee terminates the contract of employment on the belief that the employer will never abandon the pattern of creating an unbearable work environment.

In the present case, the employee had been constructively dismissed because the inaction on the part of the employer made the employment relationship intolerable. The court was therefore faced with an interesting question: How could an employee claim that his continued employment had become intolerable but at a later stage ask to be reinstated in that same position?

The court held that the arbitrator has a wide discretion when determining the appropriate remedy in the case of an unfair dismissal. Section 193 of the Labour Relations Act, No 66 of 1995 prescribes reinstatement as a primary remedy for an unfair dismissal. The court held that the employee's work circumstances at the time of the arbitration award differed from the circumstances that surrounded his dismissal at the time of the Employee's resignation. Therefore, the employee would not be reinstated into the same circumstances that led to his resignation.

The employee was accordingly reinstated. However, the court warned that the conclusion it arrived at is limited to the facts of this particular case and that it would be unusual for the same conclusion to repeat itself in the future.

Ndumiso Zwane

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INTERNATIONAL NEWS

The International Labour Organization (ILO) reports that Brazil has implemented a constitutional amendment (with effect from 2 April 2013) that sees the guaranteeing of certain rights to domestic workers.

The constitutional amendment establishes 16 new rights for domestic workers, including the right to overtime pay and a 44 hour working week.

Brazil joins various other countries, including South Africa, who have moved to ratify ILO Convention 189 (Convention) which deals with 'decent work for domestic workers'. The Convention states that domestic workers should have the same rights as 'other workers' including the right to reasonable working hours and clear information on terms and conditions of employment.

A global effort toward the realisation of equal rights for domestic workers is urgent given that over 52 million people around the world are employed as domestic workers and only a mere 10% of those domestic workers are covered by general labour legislation.

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