

Constructive Dismissal

In many an instance, the charge is levied by an employee against an employer of having been unfairly dismissed. The charge is based on the grounds that the employer did not follow the established procedures in undertaking to terminate the services of the employee. The foundation of a charge against an employer for constructive dismissal is seemingly quite different.

In employment law, constructive dismissal is also known as constructive termination. This occurs when an employer places extraordinary and unreasonable work demands on an employee so as to force the employer to resign his/her job. In such circumstances, this is viewed as an involuntary termination of employment.

Constructive dismissal can therefore result where the employer refuses to grant an employee maternity leave, or where an employee is denied leave to respond to the call to undertake jury duty. Equally so, where the employer fails to pay the employee, or without notice or reason, demotes the individual from his/her substantive position in the organization. When it comes to making change(s) to conditions of work of an employee, the practice is that this done with the agreement of the employee. Where an employer resorts to making unreasonable changes and the employee is forced to accept the same, this can be considered as constructive dismissal.

As for example, where an employee who is employed as a cashier in a restaurant, the employer can rightfully be accused of constructive dismissal where there is a demand that the employee helps to prepare meals in the kitchen and/or serves meals to customers. A constructive dismissal claim can also be made where the employer demands that the employee works in another location other than that stated in his/her contract of employment.

Employers must be aware that they have no legal authority to arbitrary or unilaterally change the contract and/or the conditions of service of an employee. It would seem that far too often, some employers exploit workers based on the fact that the employee is in desperate need of the job, and so, is will tend to accept the job under duress, as being able to secure and maintain a job is of the utmost importance to the individual.

To avoid a claim of constructive dismissal, employers should be proactive in ensuring that they respond to a charge laid by an employee of bullying, harassment or violence against the individual by fellow work colleague(s). At another level, there is a legal and moral responsibility of the employer to provide a safe place of work. It follows that where the employer proceeds to require an employee to work under dangerous conditions, that this constitutes grounds for constructive dismissal.

An employee should be aware that they must be able to prove that he/she has been constructively dismissed. Being unable to do so could lead to the conclusion that the individual has resigned from the job. If an employee decides to bring a constructive dismissal charge, it is important that the employee brings documented evidence to support their case. This effectively means that the individual should practice good record keeping.

The experts suggest that where an employee believes that he/she has a case to be brought on the grounds of constructive dismissal, that the individual should immediately leave the job. In the event that the employee chooses to stay, this gives the employer reason to put forward an argument that by staying, the employee would have accepted the conduct or treatment meted out to him/her.

It is however advisable that an employee should never to resign from the job before the actual breach of contract occurs.