What is constructive dismissal?

Leonie Munro  ND Rad (D); MA, Durban

An employer can dismiss an employee for a range of reasons provided correct procedures have been followed. Constructive dismissal is not spelt out in the relevant labor legislation [1]. It is an action taken by an employee when it is no longer possible to continue to work for an employer due to unbearable circumstances [1]. Under such a situation, according to the law, an employer is considered to have dismissed the employee. There are four steps to a constructive dismissal claim instituted by an employee against an employer:

(i) The employee must have resigned.
(ii) The employee’s resignation must solely be based on intolerable actions/conduct of the employer.
(iii) The employer’s conduct therefore must have created a situation that was so intolerable that an employee could no longer continue with being employed. The employee must have grounds to objectively show that the employer’s conduct was intolerable and that any other employee, placed in that situation, would arrive at the same conclusion. For example, when an employee has exhausted all the options reasonably available then it could be stated in the constructive dismissal claim that the employer’s conduct was intolerable as steps were not taken to stop such conduct and the intolerable conduct persisted. The Labor Appeal Court will look at the employer’s conduct as a whole and will then decide whether the employee can be expected to put up with it or not [1].

(iv) If the employer’s conduct is proven by the employee to be intolerable then the normal test for dismissal cases applies. The employer must prove

• that a fair reason existed for the dismissal of the employee: substantive fairness, and
• that fair procedure is followed when dismissing an employee: procedural fairness.

As constructive dismissal occurs after an employee resigns it is usually inevitable the employer cannot provide supporting evidence in terms of procedural fairness. It would thus be unlikely that the employer could show that any procedure had been followed. The employer could attempt to show that his/her conduct was justified hence substantive fairness was operative. However since the employee resigned due to intolerable conduct in the work-place an employer would have to prove fair labor practice was implemented at all times [1].

An employer would possibly be ordered to pay monetary compensation for not following a fair procedure and for not having a fair reason to dismiss the employee if the latter

(i) can show the employer made his/her continued employment intolerable, and
(ii) can prove that he/she was constructively dismissed.

Reference