

## **Alleged Constructive Dismissal**

This checklist has been prepared having regard to the CCMA  
Misconduct Arbitration Guidelines and relevant case law

v8

**NB: The law does NOT require that each and every factor set out below apply in all cases. The law encourages the minimum of legal formality. This checklist is merely a guide and should be used with care and flexibility.**

**GLOSSARY:** EE (employee); ER (employer); AG (CCMA Arbitration Guidelines on Misconduct).

**A constructive dismissal comes about when an EE resigns because the ER makes continued employment intolerable.**

### **PROCEDURAL FAIRNESS**

- 1 The only procedural issue of relevance is whether the EE terminated the employment relationship. (Acceptance of resignation by ER is NOT a requirement.)
- 2 Determine therefore whether there has been a resignation in writing, orally or by way of conduct. This is on the assumption that there was an employment relationship between the parties.
- 3 Determine the date of the alleged resignation.

### **SUBSTANTIVE FAIRNESS**

- 4 What is the alleged conduct on the part of the ER that caused the EE to resign?
- 5 Would the EE have resigned but for the ER's alleged conduct?
- 6 Was the resignation initiated by the EE or ER?
- 7 Was the resignation given in the heat of the moment?
- 8 Was the alleged conduct of the ER intolerable? In other words can the ER's conduct be objectively judged to be reasonable?
- 9 Were the alleged intolerable circumstances under the control of the ER?
- 10 Was the alleged conduct an **act** or an **omission**? What was the act or omission? Was the alleged conduct

of the ER a **single** act / omission or a **series** of acts / omissions? If single act / omission then determine date. If series of acts / omissions then determine the dates or the period during which these occurred.

- 11 Was the conduct of the ER calculated to coerce the EE to leave the employment?
- 12 Was the ER's alleged conduct related to the EE's **performance** in the workplace? Was the ER's alleged conduct related to the EE's **conduct** / discipline in the workplace? Was the ER's alleged conduct related to **operational** decisions that impacted on the EE's terms and conditions of employment, or transfer or demotion, or remuneration?
- 13 Has the EE been paid his full remuneration?
- 14 Was the ER's conduct related to a change in workplace practices? If so, give details.
- 15 If there have been changes, then, was the EE consulted before the changes were made?
- 16 Did the EE contribute in any way to aggravate the problem?
- 17 Does the ER have a grievance procedure?
- 18 Was the procedure used by the EE?
- 19 What was the result of the grievance process?
- 20 If the outcome of the grievance process was in favour of the EE, then did the ER implement the recommendations made in that process?
- 21 Were reasonable steps taken by the EE to escape from the alleged intolerable circumstances before resigning?
- 22 Did the EE allow the recommendations of the grievance process to be implemented before resigning?

### **REMEDIES**

- 23 Does EE have long service? What is the implication of that?

- 24 What impact would the resignation have on EE? Personal / family circumstances? AG106 Who does he support?
- 25 If applicable does the EE trust the ER, ie does the EE trust the ER to treat him or her properly in future?
- 26 **REINSTATEMENT / RE-EMPLOYMENT:**
- 27 Is reinstatement or re-employment reasonably practicable? AG113 Is there evidence that a good working relationship can be restored?
- 28 Would reinstatement cause a disproportionate level of disruption or financial burden to the ER? AG115
- 29 Has another EE been appointed in place of the applicant, even though this is not an obstacle to reinstating a deserving EE?
- 30 Has EE shown that reinstatement or re-employment should be from the date of the resignation? AG115.
- 31 **COMPENSATION:** Factors when awarding compensation for substantive unfairness: EE's remuneration and benefits at the time of resignation; time lapse since resignation; whether EE has secured alternative employment and if so date thereof and rate of remuneration; whether EE has taken steps to mitigate his losses by finding alternative employment; financial loss suffered by EE; EE's prospects of future employment eg age, experience, education, qualifications and availability of suitable job opportunities; whether resolution of dispute was unreasonably delayed and if so who caused the delay; whether there was a condonation for late referral; whether EE received any payments from ER over and above that required by law, any collective agreement or contract; whether EE unreasonably refused an offer of reinstatement made in good faith; whether actions of EE led to loss or damage to ER; ER's financial position. AG130-136