



NTEU at NMMU

## The Common Law Contract of Employment : Part 9

### Options open to the employee if the employer is in breach of any of its duties

An employee could:

- Summarily terminate the contract if the employer is in material breach of the contract or give notice if the employer's breach is less serious.
- Claim specific performance.
- Claim damages.
- Refuse to work if the employer is in breach of contract, for example "no pay no work".
- Utilise statutory remedies in terms of the relevant labour legislation.

The employer has the same options open to it if an employee is in breach of any of the duties employee must fulfil in terms of the common law contract of employment.

We have already dealt with the summary termination of the contract by either party, in earlier parts of this series.

In the general law of contract, one of the remedies of a party who has suffered from a breach of contract is for the courts to order the delinquent party to honour any undertaking given. This is known as the remedy of specific performance. The errant party must specifically do what is contained in the contract.

Should either party incur any damages or loss as a result of the other party being in breach of the contract, they can claim damages in the amount they suffered any loss.

The Basic Conditions of Employment Act (BCEA) spells out the basic conditions of employment that employees are entitled to and includes minimum wage schedules for the different economic sectors, leave entitlement, sick leave entitlement and overtime, among others. Should an employer be in breach of any of these minimum conditions, the employees affected can seek a remedy in terms of the BCEA. Some unscrupulous employers enter into an agreement with employees who are desperate for work and provide them with conditions of employment which are below those contained in the BCEA, thinking that because the employees accepted it, it is legal. Our labour law does not permit this, as the BCEA supercedes any agreement an employer may reach with an employee to provide conditions of employment below the minimum.

One of the main aims of the Labour Relations Act (LRA) is to provide employment security to employees, ensure labour peace and the democratisation of the workplace. To that end the behaviour of both employers and employees is proscribed in the Act so that neither party can do as they please. They must act strictly within the confines of the LRA, and a failure to do so can result in either party seeking a remedy in terms of the LRA. Employers cannot just hire and fire and employees cannot engage in wildcat strikes, for example. Certain procedures always have to be followed.

The onus on all parties is to be reasonable in all matters at all times. Employers treating employees in an unreasonable manner, or employees making unreasonable demands of management, is unacceptable. If all parties acted reasonably at all times, we would have labour peace, exactly what the LRA seeks, but unfortunately there are many who fall foul of this requirement in our work environment which costs the economy dearly.

CREDIT: PROF NORMAN D KEMP – FORMER NTEU PRESIDENT

**There is nothing like returning to a place that remains unchanged to find the ways in which you yourself have altered.**

**Nelson Mandela**



## When your boss makes life at work intolerable

Conventional wisdom tells us that when an employee tenders his/her resignation to their employer, which resignation is then accepted, this terminates the employment contract between the parties, and the

employee will normally not have any claims against the employer.

However, if the conduct of the employer is such that it causes the employee to find the workplace environment so intolerable, which leaves the employee with little or no option but to resign, this is termed "constructive dismissal" and the employee could then have a claim against the employer.

Section 186 (1) (e) of the Labour Relations Act says that in circumstances where "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee", this would constitute a dismissal. The resignation was therefore not a voluntary one and because of the employer's conduct, the employee was forced or coerced leave his/her employment. Of course, if an employee resigns so as to avoid any disciplinary hearing or because of any misconduct on his path, that will not be considered as a constructive dismissal.

Constructive dismissal ultimately means that the employee was unfairly dismissed. To prove this, the employee must prove two vital facts.

Firstly, that the resignation was not voluntary. Secondly, that the resignation was due to the conduct of the employer who made it intolerable for the employee to continue working.

However, constructive dismissal claims are notoriously difficult to prove. In normal dismissal claims, the onus lies with the employer to prove that the dismissal was procedurally and substantively fair. However, in a constructive dismissal claim, the burden of proof shifts from the employer to the employee. Now the employee must prove the constructive dismissal, on a balance of probabilities. The employee must prove the intolerable work conditions.

The employer does not need to show that he did not introduce any intolerable condition. If the employee cannot prove the introduction of intolerable condition at work, he/she will not succeed with the claim of constructive dismissal.

Once the employee at the CCMA proves a constructive dismissal, the onus shifts to the employer to prove that the dismissal was fair.

Credit to **Fawzia Khan, Fawzia Kahn and Associates**

## DID YOU KNOW?

**International Men's Day  
21 November 2015**

The Department of Women is planning to host the International Men's Day on the 21st November 2015 in the form of a rally at Soshanguve, in Pretoria. The targeted number of people is 10 000. The event will serve as one of the build up towards the 16 days of Activism Campaign and is actually aligned to the Theme "CountMeIn" Together Moving a Non Violent South Africa Forward. The event will present a window of opportunity for men in the Country to be counted amongst those who have pledged their support to the fight on violence against women and children.



NTEU awaits a reply from the Chair of Council to our letter of 18 Nov 2015, requesting to attend the Special Council meeting on Saturday, 21 Nov 2015, as observers. The meeting will discuss the impact of the Fees Must Fall demands on the NMMU.