Constructive Dismissal and Resignation due to Work Stress

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Summary

In terms of section 186(1)(e) of the *Labour Relations Act* 66 of 1995 constructive dismissal occurs where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable.

Work stress is becoming more and more imminent in the workplace. Some employees feel that the amount of work stress also makes their continued employment intolerable, and then they claim constructive dismissal.

This raises the question whether the courts should apply the same tests they apply in constructive dismissal cases as well as in cases where the employee resigns because of work stress. But, if the same tests that are used to determine if there has been a constructive dismissal are used in a case where an employee resigns because of work stress, a real danger exists because then it can lead to the misuse of a claim of constructive dismissal by employees who cannot handle a minimum amount of work stress.

Over the years the courts have indicated that they apply an objective test in cases of constructive dismissal. This leads to the argument whether subjectivity should play a role, and whether one should look at the subjective perspective of both the employer and the employee.

This research looks at numerous court decisions, from both the South African legal system as well as the United Kingdom legal system, in order to determine which tests the South African courts need to apply when they are confronted with a constructive dismissal claim where the employee resigned due to work stress.

Constructive dismissal – resignation – work stress – stress due to an excessive workload – work stress and employee wellness – stress based claims.

Konstruktiewe ontslag en bedanking as gevolg van werkstres

Opsomming

In terme van Artikel 186(1)(e) van die *Wet op Arbeidsverhoudinge* 66 van 1995 vind konstruktiewe ontslag plaas wanneer die werknemer die dienskontrak met of sonder kennisgewing beëindig het omdat die werkgewer voortgesette diens vir die *werknemer* ondraaglik gemaak het.

Werk stres is besig om meer en meer dreigend in die werksomgewing te raak. Sommige werknemers voel dat die hoeveelheid werk stres wat hulle ervaar ook hulle voortgesette diens by die werkgewer ondraaglik maak en hulle dan besluit om konstruktiewe ontslag te opper.

Dit laat die vraag ontstaan of die howe dieselfde toetse moet gebruik in konstruktiewe ontslag sake sowel as in sake waar die werknemer as gevolg van werkstres bedank. Maar as die howe dieselfde toetse gebruik, bestaan daar die gevaar dat ‘n eis vir konstruktiewe ontslag deur werknemers wat nie ‘n minimum hoeveelheid werk stres kan hanteer nie, misbruik kan word.

Die howe het oor die jare aangedui dat hulle ‘n objektiewe toets in sake van konstruktiewe ontslag gebruik. Dit lei tot die argument of subjektiwiteit ‘n rol moet speel, en of beide die werkgewer en werknemer se subjektiewe persepsie in ag geneem moet word.

Hierdie navorsing fokus op verskeie hofbeslissings, van beide die Suid Afrikaanse en Engelse regsisteem, ten einde vas te stel watter toetse die Suid Afrikaanse howe moet gebruik wanneer hulle gekonfronteer word met ‘n saak waar die werknemer bedank het as gevolg van werksdruk.

Konstruktiewe ontslag – bedanking – werk stres – stres as gevolg van buitensporige werkslading – werk stres en werknemerwelstand – stres gebaseerde eise.

List of abbreviations

EAT Employment Appeal Tribunal

ERA Employment Rights Act

ILJ Industrial Law Journal

LRA Labour Relations Act

1 Introduction

In terms of Section 186(1)(e) of the *Labour Relations Act* 66 of 1995 constructive dismissal occurs where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable.

In terms of Section 192(1) of the *Labour Relations Act* the onus rests on the applicant to prove, on a balance of probabilities, that he or she was dismissed from her or his employment. There are certain critical issues which need to be determined in cases involving claims for constructive dismissal. The first issue is whether the employee terminated the contract. The second issue is whether the reason for the employee's action was that the employer had rendered the prospects of continued employment intolerable and ultimately whether the employee has no reasonable alternative other than terminating the contract.

With regard to the first issue, the courts will ask a factual question and will also look at the circumstances of each case. In the case of the second and the third issue, the Labour Appeal Court formulated a general test in the matter of *Pretoria Society for the Care of the Retarded v Loots*[1] and the court stated that:

> …the enquiry then becomes whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it…

1 *Pretoria Society for the Care of the Retarded v Loots* (1997) 6 BLLR 721 (LAC).

In a number of other cases[2] the courts argued that cases of constructive dismissal can only be decided on a case to case basis, which means that an element of uncertainty is always inherent in such situations.

Work stress is becoming more and more of a threat in the workplace. Employers are unsure about what they should do in cases where an employee cannot handle the pressure. There is uncertainty about the steps that must be taken by the employer to relieve the employee of his or her work stress and whether the employer has any duty in this regard at all. Work stress is experienced differently by everyone and that makes the whole process even more complex.

But, if the same tests that are used to determine whether a constructive dismissal took place are used in a case where an employee resigns because of work stress, a real danger exists because the grounds can then be abused by employees who cannot handle even a minimum amount of work stress. The current situation in our law is that an objective test is applied in cases of constructive dismissal. This leads to the argument whether subjectivity should play a role, and whether one should look at the subjective perspective of both the employer and the employee.

It is therefore important to do an intensive study of the tests the South African and the UK courts use in constructive dismissal cases and in cases where an employee resigns because of work stress.

2 *Jooste v Transnet t/a South African Airways* (1995) 5 BLLR 1 (LAC); *Watt v Honeydew Diaries (Pty) Ltd* (2003) 24 ILJ 46 (CCMA); *Mbongwe v SA Express Airways* (2009) 3 BALR 268 (CCMA).

2 Work stress and constructive dismissal in the South African Law

2.1 Introduction

Dismissals and work stress are common occurrences in South Africa. The employment relationship and the parties to this relationship are influenced by different factors, such as work stress as well as the way the parties in the employment relationship handle stress. In this chapter, the main focus will be to look at constructive dismissal and work stress respectively, and to do an analysis of how the South African courts have dealt with it.

2.2 Constructive dismissal: An introduction

In terms of Section 186(1)(e) of the *Labour Relations Act* 66 of 1995[3] constructive dismissal takes place where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable. When an employee claims that he has been dismissed under Section 186(1)(e) of the LRA, it is not necessary for the employee to prove that the employer committed a breach of contract or that the employer's conduct amounted to a repudiation of the contract of employment. What needs to be proven is that the conduct of the employer created circumstances that are, objectively speaking, intolerable for the employee. But, the mere existence of a breach is not necessarily a sufficient condition to prove intolerability.[4] This type of dismissal occurs in circumstances when the employee abandons the contract, either by resigning or by leaving the place of employment and not returning.[5]

Constructive dismissal is a type of termination once unknown to the common law except in cases where the employer made it impossible for the employee to

3 *Labour Relations Act* 66 of 1995, hereafter referred to as the LRA.
4 Grogan *Dismissal* 197.
5 Grogan *Dismissal* 196.

perform due to the fact that the employment relationship became intolerable.[6] When an employee claimed that he or she[7] was forced to abandon his employment, he will have no remedy in terms of the common law, unless he is able to prove that that the employer committed a material breach of contract or repudiated the contract. Then it is said, under the law of contract, that it is the employer who committed the breach. In such circumstances, the employee had a choice. The employee could either hold the employer to the contract or seek an order compelling the employer to remedy the breach committed or the employee could abandon the contract and sue the employer for damages he sustained.[8]

In terms of Section 192(1) of the LRA the onus rests on the employee to prove, on a balance of probabilities, that he was dismissed from his employment. There are certain critical issues which need to be determined in cases involving claims for constructive dismissal. The first issue is whether the employee brought the contract to an end. This element is in most cases common cause and may be evidenced by some form of letter of resignation or by signifying in some other way that that they no longer intend to be bound by the contract.[9] The second issue is whether the reason for the employee's action was that the employer had rendered the prospects of continued employment intolerable. In order to prove the second element, the applicant will have to present evidence of conduct on the part of the employer which was unreasonable or created a hostile environment. The conduct may take the form of acts or omissions and may be conducted on the part of the employer which is specifically intended to force the employee's resignation.[10]

The last element that needs to be proven is ultimately whether the employee has no reasonable alternative other than terminating the contract. The onus rests on the employee to prove that these requirements have been met in order to prove

6 Grogan *Dismissal* 196.
7 Where the word "he" is used, it must be understood to include both the male and the female version.
8 Grogan *Dismissal* 197.
9 Davel 2011 http://www.solidaritylegalservices.co.za
10 Bouwer 2009 http://www.retrenchmentassist.co.za

that he or she was dismissed.[11] All of these requirements must be present to succeed with a claim of constructive dismissal. If the employee fails to prove all of the requirements, it cannot be said that constructive dismissal took place. Once an employee has established that he or she was indeed constructively dismissed, the onus then shifts to the employer to prove that the employee was dismissed for a fair reason and in accordance with a fair procedure.[12]

It is not enough to look at the subjective feelings of the employee alone, attention must rather be given to the belief of the employee which must be a reasonable belief. The employee must also prove that the employer was in fact responsible for creating the conditions that induced this belief. A mere claim by employees that they believed that there was no point in continuing with the employment relationship is not in itself sufficient. The employee must also prove that the belief was reasonable. Reasonableness in this context firstly means that the circumstances which the employees' concerned claim induced their belief was such as to justify their claim; secondly that the circumstances in fact existed.[13] The onus is on the employee to prove that it was the employer who was responsible for creating conditions that induced the employee's belief.[14]

The following discussion will thus regard the type of tests the courts apply. This raises the question whether these tests are still the right tests which need to be applied. Times have changed and the workplace has become more and more stressful. Maybe the time has arrived that our courts should reformulate the tests to establish whether constructive dismissal in fact took place.

It is thus clear from the above introductory discussion that constructive dismissal is clearly defined in the LRA. As discussed, there are also certain critical issues which need to be proven and the onus rests on the employee to prove those

11 Grogan *Dismissal* 197.
12 Bouwer 2009 http://www.retrenchmentassist.co.za
13 Roets & Du Plessis Attorneys 2009 http://www.roetsduplessis.co.za
14 Grogan *Dismissal* 199.

issues. The problem is that it is extremely difficult to prove that constructive dismissal indeed took place, and it is therefore necessary to analyse the tests the court apply to ascertain whether a constructive dismissal indeed took place. A discussion of these tests will now follow.

2.2.1 The tests for constructive dismissal

Analyses of the tests, as mentioned above, is of the utmost importance, because it will lead to a clearer understanding of how the courts deal with these kinds of cases. In order for a party to succeed with his claim for constructive dismissal, he must understand how the courts go about judging such cases.

The tests that are used to determine whether constructive dismissal took place are partly objective and partly subjective.[15] The perceptions of the employee at the time of the termination of contract, as well as the circumstances in which the termination took place should be considered.[16] It is important to note that the employee's perceptions should not be the only factor which needs to be taken into account. The employee must keep in mind that he still needs to prove that he would have continued working had it not been for the employer's conduct. In other words, the employee should not already have planned on resigning. The employee should also have reasonable believed that the employer would not have improved and ceased the unreasonable and intolerable conduct.[17]

In the case of *Jooste v Transnet Ltd t/a SA Airways*[18] the appellant was employed as a senior manager in cargo operations by South African Airways. The appellant and his superior, the executive manager, did not get along. The executive manager kept on criticizing the appellant's work, and took some of the

15 Grogan *Dismissal* 199
16 Grogan *Dismissal* 199.
17 Davel 2011 http://www.solidaritylegalservices.co.za
18 *Jooste v Transnet Ltd t/a SA Airways* 1995 16 ILJ 629 (LAC), par 638B-D.

appellant's projects away from him. The executive manager also informed the appellant that he wanted him to resign and accept a retrenchment package, but the appellant refused. Thereafter the appellant on several occasions lodged a complaint with senior management about his inability to work with the executive manager, but never informed them that the executive manager pressured him to leave. Even after the meetings were held, the manager still kept pressurizing the appellant to leave. A meeting was then held between the parties and their legal representatives. At the meeting the appellant was accused of misconduct and told that he could face disciplinary proceedings and that he was at risk of being retrenched. After the meeting, the executive manager once again pressurised the appellant to resign. The appellant who wanted to avoid further harassment by the executive decided to resign. His resignation was accepted and the details agreed upon. In Section 43 proceedings the appellant contended that, under pressure from the executive manager, he had tendered his resignation and that, under pressure, he had accepted the retrenchment package, and that this amounted to a constructive dismissal, which was unfair. The court ordered his interim reinstatement and the respondent chose to pay the appellant his salary instead of allowing him to return to work. In Section 46(9) proceedings the Industrial Court found that the appellant had not been constructively dismissed but had resigned voluntarily. The appellant then appealed to the Labour Appeal Court.

The court made the following important statement:

> In a matter in the Industrial Court in which the applicant resigned, but averse that he was constructively dismissed, the first factual enquiry is whether, in resigning, the applicant did not intend to terminate the employment relationship. The onus is on the applicant. If the court finds that the applicant did have that intention, the enquiry is at an end. Similarly, where the resignation forms part of an agreement between the applicant and his former employer to terminate their relationship, once the agreement is proved (by the employer) or admitted, the enquiry is at an end, unless the applicant contends and proves that the

> agreement is not binding. If the applicant is unable to discharge the onus on a balance of probabilities, the Industrial Court had no jurisdiction to determine the dispute concerning the alleged unfair labour practice. If the applicant does discharge the onus, the next enquiry, in a case in which the applicant contends that he was constructively dismissed, is whether the employer did constructively dismiss him. The onus is on the employee to establish that there was a constructive dismissal.

In a case of constructive dismissal the employee terminates the employment relationship by resigning because of the conduct of the employer. The court looks at the employer's conduct as a whole and determines whether it is such that its effect judged reasonably and sensibly, is that the employee cannot be expected to put up with it.

The relevance of this *dictum* to establish whether a dismissal within the meaning of Section 186(1)(e) took place seems to be questionable at times. The former Labour Appeal Court was seeking to lay down a test for whether the Industrial court (as it then was) had jurisdiction to grant relief to an employee who claims that he was constructively dismissed.[19]

In the case of *Pretoria Society for the Care of the Retarded v Loots*[20] the Labour Appeal Court under the 1956 Act laid down a test that must be used to determine whether the termination of an employment contract by the employee amounts to constructive dismissal:

> When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created.

19 Grogan *Dismissal* 199.
20 *Pretoria Society for the Care of the Retarded v Loots* 1997 18 ILJ 981 (LAC), par 72.

It is not enough for the employee to claim that he or she believed that the employment relationship was intolerable. The employee must in fact satisfy the court or the arbitrator that at the time of the termination of the contract they were under the genuine impression that their employer's conduct was of such a nature that it made the continuance of the working relationship intolerable. The test the court applied in this matter is purely subjective in that the court only looked at how the employee sees and experiences an unbearable situation. In practice, situations can occur where employees use constructive dismissal as a means to get out of their contracts, for example if they received a better work offer or in instances where an employee wants to make money from the employer by running to the courts. It is further extremely difficult to prove intolerable working conditions, because each individual experiences working conditions in a different way.[21]

In the case *Loubser v PM Freight Forwarding*[22] the commissioner made the following important statement:

> It is important to be cautious in adopting a wide interpretation of what conduct by an employer would constitute constructive dismissal because of the danger of inviting a flood of employees who resign and then repent and want to claim the protection of the Act … On the one hand, it would be a corruption of the Act to adopt a very restrictive interpretation. The definition in Section 186 (1)(e) was clearly designed to protect employees who resign in desperation as a last resort because of the unlawful or unfair conduct of the employer that makes a continued employment relationship intolerable. Employers do have the responsibility to avoid acting in a manner that would likely to destroy or undermine the employment relationship. This means that care should be taken of the conduct of the employee and the interaction between both parties in determining the existence of a constructive dismissal.

21 Grogan *Dismissal* 200.
22 *Loubser v PM Freight Forwarding (1998) 7 CCMA 6.13.13.*

The employee's perception must be tested against the actual reasons why he ended the contract of employment. Where it is clear that the employee had an ulterior reason for ending the contract of employment, for example if the employee had the desire to take up alternative employment, then it cannot be said that the employee was constructively dismissed.[23] The employer's actions after the employee's resignation or departure must only be taken into account if those actions can cast some light on the employer's conduct and attitude before the resignation or the termination of the contract of employment. [24]

It is not necessary that the employer's conduct should be a breach of the employment contract. If one looks at the wording of Section 186(1)(e) of the LRA, which describes the conduct which is required to justify a claim of constructive dismissal, then one will see that what is required is conduct of the employer which made continued employment intolerable for the employee.[25]

It is necessary for the writer to analyse the term intolerable. The choice of that term by the legislature indicates that mere inconvenience is not sufficient. Emphasis must also be placed on the effects of the prospects of continued employment. The circumstances, on which the employee relies, should also be scrutinised. Those circumstances must not be of a temporary nature. However, a single incident may in some cases be enough to cause a reasonable employee to conclude that the incident had the effect that the employment relationship cannot be renewed or continued.[26]

In the case of *Beets v University of Port Elizabeth*[27], it was found that the constructive dismissal takes place only if the employee resigned because of the employer's harsh, antagonistic and hostile conduct, and in another instance it

23 Grogan *Dismissal* 200.
24 Grogan *Dismissal* 200.
25 Grogan *Dismissal* 200.
26 Grogan *Dismissal* 201.
27 *Beets v University of Port Elizabeth* 2000 8 BALR 871 (CCMA).

was held that the resignation must be ascribed because the prospect of continued employment was intolerable.

Examples of some of the actions potentially justifying resignation, *inter alia*, are the following: Putting managers into exceptionally difficult work situations without supporting their decisions; harassment or humiliation, particularly in front of less senior staff; victimisation of the staff member; unilaterally changing the employee's job content or terms of employment; significantly changing the employee's job location at short notice; falsely accusing an employee of misconduct or of not being capable of carrying out their job; undue demotion or disciplinary procedures; sabotage of employee's work product either directly or indirectly with repeated interruption, confusing or inaccurate direction, or uncommunicated deadline changes; vandalizing the employee's workspace, home or other personal property.[28]

In the case of *Marsland v The New Way Motor & Diesel Engineering*[29] (facts of the case will be discussed later on) the court stated that the next requirement for proving constructive dismissal to be considered by the court was whether the applicant had shown that continued employment had become intolerable. This had to be objectively established, and the subjective apprehension of the applicant was not the final determinant of whether or not his employer's conduct was intolerable. Relying on the test formulated in the Pretoria Society case, as already discussed above, the court found that it was not necessary to show that the employer intended any repudiation of the contract. The court's function was to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The conduct of the parties had to be looked at as a whole and its cumulative impact assessed.

28 Claassen 2009 http://www.bregmansattorenys.co.za
29 *Marsland v The New Way Motor & Diesel Engineering*[29] 2009 30 ILJ 169 (LC)

In the case of *CEPPAWU & Another v Aluminium*[30] the Labour Appeal Court considered and defined the meaning of Section 186(1) (e) and stated that constructive dismissal involves a resignation because the work environment has become intolerable for the employee as a result of conduct on the part of the employer. In the case of *Executive Council for the Department of Health, Eastern Cape v Odendaal and Others*[31] the Labour Court confirmed that the law in respect of constructive dismissal is as follows:

> In considering what conduct on the part of the employer constitutes constructive dismissal, it needs to be emphasized that a constructive dismissal is merely one form of dismissal. In a conventional dismissal, it is the employer who puts an end to the contract of employment by dismissing the employee. In a constructive dismissal it is the employee who terminates the employment relationship by resigning due to the conduct of the employer.

In the case of *Watt v Honeydew Dairies (Pty) Ltd*[32] the court stated that in order to determine whether the reason for the resignation was intolerable working conditions, an objective test needs to be applied and it does not depend on the employer's perception or personal opinion.

Some writers, such as J Grogan, believe that the test is partially subjective and partially objective provided the employer's perception was reasonable.[33] Additionally, the employee must prove that he or she would have continued working had it not been for the employer's conduct.[34] In other words, the employee should not already have planned on resigning. The employee should also have reasonable believed that the employer would not have changed and ceased the unreasonable and intolerable conduct.[35] It is further important to remember that there must be a link between the employer's conduct and the

30 *CEPPAWU & Another v Aluminium* 2000 CC [2002] 5 BLLR 399 (LAC) para 30.
31 *Executive Council for the Department of Health, Eastern Cape v Odendaal and Others* (P504/07) [2009] ZALC 5 (13 January 2009)
32 *Watt v Honeydew Dairies (Pty) Ltd* (2003) 24 ILJ 466 (CCMA).
33 Anon 2010 http://www.solidaritylegalservices.co.za
34 *Jooste v Transnet Ltd t/a SA Airways* 1995 16 ILJ 629 (LAC),
35 Anon 2010 http://www.solidaritylegalservices.co.za

situation that caused the employee to resign. The question is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy it, or seriously damage the relationship of confidence and trust between employer and employee.[36]

In some cases the test is to determine whether the employee had any reasonable option other than to resign or to abandon the contract of employment. For example, if the employee had some effective channel for obtaining the relief, like a grievance procedure, but failed to use it, it would be fatal for the employee's claim.[37] If an employee lodges a claim, and the basis for that claim is mere distress or disappointment as a result of the actions of their employers, constructive dismissal will not have been proved.[38]

As discussed above, the first element that an employee needs to prove is that a resignation did indeed take place. But before the employee decides to resign, he needs to keep the following in mind: The employee needs to take some reasonable steps to try to resolve the problem that led to the unbearable situation he currently is in. Thus, the employee firstly needs to make use of the workplace's internal grievance procedures. If there are no internal grievance procedures at the workplace, the employee needs to place his grievance on record and request the employer or HR department to address the grievance within a reasonable time. If the grievance still remains unresolved, the employee should then consider whether the resignation is a reasonable response to the employer's actions.[39]

This raises the question: For whose acts will the employer be responsible and held liable for? This brings us back to the third requirement, set out in Section 186(1)(e).[40] This section clearly states that the circumstances, leading to the resignation of the employee, must have been brought about by the employer. In

36 Anon 2010 http://www.solidaritylegalservices.co.za
37 Grogan *Dismissal* 201.
38 Grogan *Dismissal* 202.
39 Anon 2009 http://www.retrenchmentassist.co.za
40 Section 186(1)(e) of the LRA.

other words, it must be either the employer personally or through one of his agents who has performed actions creating the intolerable circumstances.[41]

In the case of *Nedcor Bank Limited v Harris*[42] the employee resigned in circumstances which he alleged constituted constructive dismissal. The resignation arose from his frustration with his immediate superior, Mrs Schroeder, and in particular centred on the implementation of a performance improvement programme. The court made the following important remarks: In cases where an employee alleges constructive dismissal, the test is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract: The court's function is to look at the employer's conduct as a whole and determine whether its effect is such that the employee cannot be expected to put up with it. Secondly, the objective assessment of the employer's conduct that may have made the continued employment intolerable has to be assessed in its totality and not piece meal. Thirdly, the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstance must have been of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. More is needed**:** The employer must be culpably responsible in some way for the intolerable conditions. The conduct must have lacked reasonable and proper cause**.**[43]

Thus, a claim of constructive dismissal, based on the actions of an employee's colleagues will not succeed unless the employer was aware of those actions and

41 Anon 2010 http://www.worklaw.co.za
42 *Nedcor Bank Limited v Harris 2009 ZALC 123.*
43 Anon 2010 http://www.worklaw.co.za

failed to take action to prevent them. Similarly, an employer cannot be held to have created intolerable working conditions for an employee if those circumstances arose as a result of factors beyond the employer's control.[44]

If an employee lodges a claim of constructive dismissal based on the actions of a co-employee, the claim will not succeed, unless the employer was aware of those actions and still failed to take preventative steps. But an employer cannot be held liable for creating intolerable working conditions if the intolerable circumstances were caused by a third party outside the employer's control.[45] Section 60(3) of the *Employment Equity Act*[46] states that if the employer fails to take the necessary steps to eliminate alleged conduct, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

The final requirement which needs to be proven for a claim of constructive dismissal is that the employee had no reasonable option in the circumstances other than to terminate the contract. Whether there were any alternative options, is a question of degree.[47] In some circumstances employees may justifiably conclude that no action on their part could possibly remedy the situation. In others, some action by the employee to rectify the cause of the distress may be called for. Where the complaint is such that the employer could, and probably would, have dealt with the cause of the employee's distress, such as the conduct of a superior, or colleague the employee should file a complaint before resigning.[48] The last element may present some difficulty as it is highly subjective. It will thus be necessary to show that reasonably and sensibly, the employee cannot be expected to put up with it.[49] In some cases it can be difficult

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44 Roets & Du Plessis Attorneys *Constructive Dismissal* http://www.roetsduplessis.co.za (date of use 12 April 2011)
45 Grogan *Dismissal* 203.
46 *Employment Equity Act* 55 of 1998.
47 Grogan *Dismissal* 203.
48 Roets & Du Plessis Attorneys *Constructive Dismissal* http://www.roetsduplessis.co.za (date of use 12 April 2011).
49 *Pretoria Society for the Care of the Retarded v Loots* 1997 18 ILJ 981 (LAC).

to determine whether it was the conduct of the employer or that of the employee which was the cause of the termination of the employment relationship.[50]

In the case of *Murray v Minister of Defence*[51] the appellant, a commander in the military police claimed that he was constructively dismissed, because he found himself the subject of investigations into allegations of serious misconduct. Although he was cleared of all charges, the appellant was removed from his post as commanding officer of the military police station at Simonstown and transferred to a supernumerary position at the Naval Staff College at Muizenberg. In the meantime, the military police office headquarters in Simonstown were restructured and the appellant's post was downgraded from the rank of commander to that of lieutenant commander. The appellant was offered a post at military headquarters, which he refused. After two years at the staff college, the appellant decided to resign and instituted action in the High Court for damages for constructive dismissal. After finding that none of the situations of which the appellant complained had induced him to resign and that the employment relationship had not been rendered intolerable, the High Court dismissed the action with costs. Then the appellant referred the matter to the Supreme Court of Appeal.

The court, *inter alia*, held as follow:

> In assessing whether the conduct of the employer made the relationship with the employee intolerable, the court should not fragment the employee's complaints, in other words consider them one by one in isolation and conclude that each was neither pivotal to the employee's resignation nor rendered his position intolerable.

The court further held that the conduct of the employer must be considered as a whole including its cumulative impact on whether its effect judged reasonably

50 Grogan *Dismissal* 197.
51 *Murray v Minister of Defence* (2008) 29 *ILJ* 1369 (SCA)

and sensibly, was such that the employee could not be expected to put up with it. The intolerable conditions which the employee complained about must have been of the employer's making. The court furthermore emphasised that:

> ...the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstance must have been of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. More is needed: The employer must be culpably responsible in some way for the intolerable conditions; the conduct must have lacked 'reasonable and proper cause'. Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case.

The court also noted that the notion of constructive dismissal flowed in turn from the English doctrine, which accepts that employers have a contractual duty to treat their employees fairly. If they do not, and render the employment relationship intolerable, the employer is regarded as having terminated the employment relationship by forcing the employee to resign**.** The Court further held that the appellant was not required to prove that the respondent had repudiated the contract. According to well-established jurisprudence on the doctrine of constructive dismissal an employee claiming to have been constructively dismissed must prove that the resignation was neither voluntary nor intended to terminate the employment relationship. Once the employee discharges that onus, it must be established whether the employer, without reasonable or proper cause, conducted itself in a manner intended to destroy or seriously damage the relationship of trust and confidence with the employee. When the relationship has been viewed as a whole, the question is whether the employee could reasonably have been expected to put up with the employer's conduct.

The court then looked at all the relevant facts and found that the appellant's work situation was intolerable, and that this was caused by the navy's conduct. The answer to the case turned on the further question: Did the navy have reasonable cause for making the employee's working life intolerable? The court stated that, after looking at all of the facts, the navy did not have reasonable cause for creating the intolerable situation and the court accordingly held that the appellant had been constructively dismissed, and that he was entitled to compensation for such losses as he could prove. The appeal was upheld with costs.

In the case of *Jordaan v CCMA*[52] the appellant was employed as an estate agent by the sixth respondent company under the direct supervision of Mr G, the majority shareholder of the company. Her husband managed and was a minority shareholder in a branch of the company. When the relationship between Mr G and the appellant's husband deteriorated, Mr G decided to conclude a restraint of trade agreement with all of his employees, which he gave them 30 days to consider. The appellant then enquired about what would happen if she refused to sign the restraint agreement. Mr G then informed her that he would not fire her but that there was a possibility that she would be retrenched.

Thereafter, the appellant continued asking for a letter from Mr G regarding her future. Her attempts, however, failed and she felt compelled to resign. The appellant then took up employment with her husband at an agency he had established in competition with the company. She then referred a constructive dismissal dispute to the CCMA. At the CCMA, the commissioner found that she had failed to establish a case of constructive dismissal in terms of Section 186(1) *(e)* of the LRA 1995. The Labour Court dismissed her review application, and the appellant decided to approach the Labour Appeal Court.

The court held that our law has developed a fairly clear set of guidelines on how to approach a dispute about constructive dismissal. The court further held that

52 *Jordaan v CCMA* 2010 31 ILJ 2331 (LAC).

our courts have developed a two-stage approach. Firstly, the employee bears the initial onus of showing, on an objective standard, that the employer has rendered the employment relationship so intolerable that no other option is reasonably available to the employee, save for termination of their relationship. Thereafter the court makes an assessment whether the dismissal was unfair. Thus, the option of constructive dismissal can only be pursued when an employee is left with no other alternative other than resigning. An employee must provide some evidence to justify that the employment relationship has become so intolerable that no reasonable option, other than resigning, is available to him or her. The court accordingly looked at all the facts and surrounding circumstances and found that there was no evidence that the company behaved in a deliberately oppressive manner and left the employee with no option but to resign. There was no evidence available to justify, on the probabilities, that there was a clear, objective and immediate threat of dismissal. The court further stated that although there was some tension in the employment relationship, this on its own could never justify constructive dismissal. The court accordingly dismissed the appeal with costs.

In the case of *Chabeli v CCMA*[53] the applicant tendered his resignation on notice on 1 April 2008, and on the same day the respondent accepted the resignation and informed him that he was not required to work out his month's notice. On 29 May 2008, the applicant referred a dispute to the CCMA, which informed him that the application was late and that he was required to seek condonation. In his condonation application, the applicant stated the dispute had arisen on 1 April 2008 (the day he tendered his resignation) and that the referral was accordingly 57 days late. Condonation was accordingly refused. On review, the applicant alleged that he had given the incorrect date of the dispute, as he had in fact remained in the respondent's employ until 20 April 2008.

53 *Chabeli v CCMA* 2010 4 BLLR 389 (LC)

The Labour court held that an employee, who had resigned from his employment but had not, either in his letter of resignation or later, provided any details as to how his employer had made his continued employment intolerable, had failed to discharge the onus on him to show that he had been constructively dismissed. The court further held that the date of termination of employment was the date on which the employee resigned, not the date on which he received his last pay cheque, and that the referral to the CCMA was therefore out of time and required condonation.

In the case of *Daymon Worldwide SA Inc v CCMA*[54] the court reviewed the essential elements that an employee must prove in order to succeed with a claim for constructive dismissal. In particular, the employee must show that the employer was culpably responsible for factors that made her employment intolerable. Where the employee had not shown that these factors were not of the employer's making the court held that the employee had not proved that she had been constructively dismissed.

In the case of *Britz and Acctech Systems (Pty) Ltd*[55] the employee claimed that her employment had been rendered intolerable by her employer's offensive behaviour, and that she had been constructively dismissed. In his award the CCMA commissioner undertook a comprehensive study of the development of the concept of constructive dismissal, under both the LRA 1956 and the LRA 1995, and of the principles on which it was based. Applying these to the conduct of the employer as a whole the commissioner found that the employee had indeed been left with no alternative but to terminate her employment, and that she had been constructively dismissed.

In the case of *Vorster and BMC Management Trust*[56] the court found that, where an employee resigned from her employment because of a strained relationship with a third party at the workplace, the employee could not claim to have been

54 *Daymon Worldwide SA Inc v CCMA (*2009) 30 ILJ 575 (LC).
55 Britz and Acctech Systems (Pty) Ltd (2009) 30 ILJ 1150 (CCMA)
56 *Vorster and BMC Management Trust* 2009 30 ILJ 1421 (CCMA).

constructively dismissed because the supposedly intolerable working conditions had not been of the employer's making.

In the case of *Strategic Liquor Services v Mvumbi* NO[57] the court held that where an employee had been given a choice between resigning and being subjected to poor performance procedures, it is not a requirement for constructive dismissal that the employee should have no choice but to resign, but that it is required that the employer must have made continued employment intolerable.

The case of *Coetzee v A & D Tyre Manufacturing Tech (Pty) Ltd*[58] is also a case which needs to be considered in this study. The facts of the case can be summarised as follows. The applicant was an employee of the respondent and the applicant was working as a CNC programmer and machinist over a period of about three years. The applicant resigned on 1 December 2008. He claimed that he had been constructively dismissed pursuant to several encounters with his new foreman. The applicant alleged that he had been subject to tantrums, aggressive behaviour and the use of foul language on the part of the new foreman. He took up the issue with management, but nothing was done about it, and the applicant was advised by management that he would have to earn respect.

The applicant was subsequently called to various disciplinary hearings as a result of the alleged abuse of sick leave, as well as unauthorised absence from work. He then had a further encounter with his foreman, who threatened to dismiss him. The question before the commissioner was whether or not the applicant had been constructively dismissed, and if so, whether the dismissal was unfair.

The commissioner considered the definition of a constructive dismissal in Section 186(1)(e) of the Act and the case law, and stated that it is clear that the onus is on the employee who claims a constructive dismissal to prove that the employer

57 *Strategic Liquor Services v Mvumbi* NO 2010 (2) SA 92 (CC).
58 *Coetzee v A & D Tyre Manufacturing Tech (Pty) Ltd* 2009 JOL 23550 (MEIBC), hereafter referred to as the *Coetzee* case.

has made his working life or the continued employment relationship intolerable. Furthermore, the employee is required to prove that his resignation was the last resort. In the final instance, the employer's conduct must be gauged objectively.

The commissioner accordingly found that the applicant did not succeed in showing that he had no intention to resign. The commissioner examined the respondent's conduct objectively, and concluded that nothing could be found on the part of the respondent that rendered a continued relationship intolerable. The respondent appeared to have been quite lenient with the applicant in that it granted him sick and other leave when the applicant had to attend to personal and health problems. The applicant failed to discharge the onus he bears to prove a constructive dismissal and the commissioner accordingly found that the applicant was not constructively dismissed.

To summarise, the tests that our courts use to determine whether a constructive dismissal took place, is partly objective and partly subjective.[59] The perceptions of the employee at the time of the termination of contract, as well as the circumstances in which the termination took place, should be considered.[60]

A two-stage enquiry needs to take place: The first factual enquiry is whether in resigning the applicant did not intend to terminate the employment relationship. The onus is on the applicant. If the court finds that the applicant did have that intention, the enquiry is at an end. Similarly, where the resignation forms part of an agreement between the applicant and his former employer to terminate their relationship, once the agreement is proved (by the employer) or admitted, the enquiry is at an end, unless the applicant contends and proves that the agreement is not binding. If the applicant is unable to discharge the onus on a balance of probabilities, the Industrial Court has no jurisdiction to determine the dispute concerning the alleged

59 Grogan *Dismissal* 199
60 Grogan *Dismissal* 199.

unfair labour practice. If the applicant does discharge the onus, the next enquiry, in a case in which the applicant contends that he was constructively dismissed, is whether the employer did constructively dismiss him.[61]

It is not enough for the employee to claim that he or she believed that the employment relationship was intolerable. The employee must in fact satisfy the court or the arbitrator that at the time of the termination of the contract they were under the genuine impression that their employer's conduct was of such a nature that it made the continuance of the working relationship intolerable. The test the court applied in this case, however, is purely subjective in that the court only looked at how the employee sees and experiences an unbearable situation.[62]

It is important to be cautious in adopting a wide interpretation of what conduct by an employer would constitute constructive dismissal because of the danger of inviting a flood of employees who resign and then repent and want to claim the protection of the Act. The courts, however, should remember that it would be a corruption of the Act to adopt a very restrictive interpretation. The definition in Section 186 (e) was clearly designed to protect employees who resign in desperation as a last resort because of the unlawful or unfair conduct of the employer that makes a continued employment relationship intolerable. Employers should remember that they have a responsibility to avoid acting in a manner that would likely destroy or undermine the employment relationship.[63]

It is not necessary that the employer's conduct should be a breach of the employment contract. If one looks at the wording of Section 186(1)(e) of the LRA, which describes the conduct which is required to justify a claim of constructive

61 *Jooste v Transnet Ltd t/a SA Airways*
62 *Pretoria Society for the Care of the Retarded v Loots*
63 Loubser v PM Freight Forwarding63

dismissal as conduct by an employer which made continued employment intolerable for the employee.[64]

To determine whether continued employment have become intolerable, the courts need to apply an objective test, and the subjective apprehension of the applicant should not be the final determinant of whether or not the employer's conduct is intolerable. It is not necessary for the employee to show that the employer intended any repudiation of the contract. The court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The conduct of the parties had to be looked at as a whole and its cumulative impact assessed. [65]

It is important to remember that there must be a link between the employer's conduct and the situation that caused the employee to resign. The question is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy it, or seriously damage the relationship of confidence and trust between employer and employee.[66]

It is important to remember that the objective assessment of the employer's conduct that may have made the continued employment intolerable has to be assessed in its totality and not piece meal. In some instances, the employer may not have control over what makes conditions intolerable. So the critical circumstance must have been of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. The employer must be culpably responsible in some way for the intolerable conditions. The conduct must have lacked reasonable and proper cause.[67]

64 Grogan *Dismissal* 200.
65 *Marsland v The New Way Motor & Diesel Engineering*[65] 2009 30 ILJ 169 (LC)
66 Anon 2010 http://www.solidaritylegalservices.co.za
67 Anon 2010 http://www.worklaw.co.za

The courts should be careful not to consider the employee's complaints one by one in isolation.[68]

From the above discussion, it is clear that the courts are very careful to find that a constructive dismissal took place. The employee must provide the court with enough evidence before his claim of constructive dismissal will succeed. As stated above, it is not sufficient for an employee to only claim that they believed that there was no point in continuing with the employment relationship. The employee must also prove that his belief was reasonable. This is where the problems start.

Every person in the workplace handles work stress differently. What may be reasonable work stress to one person, can be unreasonable or excessive work stress for another. So in order for an employee to prove that his belief was reasonable, an intensive and extensive enquiry is required. The employee's job description, the employee's workplace, the co-employees, the employee's personal circumstances, the employee's mental health, the employee's relationship with his superiors, the employee's history of handling work stress, *etcetera* should be scrutinised. So the tests as it stands in our courts at this moment makes it extremely difficult for a person, suffering from extensive work stress, to succeed in his constructive dismissal claim.

An enquiry about the circumstances which led to the employee's claim must also be studied in order to see whether those particular circumstances justify the employee's claim. It is also important to ascertain whether those circumstances indeed existed, and that it wasn't just a story the employee made up just because he could not handle the normal work stress that comes with the job.[69]

68 *Murray v Minister of Defence*[68]
69 Israeltam 2009 http://www.labourguide.co.za.

The choice by the legislature of the word “intolerable” also raises some concerns. As stated in the paragraph above every person handles work stress differently. Intolerable circumstances for one person may be tolerable circumstances for another. There is thus a need for some guidelines in cases where a court or an attorney is confronted with a case where an employee suffers from work stress, and he wants to claim that he was constructively dismissed.

It is thus necessary to do a study about work stress in South Africa, for it will indicate how the courts should handle constructive dismissal cases where the employee resigns because of work stress caused by the employer which resulted in the working conditions becoming intolerable, and whether one can formulate a list of factors which could also be helpful in similar future cases.

3 Work stress in South Africa

Work stress is becoming a greater threat in the workplace. Employers are unsure about what they should do in cases where an employee cannot handle the pressure. There is uncertainty about the steps that must be taken by the employer to relieve the employee of his or her work stress. Work stress is experienced differently by everyone and that makes the whole process even more complex. Anybody can get stressed, but everybody has a different threshold at which they become stressed. Stress is an interaction between the person and the environment. Stress can either have a positive of negative influence on the employee’s performance. Some people perform better under stress and for some stress causes lower productivity in the workplace. Stress is usually caused because there are too many demands and a lack of control, but it also depends on how the person perceives the situation. Stress in the workplace is definitely a growing concern and both the employer and employee must try to

reduce stress factors as well as trying to cope with it through different methods and techniques available.[70]

3.3.1 Stress in general

A person's ability to work is subject to some highly personal factors such as intelligence, the person's personality, training, experience as well as the culture of the workplace. There are a number of work-related situations that may create a stressful working environment. In most cases, these types of situations are handled by following a statutory path, thus by using the LRA and the EEA.[71] If an employee suffers from a stress-related illness and is unable to perform his or her duties, that person may be fairly dismissed as long as the employer followed the guidelines set out in the Code of Good Practice: Dismissal.[72] An employer may dismiss an employee who is absent from work due to a stress-related illness on grounds of the employer's operational requirements, provided the usual substantive and procedural guidelines have been complied with.[73]Alternatively the employer may follow the incapacity due to illness route, but it can be very problematic to choose which procedure is the correct procedure to follow.[74]

In the case of *Hendriks v Mercantile & General Reinsurance Co of SA Ltd*[75] the appellant was suffering from anxiety and depression which was aggravated by the depressing circumstances at work. The court found that the dismissal was fair since the employer tried to accommodate the employee by offering him

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70 Naeck *"Stress factors inside and outside the workplace and their effects on behaviour"* 65.

71 Van Jaarsveld *Employer's Liability for stress at work* 627.

72 Van Jaarsveld *Employer's Liability for stress at work* 627.

73 Section 188(1)(a)(i) of the LRA, Section 189 LRA, Item 12 of the Code of Good Practice on Dismissals Based on Operational Requirements Item 12, Section 41(2) of the BCEA.

74 Section 188(1)(a)(i) of the LRA ,Section 189 LRA, Item 12 of the Code of Good Practice on Dismissals Based on Operational Requirements Item 12, Section 41(2) of the BCEA.

75 *Hendriks v Mercantile & General Reinsurance Co of SA Ltd* 1994 15 ILJ 304 (LAC).

alternative, less stressful employment which the employee declined. Instances can arise where an employee decides to end his or her employment, because stress-related situations caused intolerable circumstances at work.

In the case of *Pretoria Society for the Care of the Retarded v Loots*[76] the court stated that it must be determined whether an employer conducted itself in such a manner as to destroy the working relationship to the extent that an employee cannot be expected to put up with it. There have been a number of cases which have been reported where the conduct of the employer or a co-employee created a stressful working environment and left the affected employee with no other alternative other than resignation. An employer has the duty to protect his or her employees and when the conduct of a fellow employee leads to great unhappiness of the staff and some of them chose to resign, the employer must act appropriately.[77]

In the UK, there is an implied obligation on every employer to take reasonable care and steps to ensure their employee's safety at work.[78] This implied obligation is not only an implied term of the employment contract, but also is a "duty of care" resulting from law of tort involving negligence.[79] This aspect will be discussed more thoroughly later on.

Sexual harassment at work may trigger stress-induced illnesses in employees. In the case of *Media 24 Ltd v Grobler*[80] a secretary (Grobler) was sexually harassed by her supervisor (Samuals). The supervisor was then dismissed. Grobler collapsed emotionally and was unable to continue working. Grobler then decided to sue the company for damages. The court held that Media 24 was liable for

76 *Pretoria Society for the Care of the Retarded v Loots* 1997 18 ILJ 981 (LAC).
77 Van Jaarsveld *Employer's Liability for stress at work* 629; *Gerber v Algorax (Pty) Ltd* 1999 20 ILJ 2994 (CCMA).
78 Van Jaarsveld *Employer's Liability for Stress at Work* 632.
79 Van Jaarsveld *Employer's Liability for Stress at Work* 632.
80 *Media 24 Ltd v Grobler* 2005 26 ILJ 1007 (SCA).

damages based on the common law duty of an employer to take care of its employees.[81]

3.3.2 Relevant case law

The case of *Marsland v The New Way Motor & Diesel Engineering*[82] is a case that needs to be considered in this study. The facts of the case are as follows: The applicant had been employed as a marketing manager by the respondent company in February 2001. While he was on his family vacation in December 2001 he suffered a nervous breakdown when his wife left him. He was hospitalised and finally returned to work on 1 February 2002. On his return to work he perceived a distinct change in attitude towards him by senior management. The applicant was excluded from participating in work that he had done previously, his development work was taken away from him, and he was excluded from the decision-making processes and was given menial tasks. The relationship between the applicant and the managing director deteriorated, until the applicant was charged with various offences and suspended. The applicant discovered that his office had been cleared of all its contents before he attended his disciplinary enquiry.

The chairperson of the enquiry found him guilty of most of the charges and issued a final written warning. When the applicant returned to work, he no longer had an office and his filing cabinet was locked. The applicant was, *inter alia* not allowed to receive any sales calls, all his calls were recorded, he was prohibited from sending and receiving faxes and he was prevented from attending promotions and exhibitions. Although the applicant wanted to work, he was prevented from doing so because he was denied access to documents and was shut out of the company's operations. The managing director's attitude to the applicant became offensive and he constantly verbally abused the applicant. The

81 Van Jaarsveld *Employer's Liability for stress at work* 630.
82 *Marsland v The New Way Motor & Diesel Engineering* 2009 30 ILJ 169 (LC).

applicant was then demoted to a junior position. The matter came to a climax in July 2002 when the applicant attended a meeting with the managing director and members of the employers' organisation at which the managing director lost his temper.

The applicant feared for his physical safety and left the company's premises. He never returned, despite several calls from the managing director, another member of management and the company's attorneys for him to do so. The applicant then decided to approach the Labour Court claiming he had been constructively dismissed in terms of Section 186(e) of the LRA and that his dismissal had been automatically unfair in terms of Section 187(1)(d) and (f).

The court first considered the fact that the company had failed to give any evidence at the trial. The company had legal advice at all times and knew that once the applicant had proved the constructive dismissal, the company would be required to prove that the dismissal was fair. The court stated that the only assumption they could draw from the company's failure to give evidence, was that the giving of evidence would damage its case.

The court then scrutinised the requirements the applicant had to meet to prove a constructive dismissal. With regard to the first requirement, whether the employment contract was terminated, the court stated that it was clear that the applicant was forced to leave the company as a result of the intolerable conduct of his employer and the applicant ended the contract of employment on 4 July 2002.

The next requirement for proving constructive dismissal to be considered by the court was whether the applicant had shown that continued employment had become intolerable. This had to be objectively established, and the subjective apprehension of the applicant was not the final determinant of whether or not his employer's conduct was intolerable. Relying on the test formulated in the Pretoria

Society case, as already discussed above, the court found that it was not necessary to show that the employer intended any repudiation of the contract. The court's function was to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The conduct of the parties had to be looked at as a whole and its cumulative impact assessed.

The court found that there had been no problem in the parties' relationship before February 2002. However, from the time the applicant returned to work in February 2002, after his hospitalisation for his nervous breakdown, the company conducted itself towards the applicant in a way that could only be described as calculated to destroy the employment relationship. The company's conduct was aimed at creating an unbearable working environment for the applicant. The court observed that the applicant had been subjected to ongoing verbal abuse from the company, of the most offensive and degrading nature, often in the presence of other employees. The verbal abuse on the applicant became increasingly worse and to the point where it was so pervasive and severe that it could be described as a form of harassment of the applicant.

Furthermore, the company, without justification, deliberately created a situation in which the employee was unable to perform the job he was employed to do. As discussed above, the company removed the applicant's key responsibilities and functions, and in the courts view this conduct was a concerted strategy on the part of the company to render the applicant's job impossible to perform and to ostracize him from his fellow employees. The court had no difficulty in finding that the company's conduct was in itself calculated or likely to destroy the employment relationship and it was conduct that the applicant could not be expected to tolerate. The court looked at all the evidence and accordingly came to the conclusion that the applicant had proved that the company had created a working environment which, objectively assessed, made continued employment for him intolerable.

The court then considered the third and final requirement, and came to the conclusion that the applicant had no alternative other than to resign. He had put up with the appalling working environment for as long as he could because he needed the income. He left the company when he could not take the abusive working environment anymore. The court was satisfied that the applicant had attempted to find a solution short of resignation, but the steps he had taken had, if anything, aggravated the situation. The court accordingly found that the applicant had proved constructive dismissal. The court further also found that the company discriminated against the applicant on the ground of his mental illness, and that the effect of that discrimination caused an intolerable working environment for the applicant, resulting is his constructive dismissal. The court accordingly declared the applicant's dismissal to be automatically unfair.

In the case of *Beukes v Crystal - Pier Trading CC T/A Bothaville Abattoir*[83] the applicant, who had been employed by the respondent since 1 February 2007, tendered her resignation on 14 July 2008. It was alleged by the applicant that her manager had made it impossible for her to continue working. According to the applicant, her manager took out her frustration as a result of the respondent's financial crisis, on the applicant. The applicant was also belittled and humiliated in the presence of clients and other employees. The applicant felt that "there were no prospects of continuing a healthy employment relationship". She accordingly resigned. The issue in dispute was whether or not the applicant's representation constituted a constructive dismissal in terms of Section 186(1)(e) of the LRA.

The court stated that the test for establishing whether the employee's resignation amounted to constructive dismissal was that the employee did not believe the

83 Beukes *v Crystal - Pier Trading CC T/A Bothaville Abattoir* (2009) JOL 23285 (CCMA).

employer will ever reform or abandon the pattern of creating unbearable environment. The court further stated that the employee's perception should be tested against the actual reason for the resignation. Ulterior motive for resigning to acquire alternative employment or pension money would not constitute constructive dismissal. The enquiry should be whether the employer without reasonable and proper cause conducted itself in a manner calculated to destroy or seriously damage the employment relationship.

The court agreed with the respondent that issues not related to work, if any, might have caused the alleged stress. The applicant failed to discharge the onus of proving that the employer behaved in a deliberate and oppressive manner which left the employee with no option but to resign. The court accordingly found that the applicant's resignation did not constitute a constructive dismissal.

A mere subjective feeling that the applicant was unfairly treated is not sufficient to prove constructive dismissal.[84] The test whether the respondent rendered the prospects of continued employment intolerable was objective.[85] Once constructive dismissal was proven, the onus shifts to the employer to prove that the dismissal was fair. To this end the question was whether the employer's conduct prompted the employee to resign.[86]

In the next paragraph, a discussion will follow about how the courts deal with cases where the employee suffers from stress due to an excessive workload and then claims that he has been constructively dismissed.

84 *Goliath v Medscheme (Pty) Ltd* (1996) 17 ILJ 760 (IC)
85 *Smithkline Beecham (Pty) Ltd v CCMA and others* (2000) 21 ILJ 998 (LC).
86 *Jonker v Amalgamated Beverages Industries* (1993) 14 ILJ 199 (IC) at 211.

3.4 Stress due to an excessive workload

The case of *Mbongwe v SA Express Airways*[87] is very insightful in this regard. The facts of the case were the following. The applicant felt that she had been constructively dismissed for the following reasons. She was working at the procurement department as a procurement officer. The first problem the applicant experienced was that her workload was too much and she proposed the employment of an additional person to assist her. The respondent, however, did nothing to assist her. As a result, her workload remained the same and she started experiencing some health problems. Ultimately the applicant had to choose between her work and her health.

The applicant submitted her resignation letter attaching the doctor's medical certificate. It was clear that the applicant intended working for the respondent if her working load was reduced or something was done to alleviate her workload. Before the applicant resigned, she raised this issue with her immediate manager, Ms Moganedi. The applicant also raised this issue with the head supply chain manager, Ms Mashabane. This is indicative of the intention on the part of the applicant of having the issue of her workload resolved. It was not disputed that the applicant battled to cope with her daily responsibilities. It was clear that the respondent failed the applicant in resolving her problem. Ms Moganedi, her immediate manager, was aware of the abovementioned problem. The same goes for Ms Mashabane, the head supply chain manager, who went to the extent of increasing the applicant's problem, but the applicant's work situation remained the same.

The general manager, Mr Malolaphiri, was aware of the applicant's problem; thus a proposal was sent to both the chief financial officer and human resources

87 *Mbongwe v SA Express Airways* 2009 3 BALR 286 (CCMA), hereafter referred to as the Mbongwe case.

executive including the chief executive officer. However, nothing fruitful was achieved because the applicant's work situation remained the same. The situation became worse when Ms Moganedi resigned. Mr Malolaphiri did nothing to rescue the applicant's situation and his evidence did not prove anything to the contrary.

It is clear from the facts that the respondent failed to do anything about the applicant's workload and, as a result, this had an effect on the applicant's health in that she started experiencing migraines in 2007 and she was referred to a psychologist. She was later treated for work stress as the headaches were related to her work. She suffered a mild heart attack on 18 April 2008 and she was diagnosed with a heart condition. The employer made the work environment unbearable and after experiencing the mild heart attack, she had to choose between work and her health. Therefore, the legal question in the case was whether the applicant's resignation amounted to constructive dismissal in accordance with Section 186(1)(e) of the LRA.

The commissioner first considered the general test for constructive dismissal as laid down by the Supreme Court of Appeal in the case of *Pretoria Society for the Care of the Retarded v Loots*[88]. In that case, the judge formulated the general test as follows:

> …the enquiry then becomes whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it…

88 *Pretoria Society for the Care of the Retarded v Loots* 1997 18 ILJ 981 (LAC), par 72.

In the *Mbongwe*[89] case the commissioner further stated that the circumstances under which constructive dismissals may arise are varied and any action on the part of the employer that drives the employee to leave her employment could amount to constructive dismissal.

The commissioner scrutinised the facts of the case and found that the applicant was under the genuine impression that her work situation would remain the same and the respondent had failed to do anything about it. The applicant also truly believed that the work situation was taking a toll on her health and, therefore, she had to choose between remaining in that frustrating work environment and preserving her health. The applicant therefore was under the genuine impression that the respondent behaved in a manner that she believed rendered the relationship intolerable, and would continue to do so. The applicant genuinely believed that the work situation has become unbearable and that she could not fulfil what was her most important function, namely to work. It is clear that this apprehension existed at the time the applicant terminated her relationship, which drove her to such termination. There was no evidence adduced by the respondent that the applicant had an ulterior reason for resigning.[90] It is also clear that the abovementioned circumstances have been brought about by the respondent's inability or failure to address the applicant's situation satisfactorily and said circumstances were not beyond the respondent's control.

At first, the commissioner only used a subjective test to ascertain whether constructive dismissal took place. This is clear from the wording the commissioner used, by constantly referring to the "genuine impression" of the applicant. The commissioner only later on studied the respondent's conduct.

89 *Mbongwe v SA Express Airways* 2009 3 BALR 286 (CCMA Par.4.5

90 As discussed in paragraph 2.2.1, the employer has to prove that the dismissal was fair. So if the employer can show the court that the employee resigned for an ulterior reason, for example to take a better job offer, the court will have to find that the dismissal was indeed fair.

The court accordingly found that the applicant had no other reasonable alternative other than tendering her resignation. The court further found that the respondent's conduct as a whole and the effect thereof judged reasonably and sensibly, was such that the applicant could not be expected to put up with it. The court thus found that the applicant succeeded in discharging the onus of proving, on a balance of probabilities, that she was constructively dismissed.

The case of *Goosen v Woodridge College & Preparatory School*[91] illustrates what needs to be proven in cases where the employee claims constructive dismissal due to an excessive workload. The applicant was removed from her post at the respondent's high school, after there were some complaints by parents about her teaching. She was then told to teach at the preparatory school. After complaining about her new workload, the applicant went on sick leave, and resigned before resuming her duties. She claimed she had been constructively dismissed. After considering all of the facts of the case, the arbitrator held that employees who allege they have been constructively dismissed must prove that they had no reasonable option but to resign; that the employment relationship had been rendered intolerable by the conduct of the employer; and that the intolerable relationship was likely to endure for some time. While the applicant's workload had been increased and her job profile had been changed, this had been done to remedy difficulties experienced by the applicant in the performance of her duties. That the applicant had not been consulted over the changes did not make the respondent's actions unreasonable. That the applicant was required to work harder did not mean that the respondent was trying to drive her away. In any event had the applicant succeeded in proving that she had been dismissed, it could not be said that the actions which had brought about the dismissal were unfair. The application of the applicant was accordingly dismissed.

To summarise, our courts approach cases involving work stress as follows: The court will look at all the facts of the case and if the court is satisfied that the

91 *Goosen v Woodridge College & Preparatory School* 2002 7 BALR 726 (CCMA).

employer tried to accommodate the employee by offering him alternative, less stressful employment which the employee declined, then it can be found that the dismissal was fair.[92] Another principle the courts take in mind is the common law duty of an employer to take care of its employees.[93]

In constructive dismissal cases where the employee resigns because of work stress caused by the employer which resulted in the working conditions becoming intolerable, the first aspect the courts look at is to see whether the employee can succeed in proving that a constructive dismissal took place. Thus, firstly the employee has to prove that the employment contract was terminated.

Then the employee needs to provide the court with enough evidence to convince the court that continued employment had become intolerable. This has to be objectively established, and the subjective apprehension of the employee should not the final determinant of whether or not the employer's conduct was intolerable.

It is not necessary to show that the employer intended any repudiation of the contract. The court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The conduct of the parties had to be looked at as a whole and its cumulative impact assessed. The court will look at the conduct of the employer and determine whether the conduct is destroying the employment relationship and whether the conduct is aimed at creating an unbearable working environment for the employee. For example, if the employee is constantly being verbally abused by the employer in such a pervasive way that it can be described as a form of harassment or if the employer constantly criticises the employee's work. If the employer's conduct deliberately, and without justification, creates a situation in which the employee is

92 *Hendriks v Mercantile & General Reinsurance Co of SA Ltd* 1994 15 ILJ 304 (LAC).
93 *Media 24 Ltd v Grobler* 2005 26 ILJ 1007 (SCA).

unable to perform the job he was employed to do, or if the employer's conduct is as such that the court cannot expect the employee to tolerate. All of the above needs to be determined by looking at all of the facts, and then by making an objective assessment.[94]

Thus, the same test that is used in ordinary constructive dismissal cases is also applied in cases where the employee claims constructive dismissal due to work stress. The following thus needs to be proved by the employee: The employee intended to terminate the relationship; objectively speaking, the employment relationship had become so intolerable that the employee could not fulfil her obligation to work; the intolerable work situation was created by the employer; that intolerable situation was likely to endure; resignation was the only reasonable option open to the employee.[95]

The courts also look at the subjective belief of the employee at the time he or she resigns, but as stated above, this should not be the final determinant. The employee must believe that the employer will not ever reform or abandon the pattern of creating an unbearable environment. The employee's perception should be tested against the actual reason for the resignation. As discussed in paragraph 2.2.1, the enquiry should be whether the employer without reasonable and proper cause conducted itself in a manner calculated to destroy or seriously damage the employment relationship.[96] A mere subjective feeling that the applicant was unfairly treated is not sufficient to prove constructive dismissal.[97]

Once constructive dismissal was proved the onus is on the employer to prove that the dismissal was fair. To this end the question was whether the employer's conduct prompted the employee to resign.[98]

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94 *Marsland v The New Way Motor & Diesel Engineering* 2009 30 ILJ 169 (LC)
95 *Brummer v Daimler Chrysler Services (Pty) Ltd* 2004 9 BALR 1060 (CCMA).
96 Beukes *v Crystal - Pier Trading CC T/A Bothaville Abbatoir [2009] JOL 23285 (CCMA)*
97 *Goliath v Medscheme (Pty) Ltd* (1996) 17 ILJ 760 (IC)
98 *Jonker v Amalgamated Beverages Industries* (1993) 14 ILJ 199 (IC) at 211

The court's function is thus to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee could not be expected to put up with it. The conduct of the parties had to be looked at as a whole and its cumulative impact assessed.[99]

4 An English Law perspective

4.1 Introduction

In the UK, a person will be regarded constructively dismissed when the employer has breached the common law implied term of mutual trust and confidence. This aspect is regulated by the *Employment Rights Act*, 1996. In the case of *Claridge v Dater Rowney*[100] the court stated that a *reasonable response test*, and not an objective test, must be used when judging the conduct of the employer. In the case of *Bournemouth University Higher Education Corporation v Buckland*[101] the judge criticised the *reasonable response test* and stated that an enquiry must be made to look whether there was a repudiatory breach of contract by the employer. The court therefore suggests that an objective test should rather be followed. There is certainly a developing tendency about this particular aspect in the United Kingdom and therefore it will be insightful to look at the law regulating constructive dismissal in the United Kingdom.

These are all aspects that require in-depth research and discussion and it will be discussed in the dissertation accordingly.

99 *Goosen v Woodridge College & Preparatory School* 2002 7 BALR 726 (CCMA).
100 *Claridge v Dater Rowney* (2008) IRLR 672.
101 *Bournemouth University Higher Education Corporation v Buckland* (2009) IRLR 606.

4.2 Legislation and case law

Constructive dismissal was first recognised in 1971 when it was introduced as part of legislation which created the law of unfair dismissal. The purpose of the particular legislation was to protect the employee. The legislation was therefore a mechanism used to make sure that the employer could not effectively get around the requirements of unfair dismissal law, by treating the employees, he wanted to dismiss, in such a bad manner that the employee eventually resigns. In that way the employer does not need to dismiss the employee's because they have already resigned.[102]

Thus there was a need for new legislation which would ensure the recognition of employee's rights in intolerable circumstances; and ensure that the termination of the contract under these circumstances would be treated as a dismissal and that it would be the subject of the same scrutiny as any other potentially unfair dismissal.[103]

Constructive dismissal is defined in the *Employment Rights Act*[104] of the United Kingdom as:

> The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.[105]

The requirements regarding the parties who could bring a claim of constructive dismissal was the same as the requirements in the case of claims of unfair dismissal, for example employees with over a year's continuous service. The heads of compensation for claims of constructive dismissal are also similar to

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102 Taylor *Employment Law* 350
103 Taylor *Employment Law* 350.
104 Section 95(1)(c) of the *Employment Rights Act, 1996*, hereafter *referred to as the ERA.*
105 Taylor *Employment Law* 350.

that of the claim of unfair dismissal.[106] Claims of constructive dismissal thus forms part of the unfair dismissal law and it is a creature of statute and not of the common law.[107]

The test which is used to determine whether constructive dismissal took place is concerned with the contract of employment. It is not sufficient for the former employee to show that the employer had acted unreasonably. In order for the former employee to succeed with a claim of constructive dismissal, he or she[108] must prove that the employer acted in such a way that it had the effect of breaching the employment contract in a fundamental way. This test was first established by the Court of Appeal in the case of *Western Excavating (ECC) Ltd v Sharp*[109]. This is one of the most significant cases in the UK employment law. Lord Denning made the following statement:

> If the employer is guilty of conduct which is significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.[110]

Since 1978 three essential conditions have to be in place before an employee will succeed with a claim of constructive dismissal. Firstly, it needs to be established that the employer has, through his actions, breached the contract of employment. It can be an actual or an anticipatory breach of the employment contract. Secondly, the employee must decide to resign shortly after the breach has taken place. Finally, the employee must resign because of the breach of the contract by the employer.[111] The problematic aspect of the test is to determine

106 Taylor *Employment Law* 350.
107 Taylor *Employment Law* 350.
108 Where the word "he" is used, it must be understood to include both the male and the female version.
109 *Western Excavating (ECC) Ltd v Sharp* 1978
110 Taylor *Employment Law* 350.
111 Taylor *Employment Law* 350.

whether the breach of contract was fundamental. The *Western* case suggests that relatively minor or slight breach does not go to the root of the contract.[112]
The leading case about constructive dismissal is the case of Tullett *Prebon PLC & Ors v BGC Brokers LP & Ors*[113]. This case sets the *status quo* of constructive dismissal case law in the UK, since it was decided by the UK Court of Appeal on 22 February 2011**.** The facts of the case are as follow: Tullett Prebon PLC (Tullett) and BGC Brokers LP (BGC) are competitors in the field of inter-dealer brokerage, acting as intermediaries for banks and other financial institutions. During January 2009, the former Chief Operating Officer at Tullett's London office, left and joined BGC as Executive Managing Director and General Manager. He placed into action a plan to recruit Tullett's brokers, and convinced thirteen of them to enter into "forward contracts" by which the individual brokers agreed to join BGC at future dates. Tullett's senior management sought to persuade the brokers to end their contracts with BGC. In March 2009, the brokers resigned from Tullett claiming constructive dismissal, which would have released them from their post-termination restrictions and obligation to give notice. It was argued that Tullett's action in seeking to persuade the brokers to break their contracts with BGC constituted constructive dismissal. The High Court found no grounds for claiming constructive dismissal. Tullett's intention was to protect, rather than destroy the relationship of trust and confidence when it tried to deter its employees from joining BGC. Then the case was referred to the UK Court of Appeal.

The Court of Appeal stated that it is a question of fact whether or not Tullett committed a repudiatory breach of the implied term of duty of trust and confidence contained in the contract of employment when it persuaded the brokers to renege on their forward contracts with BGC. If there had been a repudiatory breach, the brokers would be entitled to terminate their contracts with

112 Taylor *Employment Law* 351.
113 *Tullett Prebon PLC & Ors v BGC Brokers LP & Ors* [2011] EWCA Civ 131.

Tullett on the grounds of constructive dismissal. The UK Court of Appeal has affirmed the following important principle:

> The test is whether the court, looking at all the circumstances objectively, from the perspective of a reasonable person in the position of the innocent party, could make a finding that the employer had clearly shown an intention to abandon and altogether refuse to perform his part of the employment contract.

This will require an objective assessment of all the circumstances that are relevant to showing the employer's intention towards the employee.[114] The Court of Appeal held that Tullett's intentions were not irrelevant to the central question as to whether Tullett had shown an intention to abandon and altogether refuse to perform the contract. It was of vital importance that Tullett's intentions be assessed objectively, as the High Court had done, and not subjectively as BGC claimed the High Court had done. The Court of Appeal agreed with the High Court that Tullett did not manifest an intention to abandon and altogether refuse to perform their contracts with the brokers by persuading the brokers to renege on the forward contracts with BGC. Rather, Tullett had tried to protect its contracts with its brokers. The claims of constructive dismissal were therefore unfounded. This case illustrates that if a court is confronted with a claim of constructive dismissal, the court needs to look at the facts of the case holistically.[115]

Before the above case was heard, the Court of Appeal heard the case of *Bournemouth University Higher Education Corporation v Buckland*[116]. In the case of *Bournemouth University Higher Education Corporation v Buckland* the facts of the case were as follows: The claimant, professor Buckland, held a chair of environmental archaeology at the defendant University. One of his annual tasks

114 Tan 2011 http://www.drewnnapier.com.
115 Tan 2011 http://www.drewnnapier.com
116 *Bournemouth University Higher Education Corporation v Buckland* (2009) IRLR 606.

was to mark examination papers, and in this instance he failed a high amount of students. The second marker endorsed Buckland's marks and the University's board of examiner's checked and accordingly confirmed the marks. Despite the endorsement, the chair of the board arranged for the papers to be remarked. Buckland then objected and an inquiry was held. The inquiry criticised the board's conduct and vindicated Buckland. Buckland then resigned and claimed constructive dismissal.

In this case the Court of Appeal rejected the view that "reasonableness" forms any part of the legal test for identifying a breach of the implied term. The Court of Appeal stated that the correct test to apply is to look whether the employer is said to have committed a fundamental breach of a contract of employment. The courts should thus apply a unitary test and not a reasonable response test. The court further stated that an employer who has committed a fundamental breach cannot cure it whilst the employee is considering whether to treat it as a dismissal.

As discussed in the previous chapter, the South African courts have developed an objective test to determine whether constructive dismissal took place or not. The onus rests on the applicant to prove the above. If the court finds that the applicant did in fact have the intention to terminate the contract of employment, the enquiry comes to an end.[117] Thus in the South African law of constructive dismissal, the proper test is as follows: When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is his most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the

117 *Jooste v Transnet Ltd t/a SA Airways* 1995 16 ILJ 629 (LAC), par 638B-D.

unbearable situation not been created.[118] The employee's perception must be tested against the actual reasons why he ended the contract of employment.

Where it is clear that the employee had an ulterior reason for ending the contract of employment, for example if the employee had the desire to take up alternative employment, then it cannot be said that the employee was constructively dismissed.[119] The employer's actions after the employee's resignation or departure must only be taken into account if those actions can cast some light on the employer's conduct and attitude before the resignation or the termination of the contract of employment.[120] It is not necessary that the employer's conduct should be a breach of the employment contract. This view is supported by the wording of Section 186(1)(e) of the LRA, which describes the conduct which is required to justify a claim of constructive dismissal as conduct by an employer which made continued employment intolerable for the employee.[121]

Thus, the South African courts and the UK courts are both of the view that an objective test must be applied in constructive dismissal cases. The South African courts put more emphasis on intolerable circumstances, where the UK courts put more emphasis on the conduct of the employer that should be a fundamental breach of the employment contract. In South Africa, it is not necessary that the employer's conduct should be a breach of the employment contract, thus making the requirements to succeed with a constructive dismissal claim, different.

4.2.1 Procedure in constructive dismissal cases

It can be said that constructive dismissal cases are the same as unfair dismissal cases “with a twist”. Procedurally, the tribunals treat constructive dismissal cases

118 *Pretoria Society for the Care of the Retarded v Loots* 1997 18 ILJ 981 (LAC), par 724E- G, 984 E-F.
119 Grogan *Dismissal* 200.
120 Grogan *Dismissal* 200.
121 Grogan *Dismissal* 200.

generally the same way as unfair dismissal cases, and in both instances the remedies are similar. Once a case of constructive dismissal is before a tribunal, there are three essential questions which need to be asked. Is the claimant entitled to bring the case?; what was the reason for the dismissal? and did the employer act reasonably in treating this as a reason for dismissal?[122] In other words the reasonable employer test is applied.

4.2.2. Remedies in constructive dismissal cases

When a claim for constructive dismissal succeeds, the remedies are exactly the same as in unfair dismissal cases. A compensatory award is given and the purpose of that award is to put the claimant financially where he would have been had the dismissal not occurred. It is highly unlikely that the claimant would wish to be reinstated. The reason for that is because in cases of constructive dismissal, the trust relationship between parties are broken and the employee does not want to return to work because he has the fear that the same type of relationship will still be in place.[123]

In the UK, in cases of constructive dismissal, the employee can in some cases be reinstated. But before a tribunal or court orders reinstatement, it will weigh and balance the following factors. The employee's wishes: The court or tribunal will not order either remedy unless the employee requests it; whether it is practicable for the employee to return to work: In some situations it may not be possible for the employee to return to work; whether it would be fair to order reinstatement: for instance, in cases where the employee acted unreasonably after resigning, the court could decide it would be unfair to order the employer to re-employ the person.[124]

122 Taylor *Employment Law* 355.
123 Taylor *Employment Law* 356.
124 Anon 2011 http://www.findlaw.co.uk

In terms of the South African law, reinstatement, regarded by most employee litigants as the primary remedy in a case of unfair dismissal, is never a viable option, unless the employer is a large company or state institution permitting the employee to be satisfactory placed in a different position. For this reason, arbitrators adjudicating on constructive dismissal claims usually make awards of compensation. The Act permits arbitrators to make compensation awards to a maximum of 12 months. The exact extent of the amount of compensation is also subject to the arbitrator's discretion.[125]

4.3 Conclusion

From the above discussion, it is thus clear that the test which is used to determine whether constructive dismissal took place is concerned with the contract of employment. It is not sufficient for the former employee to show that the employer had acted unreasonably. In order for the former employee to succeed with a claim of constructive dismissal, he or she[126] must prove that the employer acted in such a way that it had the effect of breaching the employment contract in a fundamental way. There are three essential conditions which have to be in place before an employee will succeed with a claim of constructive dismissal. Firstly, it needs to be established that the employer has, through his actions, breached the contract of employment. Secondly, the employee must decide to resign shortly after the breach has taken place. Finally, the employee must resign because of the breach of the contract by the employer.

If the employer is guilty of conduct that goes to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then

125 Grant 2010 http://www.bregmansattorneys.co.za

126 Where the word "he" is used, it must be understood to include both the male and the female version.

he terminates the contract by reason of the employer's conduct. He is constructively dismissed.[127]

The test is thus whether the court, looking at all the circumstances objectively, from the perspective of a reasonable person in the position of the innocent party, could make a finding that the employer had clearly shown an intention to abandon and altogether refuses to perform his part of the employment contract.

This will require an objective assessment of all the circumstances that are relevant to showing the employer's intention towards the employee.[128]

5 Work stress and Employee wellness under English Law

5.1.1 Introduction

Studies that were done in the UK showed that stress and stress-related illness were second only to musculoskeletal disorders as the major cause of occupational ill health. However stress in the workplace had the effect that 6.5 million working days were lost and it also caused a financial burden to the economy of £3.7 billion per annum.[129]

In the UK the employee's health and safety at the workplace are protected in two ways. The first type of protection is protection in terms of the common law of negligence. It therefore means that the employer is required to take reasonable care to protect his employees based on the principle "duty of care". This principle is translated into an implied term in an employment contract. If this implied term

127 *Western Excavating (ECC) Ltd v Sharp* 1978
128 *Tullett Prebon PLC & Ors v BGC Brokers LP & Ors* [2011] EWCA Civ 131.
129 Sieberhagen, Rothman and Pienaar 2009 *South African Journal of Human Resource Management* 1-9.

is broken, it can be seen as a repudiatory breach of contract which is based on the implied duty of care.[130]

The second type of protection is protection through different types of legislation and directives. The aim of these legislation and directives are to protect the health and the safety of employees in the workplace. It is important to note that a breach of legislative provisions does not constitute a cause of action for employees to sue their employer, because a breach in terms of legislation is a cause of action in respect of criminal proceedings and not in terms of civil law.[131]

5.1.2 The duty of care

There is an implied obligation in the UK on every employer to take reasonable care and certain steps to ensure the employee's safety at work. This implied obligation is not only an implied term of the employment contract, but is also a "duty of care" resulting from the tort of negligence.[132]

In the case of *Lister v Romford Ice and Cold Storage Co Ltd*[133] the court evaluated the employer's duty of care and the court stated that:

> There is no real distinction between the two sources of obligation. But it is certainly as much contractual as tortuous. Since in modern times the relationship between master and servant, employer and employee, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.[134]

In the case of *Waltons & Morse v Dorrington*[135] the Employment Appeal Tribunal stated that the correct implied term to deal with the complaint is that the employer will provide, so far as reasonably practicable, a working environment which is

130 Van Jaarsveld *Employer's Liability for Stress at Work* 632.
131 Van Jaarsveld *Employer's Liability for Stress at Work* 632.
132 Van Jaarsveld *Employer's Liability for Stress at Work* 632.
133 *Lister v Romford Ice and Cold Storage Co Ltd* 1957 AC 555 (HL).
134 Van Jaarsveld *Employer's Liability for Stress at Work* 634.
135 *Waltons & Morse v Dorrington* 1997 IRLR 488 (EAT).

reasonably suitable for the performance of the employee's contractual duties.[136] Whether an employer is liable based on the principles of tort or contract law, is not yet clear in the English Law.[137]

5.1.3 Work stress and employee wellness: Legislation applicable

In the UK the provisions of the *Health and Safety at Work Act* (1974) and *Management of Health and Safety at Work Regulations* (1992) exist to safeguard the health and the wellness of the employees. Non-unionised employees are protected by the *Health and Safety (Consultation with Employees) Regulations 1996.*[138] The British Government has also implemented the *Framework Directive*[139] of the *European Community Directives* through the *Management of Health and Safety at Work Regulations*.[140] These laws make risk assessment and management essential.[141]

5.1.4 The impact of Health and Safety legislation on employment contracts

The common law and the law of statute run side by side in the UK, but they have different aims. The common law provides an employee with compensation once the employee is injured at work. These two systems complement each other and cases can occur where the employee will allege breach of statute as well as breach of contract. It is sometimes argued that the common law has developed implied duties in an employment contract in order to protect employees during the employment relationship. If a breach of these common law duties occurs, it will create a possible claim for a breach of contract.[142]

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136 Van Jaarsveld *Employer's Liability for Stress at Work* 634.
137 Van Jaarsveld *Employer's Liability for Stress at Work* 633.
138 Health and Safety (Consultation with Employees) Regulations 1996. SI 1996 No 1513.
139 Framework Directive June 1989, 89/391/EEC.
140 Van Jaarsveld *Employer's Liability for Stress at Work* 634.
141 Sieberhagen, Rothman and Pienaar *South African Journal of Human Resource Management* 4.
142 Van Jaarsveld *Employer's Liability for Stress at Work* 635.

There have been a number of court decisions in the UK which has emphasised the existence of a distinct contractual claim for damages in cases based on stress-induced illnesses due to heavy workloads.[143]

In the case of *Johnstone v Bloomsbury Area Health Authority*[144] the majority of the Court of Appeal agreed that an action for damages could succeed where the employee was able to show that it was reasonably foreseeable that the conduct of the employer by requiring him to work excessive hours would damage his health. The court further held that the express terms of a contract (for example a stipulation of work hours) had to be exercised in the light of other contractual terms and in particular their duty to take care for his safety which was an implied term of law.[145]

A few years later the case of *Walker v Northumberland County Council*[146] occurred and this case was the first case of its kind to come before a court in the UK. Previously, there were only out-of-court settlements regarding stress claims in the UK.[147] The Walker case is thus significant in this regard. The facts of the case can be summarised as follows:

Walker, a social services manager, lodged a case against her former employers. The reason why she lodged the case was because they failed to prevent her from trying to cope with a health-endangering workload. Walker suffered two nervous breakdowns due to her workload. After she suffered her first nervous breakdown, she returned to work. After Walker returned to work, she was still given the same amount and level of work, with very little support from her employer. She then suffered from another nervous breakdown and she had to

143 Van Jaarsveld *Employer's Liability for Stress at Work* 636.
144 *Johnstone v Bloomsbury Area Health Authority* 1992 QB 333 (CA).
145 Van Jaarsveld *Employer's Liability for Stress at Work* 637.
146 *Walker v Northumberland County Council* 1995 1 WLR 737, IRLR 35 (QBD) and 1995 All ER 737 (QBD).
147 Van Jaarsveld *Employer's Liability for Stress at Work* 637.

retire on the grounds of ill-health.[148] The court held that the employer was in breach of his safety duty. Given the first nervous breakdown Walker has suffered, it was reasonably foreseeable that without assistance her health would deteriorate.[149]

The court ruled in the favour of the plaintiff and stated that there should be no reason why psychological damage should be excluded from the scope of an employer's duty of care. The court held that employers had a duty not to cause their employees psychiatric damage by giving them too much work or by giving them too much work without giving the employees sufficient backup support.[150]

The general principle is that an employer can assume that the employee is able to withstand the normal pressures of the job. However, if it is reasonably foreseeable that there is a risk of injury, which must be a clinically recognisable condition, due to stress at work, then the employer owes the employee a positive duty to make the working environment less stressful.[151]

The case of *Sutherland v Hatton*[152] provides certain distinct guidelines in order to ascertain the liability of an employer. Firstly, the court stated that claims for psychiatric injury fall within four different categories[153]. A claim arising from the stress of doing the work that the employee is required to do is based on the contractual duty of care. Secondly, for liability to arise there must be some

148 Van Jaarsveld *Employer's Liability for Stress at Work* 637.
149 Van Jaarsveld *Employer's Liability for Stress at Work* 637.
150 Sieberhagen, Rothman and Pienaar *South African Journal of Human Resource Management* 4.
151 Sieberhagen, Rothman and Pienaar *South African Journal of Human Resource Management* 4.
152 *Sutherland v Hatton* 2002 IRLR 263 (CA).
153 Firstly, tortious claims by primary victims: usually those within the foreseeable scope of physical injury. Secondly, tortious claims by secondary victims: those outside that zone who suffer as a result of harm to others. Thirdly, contractual claims by primary victims: where the harm is the reasonably foreseeable product of specific breaches of a contractual duty of care towards a victim whose identity is known in advance and lastly, contractual claims by secondary victims: where the harm is suffered as a result of harm to others, in the same way as secondary victims in tort, but there is also a contractual relationship with the defendant. As quoted in: Van Jaarsveld *Employer's Liability for Stress at Work* 638,639

indications of impending harm arising from stress at the workplace. Thirdly, it must be determined whether the harm to the particular employee was reasonably foreseeable. Unless an employer knows of a particular problem or vulnerability, an employer is usually entitled to assume that an employee can withstand the normal pressures of the job and he is entitled to take what he is told by the employee at face value. These guidelines developed by the court in this case can be very useful for both the employer and employee. The employer can use these guidelines to understand how far his liability goes and the employee can use these guidelines to understand the duty that both he and the employer have in the workplace to keep work stress under control.

There are certain aspects that must be considered at all times: Whether the employee has a particular vulnerability, whether he or she has already suffered from stress-induced illness from work, whether there are regular absences by the employee that are out of character, and whether these absences are attributed to stress at work by the employee or other employees. Lastly it must be established whether and how the employer has broken his duty of care. An employer will only be in breach of this duty if he has failed to take reasonable steps to conquer the risk of ill-health.[154]

In *Barber v Somerset County Council*[155] Barber claimed that his stress was caused by the stress of his workload and he claimed damages from his former employees. Barber was awarded €72 547 in damages after the House of Lords held that his employer's duty to take some action arose after Barber was signed off due to stress and depression. Although he approached a number of superiors informing them of his problems coping with his workload, nothing was done to assist him. His condition should have been monitored and if it did not improve,

154 Van Jaarsveld *Employer's Liability for Stress at Work* 638,639.
155 *Barber v Somerset County Council* 2004 IRLR 475 (HL).

some more drastic action should have been taken to relieve him temporarily of his duties, such as taking in a substitute teacher at the school.[156]

In the Barber case the House of Lords laid down the overall test that must be applied in order to determine whether an employer is in breach of a duty of care owed to an employee in respect of psychiatric illness caused by work-related stress. The overall test can be described as follows:

> The overall test is still the conduct of the reasonable and prudent employer taking positive thought for the safety of his workers in light of what he knows or ought to know.[157]

Thus, employers have to pay more attention to the well-being of their employees in the workplace. Employees should let their employer's know if they cannot handle the pressure of their job and then the employer needs to take some steps in order to see whether he can relieve the employee from some of his workload. Both the employer and the employee's conduct should be judged by using the reasonable employer and employee test. Thus by asking the question: What would a reasonable employer and employee have done in those particular circumstances?

5.1.5 The importance of management standards in managing employee health and wellness

The development and use of management standards to manage work-related stress can be found in the UK *Health and Safety Executive (HSE) Management Standards.* The main objective of these standards are to simplify risk assessment for stress, to encourage employers, employees and their representatives to act like partners in a partnership in order to address work-related stress throughout their workplace. Another aim of these managing standards is to provide a certain

156 Van Jaarsveld *Employer's Liability for Stress at Work* 640.
157 Van Jaarsveld *Employer's Liability for Stress at Work* 640.

standard by which organisations can measure their performance in tackling the primary sources of the stress.[158] These managing standards have certain effects on the employers. The employers will have to assess the risk and the potential causes of the stress within the organisation. That can be done by looking at the absence patterns due to sickness and the conduction of surveys. Then the employers need to use that information to evaluate the organisation's performance in relation to certain factors.[159] Then it will be the task of the employers to decide what the organisation's improvements targets will be and which hands-on steps need to be taken in conjunction with the employees and their representatives.[160]

The UK *Health and Safety Executive (HSE)* have identified six stressors in 2001 that may have a negative effect on the wellness of employees. They are the following: Job demands, control over work, support, relationships at work, role in the organisation and change in the organisation.[161]

5.2 Stress-based claims

Case law exists that have emphasised the existence of a distinct contractual claim for damages in cases based on stress-induced illnesses due to heavy workloads.

In the case of *Paris v Stepney Borough Council*[162] the House of Lords held that:

> An employer's duty of care is owed to each employee as an individual. An employer must take into account any particular susceptibility of the employee of which he is aware or ought to be aware. Whether or not the harm is

158 Sieberhagen, Rothman and Pienaar *South African Journal of Human Resource Management*, 6.
159 These factors are discussed in the following paragraph.
160 Sieberhagen, Rothman and Pienaar *South African Journal of Human Resource Management*, 6
161 Sieberhagen, Rothman and Pienaar *South African Journal of Human Resource Management*, 6
162 Van Jaarsveld *Employer's Liabilty for Stress at Work* 636.

> foreseeable, it is relevant to consider the employer's actual knowledge of any special susceptibility to harm of the employee. A better chance of establishing a reasonable foreseeability will be established if the employer knew that the specific employee had suffered from a stress-related illness in the past.

In the case of *Johnstone v Bloomsbury Area Health Authority*[163] the majority of the Court of Appeal agreed that an action for damages could succeed where the employee was able to show that it was reasonably foreseeable that the conduct of the employer by requiring him to work excessive hours would damage his health. The terms enclosed in the contract did not override the duty of the employer in both contract and tort to take reasonable care to ensure the employee's safety and health.

In a later case of *Fraser v State Hospitals Board of Scotland*[164] it was held that there were no indications that the stress the applicant had experienced due to disciplinary measures would lead to psychiatric illness. The court noted that the duty of the employer is only to take reasonable care to prevent psychiatric harm, and as such did not include preventing an employee from experiencing unpleasant emotions such as grief or anger. In previous cases, the awards that were given were in trauma cases where a sudden shock of some kind had caused an illness.[165]

In the case of *Baber v Somerset County Council*[166] the House of Lords stated that the above guidelines is indeed a valuable contribution to the development of the law, but it ought not be read as having statutory force. Each case should be decided on its own merits.

The preference of those suffering from stress caused by their work has been to use the law of negligence. The case of *Walker v Northumberland County*

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163 Van Jaarsveld *Employer's Liabilty for Stress at Work* 636.
164 As quoted in: Van Jaarsveld *Employer's Liability for Stress at Work* 637.
165 Taylor *Employment Law* 394.
166 Van Jaarsveld *Employer's Liabilty for Stress at Work* 639.

Council[167] can be seen as a breakthrough case with regard to the aspect of stress-based claims. It was the first time that a personal injury award was made for psychiatric injury following prolonged stress due to workload. In previous cases, the awards that were given were in trauma cases where a sudden shock of some kind had caused an illness.[168]

5.3 Stress due to an excessive workload

In the case of *Daw v Intel Corporation UK Ltd*[169] the claimant was employed by the defendant in an administrative post. Between late 2000 and early 2001 she had a heavy workload and she was provided with insufficient assistance and had to work excessive hours to get the job done. She made many representations about the amount of work she was required to do and the problems which arose in her work. In early March 2001 she once again described all of her problems, to one of the managers in detail. She stayed on in her post on an assurance that another employee would be recruited to assist with her workload, but in the event no appointment was made. The claimant's health deteriorated and she became depressed. She was signed off work in June for three weeks and attempted suicide the day after leaving the office. She then brought proceedings for damages for personal injury.

The judge found that, by the time of the claimant's conversation with the manager in March 2001, the defendant ought to have known that the demands on the claimant were totally unreasonable and that the risk of harm to her health was clear. He considered that the fact that the defendant provided a counselling service for its employees did not discharge its duty of care in that short term counselling could not have ameliorated the risk of harm to her health or helped her cope with it. The service could not have reduced her workload and the most it

167 *Walker v Northumberland County Council* 1995 1 WLR 737, IRLR 35 (QBD) and 1995 All ER 737 (QBD).
168 Taylor *Employment Law* 394.
169 *Daw v Intel Corporation UK Ltd* 2007 2 ALL ER 126.

could have done was to have advised her to see her doctor. He made an award of damages. The defendant appealed, contending, *inter alia*, that the provision of counselling services had discharged its duty of care and that, had that service been used by the claimant, the urgency of the situation would have become clear to it.

The judge accordingly held that it was a failure of management which had created the claimant's stresses and led to the breakdown. The court further held that by early March, injury to the claimant's health was reasonably foreseeable and to find that the defendant's failure to take urgent and appropriate action was causative of the severity of the claimant's depression. The consequences of the management's failure to take action were not avoided by the provision of counsellors. Accordingly, the appeal was dismissed.

The *Hatton*[170] case is also applicable here. In this case the defendant employer appealed against a finding of liability for an employee's psychiatric illness caused by stress at work. Two of the claimants were teachers in public sector comprehensive schools; the third was an administrative assistant at a local authority training centre; while the fourth was a raw material operative in a factory. In the first two appeals, the claimants had not told their employers that their health was suffering due to heavy workload. In contrast, the claimant in the third appeal had twice formally complained to her employer that her health was being harmed by problems at work, but no extra help had been provided even though the employer had acknowledged that such help should have been provided. In the fourth appeal, the claimant had been unable to cope with a reorganisation at work, but had not informed his employer that his doctor had advised him to change his job.

The court stated that the threshold question is whether this kind of harm to this particular employee was reasonably foreseeable. Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual

170 *Sutherland v Hatton* 2002 IRLR 263 (CA).

employee. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability. The test is the same whatever the employment: There are no occupations which should be regarded as intrinsically dangerous to mental health.

The court also identified factors likely to be relevant in answering the threshold question include: The nature and extent of the work done by the employee; is the workload much more than is normal for the particular job?; is the work particularly intellectually or emotionally demanding for this employee?; are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs?; or are there signs that others doing this job are suffering harmful levels of stress?; is there an unusual level of sickness or absenteeism in the same job or the same department?, signs from the employee of looming harm to health; does he have he a particular problem or vulnerability?; has he already suffered from illness attributable to stress at work; have there recently been frequent or long-lasting absences which are uncharacteristic of him?; is there reason to believe that these are attributable to stress at work?.[171]

The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. The employer does not generally have to make searching inquiries of the employee or seek permission to make further inquiries of his medical advisers.

The court made the following important statement:

> To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it. The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it,

171 *Sutherland v Hatton* 2002 IRLR 263 (CA).

> and the justifications for running the risk. The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly. An employer can only reasonably be expected to take steps which are likely to do some good: The court is likely to need expert evidence on this. If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job. [172]

The court upheld the employer's appeal, finding that Mrs Hatton's illness was not reasonably foreseeable as she never complained of her workload, which was no greater than that of the other teachers.

5.4 Conclusion

From the above it is clear that there is an implied obligation in the UK on every employer to take reasonable care and certain steps to ensure the employee's safety at work.[173]

The general principle is that an employer can assume that the employee is able to withstand the normal pressures of the job. However, if it is reasonably foreseeable that there is a risk of injury, which must be a clinically recognisable condition, due to stress at work, then the employer owes the employee a positive duty to make the working environment less stressful.[174] It is important to remember that each case should be decided on its own merits. [175]

For liability to arise there must be some indications of imminent harm arising from stress at the workplace. Further, it must be determined whether the harm to the

172 *Sutherland v Hatton* 2002 IRLR 263 (CA).
173 Van Jaarsveld *Employer's Liability for Stress at Work* 632.
174 *Walker v Northumberland County Council* 1995 1 WLR 737, IRLR 35 (QBD) and 1995 All ER 737 (QBD).
175 *Barber v Somerset County Council* 2004 IRLR 475 (HL).

particular employee was reasonably foreseeable. Unless an employer knows of a particular problem or vulnerability, an employer is usually entitled to assume that an employee can withstand the normal pressures of the job and he is entitled to take what he is told by the employee at face value.[176]

As discussed above, the employer should keep certain aspects in mind, such as: whether the employee has a particular vulnerability, whether he or she has already suffered from stress-induced illness from work, whether there are frequent absences by the employee that are uncharacteristic, and whether these absences are attributed to stress at work by the employee or other employees.[177]

An employer will only be in breach of this duty if he has failed to take reasonable steps to overcome the risk of ill-health.[178] The threshold question always should be whether this kind of harm to this particular employee was reasonably foreseeable. Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee.

Certain factors, such as the nature and extent of the work done by the employee; the amount of workload that is normal for the particular job, unreasonable demands from employers; harmful levels of stress experienced by other employees doing the same job; signs from the employee of impending harm to health.[179]

Before the court can find that an employer has failed to take the necessary steps, the court has to look at all of the facts of the case to see whether the indications of impending harm is plain enough for any reasonable employer to realise that he should do something about it. The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of

176 *Sutherland v Hatton* 2002 IRLR 263 (CA).
177 *Sutherland v Hatton* 2002 IRLR 263 (CA).
178 Van Jaarsveld *Employer's Liability for Stress at Work* 638,639.
179 *Sutherland v Hatton* 2002 IRLR 263 (CA).

preventing it, and the justifications for running the risk. The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly.[180]

6 Conclusion and recommendations

To summarise, the tests the South African courts use to determine whether a constructive dismissal has taken place, is partly objective and partly subjective.[181] The perceptions of the employee at the time of the termination of contract, as well as the circumstances in which the termination took place, should be considered.[182]

A two stage enquiry needs to take place: The first factual enquiry is whether, in resigning, the applicant did not intend to terminate the employment relationship but had no other option. The onus is on the applicant. If the court finds that the applicant did have that intention, the enquiry is at an end. If the applicant is unable to discharge the onus on a balance of probabilities, the Industrial Court has no jurisdiction to determine the dispute concerning the alleged unfair labour practice. If the applicant does discharge the onus, the next enquiry, in a case in which the applicant contends that he was constructively dismissed, is whether the employer did constructively dismiss him.[183]

It is not enough for the employee to claim that he or she believed that the employment relationship was intolerable. The employee must in fact satisfy the court or the arbitrator that at the time of the termination of the contract they were under the genuine impression that their employer's conduct was of such a nature that it made the continuance of the working relationship intolerable. The test the

180 *Sutherland v Hatton* 2002 IRLR 263 (CA).
181 Grogan *Dismissal* 199
182 Grogan *Dismissal* 199.
183 *Jooste v Transnet Ltd t/a SA Airways*

court applied in this case, however, is purely subjective in that the court only looked at how the employee sees and experiences an unbearable situation.[184]

It is important to be cautious in adopting a wide interpretation of what conduct by an employer would constitute constructive dismissal because of the danger of inviting a flood of employees who resign and then repent and want to claim the protection of the Act. The courts, however, should remember that it would be a corruption of the Act to adopt a very restrictive interpretation. The definition in Section 186(1)(e) was clearly designed to protect employees who resign in desperation as a last resort because of the unlawful or unfair conduct of the employer that makes a continued employment relationship intolerable. Employers should remember that they have a responsibility to avoid acting in a manner that would likely to destroy or undermine the employment relationship.[185]

It is not necessary that the employer's conduct should be a breach of the employment contract. If one looks at the wording of Section 186(1)(e) of the LRA, which describes the conduct which is required to justify a claim of constructive dismissal as conduct by an employer which made continued employment intolerable for the employee.[186]

To determine whether continued employment have become intolerable, the courts need to apply an objective test, and the subjective apprehension of the applicant should not be the final determinant of whether or not the employer's conduct is intolerable. It is not necessary for the employee to show that the employer intended any repudiation of the contract. The court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to

184 *Pretoria Society for the Care of the Retarded v Loots*
185 Loubser v PM Freight Forwarding
186 Grogan *Dismissal* 200.

put up with it. The conduct of the parties had to be looked at as a whole and its cumulative impact assessed.[187]

It is important to remember that there must be a link between the employer's conduct and the situation that caused the employee to resign. The question is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy it, or seriously damage the relationship of confidence and trust between employer and employee.[188]

It is important to remember that the objective assessment of the employer's conduct that may have made the continued employment intolerable has to be assessed in its totality and not piece meal. In some instances, the employer may not have control over what makes conditions intolerable. So the critical circumstance must have been of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. The employer must be culpably responsible in some way for the intolerable conditions. The conduct must have lacked reasonable and proper cause**.**[189] The courts should be careful not to consider the employees complaints one by one in isolation.[190]

From the above discussion, it is clear that the courts are very careful to find that a constructive dismissal took place. The employee must provide the court with enough evidence before his claim of constructive dismissal will succeed. As stated above, it is not sufficient for an employee to only claim that they believed that there was no point in continuing with the employment relationship. The employee must also prove that his belief was reasonable. This is where the problems start.

187 *Marsland v The New Way Motor & Diesel Engineering*[187] 2009 30 ILJ 169 (LC)
188 Anon 2010 http://www.solidaritylegalservices.co.za
189 Anon 2010 http://www.worklaw.co.za
190 *Murray v Minister of Defence*[190]

The test which is used to determine whether constructive dismissal took place, in the UK, is concerned with the contract of employment. It is not sufficient for the former employee to show that the employer had acted unreasonably. In order for the former employee to succeed with a claim of constructive dismissal, he or she must prove that the employer acted in such a way that it had the effect of breaching the employment contract in a fundamental way. There are three essential conditions which have to be in place before an employee will succeed with a claim of constructive dismissal. Firstly, it needs to be established that the employer has, through his actions, breached the contract of employment. Secondly, the employee must decide to resign shortly after the breach has taken place. Finally, the employee must resign because of the breach of the contract by the employer.

If the employer is guilty of conduct that goes to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.[191]

The test is thus whether the court, looking at all the circumstances objectively, from the perspective of a reasonable person in the position of the innocent party, could make a finding that the employer had clearly shown an intention to abandon and altogether refuse to perform his part of the employment contract. This will require an objective assessment of all the circumstances that are relevant to showing the employer's intention towards the employee.[192]

191 *Western Excavating (ECC) Ltd v Sharp* 1978
192 *Tullett Prebon PLC & Ors v BGC Brokers LP & Ors* [2011] EWCA Civ 131.

Thus, the South African courts and the UK courts are both of the view that an objective test must be applied in constructive dismissal cases. The South African courts put more emphasis on intolerable circumstances, where the UK courts put more emphasis on the conduct of the employer that should be a fundamental breach of the employment contract. In South Africa, it is not necessary that the employer's conduct should be a breach of the employment contract, thus making the requirements to succeed with a constructive dismissal claim, different.

Every person in the workplace handles work stress differently. What may be reasonable work stress to one person, can be unreasonable or excessive work stress for another. So in order for an employee to prove that his belief was reasonable, an intensive and extensive enquiry is required. The employee's job description, the employee's workplace, the co-employees, the employee's personal circumstances, the employee's mental health, the employee's relationship with his superiors, the employee's history of handling work stress, *etcetera* should be scrutinised. So the tests as it stands in our courts at this moment makes it extremely difficult for a person, suffering from extensive work stress, to succeed in his constructive dismissal claim.

An enquiry about the circumstances which led to the employee's claim must also be studied in order to see whether those particular circumstances, justifies the employee's claim. It is also important to ascertain whether those circumstances indeed existed, and that it wasn't just a story the employee made up just because he cannot handle the normal work stress that comes with the job.[193]

The choice by the legislature of the word "intolerable" also raises some concerns. As stated in the above paragraph, every person handles work stress differently. Intolerable circumstances for one person may be tolerable circumstances for another. There is thus a need for some guidelines in cases where a court or an

193 Israeltam 2009 http://www.labourguide.co.za.

attorney is confronted with a case where an employee suffers from work stress, and he wants to claim that he was constructively dismissed.

From the study, it is clear that the South African courts approach cases involving work stress as follows: The court will look at all the facts of the case and if the court is satisfied that the employer tried to accommodate the employee by offering him alternative, less stressful employment which the employee declined, then it can be found that the dismissal was fair.[194] Another principle the courts take in mind is the common law duty of an employer to take care of its employees.[195]

In constructive dismissal cases where the employee resigns because of work stress caused by the employer which resulted in the working conditions becoming intolerable, the first aspect the courts look at is to see whether the employee can succeed in proving that a constructive dismissal took place. Thus, firstly the employee has to prove that the employment contract was terminated.

Then the employee needs to provide the court with enough evidence to convince the court that continued employment had become intolerable. This has to be objectively established, and the subjective apprehension of the employee should not the final determinant of whether or not the employer's conduct was intolerable.

It is not necessary to show that the employer intended any repudiation of the contract. The court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The conduct of the parties had to be looked at as a whole and its cumulative impact assessed. The court will look at the conduct of the employer and determine whether the conduct is

194 *Hendriks v Mercantile & General Reinsurance Co of SA Ltd* 1994 15 ILJ 304 (LAC).
195 *Media 24 Ltd v Grobler* 2005 26 ILJ 1007 (SCA).

destroying the employment relationship and whether the conduct is aimed at creating an unbearable working environment for the employee. If the employer's conduct deliberately, and without justification, creates a situation in which the employee is unable to perform the job he was employed to do, or if the employer's conduct is as such that the court cannot expect the employee to tolerate. All of the above needs to be determined by looking at all of the facts, and then by making an objective assessment.[196]

Thus, in South African law, the same test that is used in ordinary constructive dismissal cases is also applied in cases where the employee claims constructive dismissal due to work stress. The following thus needs to be proved by the employee: the employee intended to terminate the relationship; objectively speaking, the employment relationship had become so intolerable that the employee could not fulfil her obligation to work; the intolerable work situation was created by the employer; that intolerable situation was likely to endure; resignation was the only reasonable option open to the employee.[197]

The South African courts also look at the subjective belief of the employee at the time he or she resigns, but as stated above, this should not be the final determinant. The employee must believe that the employer will not ever reform or abandon the pattern of creating unbearable environment. The employee's perception should be tested against the actual reason for the resignation. As discussed in paragraph 2.2.1, the enquiry should be whether the employer without reasonable and proper cause conducted itself in a manner calculated to destroy or seriously damage the employment relationship.[198] A mere subjective feeling that the applicant was unfairly treated is not sufficient to prove constructive dismissal.[199]

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196 *Marsland v The New Way Motor & Diesel Engineering* 2009 30 ILJ 169 (LC)

197 *Brummer v Daimler Chrysler Services (Pty) Ltd* 2004 9 BALR 1060 (CCMA).

198 Beukes *v Crystal - Pier Trading CC T/A Bothaville Abbatoir [2009] JOL 23285 (CCMA)*

199 *Goliath v Medscheme (Pty) Ltd* (1996) 17 ILJ 760 (IC)

From the discussion in the previous chapter, it is clear that there is an implied obligation in the UK on every employer to take reasonable care and certain steps to ensure the employee's safety at work.[200]

The general principle is that an employer can assume that the employee is able to withstand the normal pressures of the job. However, if it is reasonably foreseeable that there is a risk of injury, which must be a clinically recognisable condition, due to stress at work, then the employer owes the employee a positive duty to make the working environment less stressful.[201] It is important to remember that each case should be decided on its own merits.[202]

For liability to arise there must be some indications of looming harm arising from stress at the workplace. Further, it must be determined whether the harm to the particular employee was reasonably foreseeable. Unless an employer knows of a particular problem or vulnerability, an employer is usually entitled to assume that an employee can withstand the normal pressures of the job and he is entitled to take what he is told by the employee at face value.[203]

The employer should keep certain aspects in mind, such as whether the employee has a particular vulnerability, whether he or she has already suffered from stress-induced illness from work, whether there are regular absences by the employee that are uncharacteristic, and whether these absences are attributed to stress at work by the employee or other employees.[204]

An employer will only be in breach of this duty if he has failed to take reasonable steps to overcome the risk of ill-health.[205] The threshold question always should be whether this kind of harm to this particular employee was reasonably

200 Van Jaarsveld *Employer's Liability for Stress at Work* 632.
201 *Walker v Northumberland County Council* 1995 1 WLR 737, IRLR 35 (QBD) and 1995 All ER 737 (QBD).
202 *Barber v Somerset County Council* 2004 IRLR 475 (HL).
203 *Sutherland v Hatton* 2002 IRLR 263 (CA).
204 *Sutherland v Hatton* 2002 IRLR 263 (CA).
205 Van Jaarsveld *Employer's Liability for Stress at Work* 638,639.

foreseeable. Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee.

Certain factors, such as the nature and extent of the work done by the employee; the amount of workload that is normal for the particular job, unreasonable demands from employers; harmful levels of stress experienced by other employees doing the same job; signs from the employee of impending harm to health. [206]

Before the court can found that an employer has failed to take the necessary steps, the court has to look at all of the facts of the case to see whether the indications of impending harm is plain enough for any reasonable employer to realise that he should do something about it. The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the seriousness of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk. The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly.[207]

Thus in constructive dismissal cases where the employee resigns because of work stress, the South African courts use the same test that is used in ordinary constructive dismissal cases. The following thus needs to be proved by the employee: The employee intended to terminate the relationship; objectively speaking, the employment relationship had become so intolerable that the employee could not fulfil her obligation to work; the intolerable work situation was created by the employer; that intolerable situation was likely to endure; resignation was the only reasonable option open to the employee.[208]

206 *Sutherland v Hatton* 2002 IRLR 263 (CA).
207 *Sutherland v Hatton* 2002 IRLR 263 (CA).
208 *Brummer v Daimler Chrysler Services (Pty) Ltd* 2004 9 BALR 1060 (CCMA).

The South African courts also look at the subjective belief of the employee at the time he or she resigns, but as stated above, this should not be the final determinant. The enquiry should be whether the employer without reasonable and proper cause conducted itself in a manner calculated to destroy or seriously damage the employment relationship.[209]

If the court is satisfied that the employer tried to accommodate the employee by offering him alternative, less stressful employment which the employee declined, then it can be found that the dismissal was fair.[210] The South African courts also take into consideration the common law duty of an employer to take care of its employees.[211]

According to South African law, it is not necessary to show that the employer intended any repudiation of the contract. The court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The court will look at the conduct of the employer and determine whether the conduct is destroying the employment relationship and whether the conduct is aimed at creating an unbearable working environment for the employee. If the employer's conduct intentionally, and without justification, creates a situation in which the employee is unable to perform the job he was employed to do, or if the employer's conduct is as such that the court cannot expect the employee to tolerate. All of the above need to be determined by looking at all of the facts, and then by making an objective assessment.[212]

According to UK law, there is an implied obligation in the UK on every employer to take reasonable care and certain steps to ensure the employee's safety at

209 Beukes *v Crystal - Pier Trading CC T/A Bothaville Abbatoir [2009] JOL 23285 (CCMA)*
210 *Hendriks v Mercantile & General Reinsurance Co of SA Ltd* 1994 15 ILJ 304 (LAC).
211 *Media 24 Ltd v Grobler* 2005 26 ILJ 1007 (SCA).
212 *Marsland v The New Way Motor & Diesel Engineering* 2009 30 ILJ 169 (LC)

work.[213] The threshold question should always be whether this kind of harm to this particular employee was reasonably foreseeable. Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. The courts have to look at certain factors and have regard to all of the facts of the case.

Thus, once again the South African courts are more concerned with the employer's conduct as a whole and to determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The UK courts put more emphasis on whether the harm to this particular employee was reasonably foreseeable. The courts also emphasise the implied duty that rests on every employer to take reasonable care and certain steps to ensure the employee's safety at work.

To conclude, both the South African and the UK courts bring something different to the table. Both of these legal systems are using an objective test to ascertain whether the resignation due to work stress amounts to a constructive dismissal. Both of these legal systems make it clear that there rests a duty on the employer to take reasonable care and certain steps to ensure the employee's safety at work.

The writer however suggests that the courts should always ask the following question: Is the conduct of both the employee and employer reasonable in the particular circumstances? The courts should take into account all of the facts of the case and judge the conduct of both of the parties by asking itself what a reasonable employee or employer would have done in those circumstances. The employers need to realise that it is up to them to create an environment which is as stress free as can be, but the employees also have to realise that they have to tell the employers if they cannot handle the pressure of the job. If the employer then fails to do anything to assist the employee, then the employer's cannot put up a defence against the

213 Van Jaarsveld *Employer's Liability for Stress at Work* 632.

employees claim of constructive dismissal. The writer thinks that it will be very insightful if both employers and employees are made more aware of how work stress should be handled. This can for example be done by the Department of Labour by way of distributing some pamphlets or by way of practical workshops. Employees should be encouraged to speak to their employers, as soon as they feel that the pressures of the job are too much for them to handle. If the employers are not aware of the stressful, intolerable situation, they cannot be held to blame for it.

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